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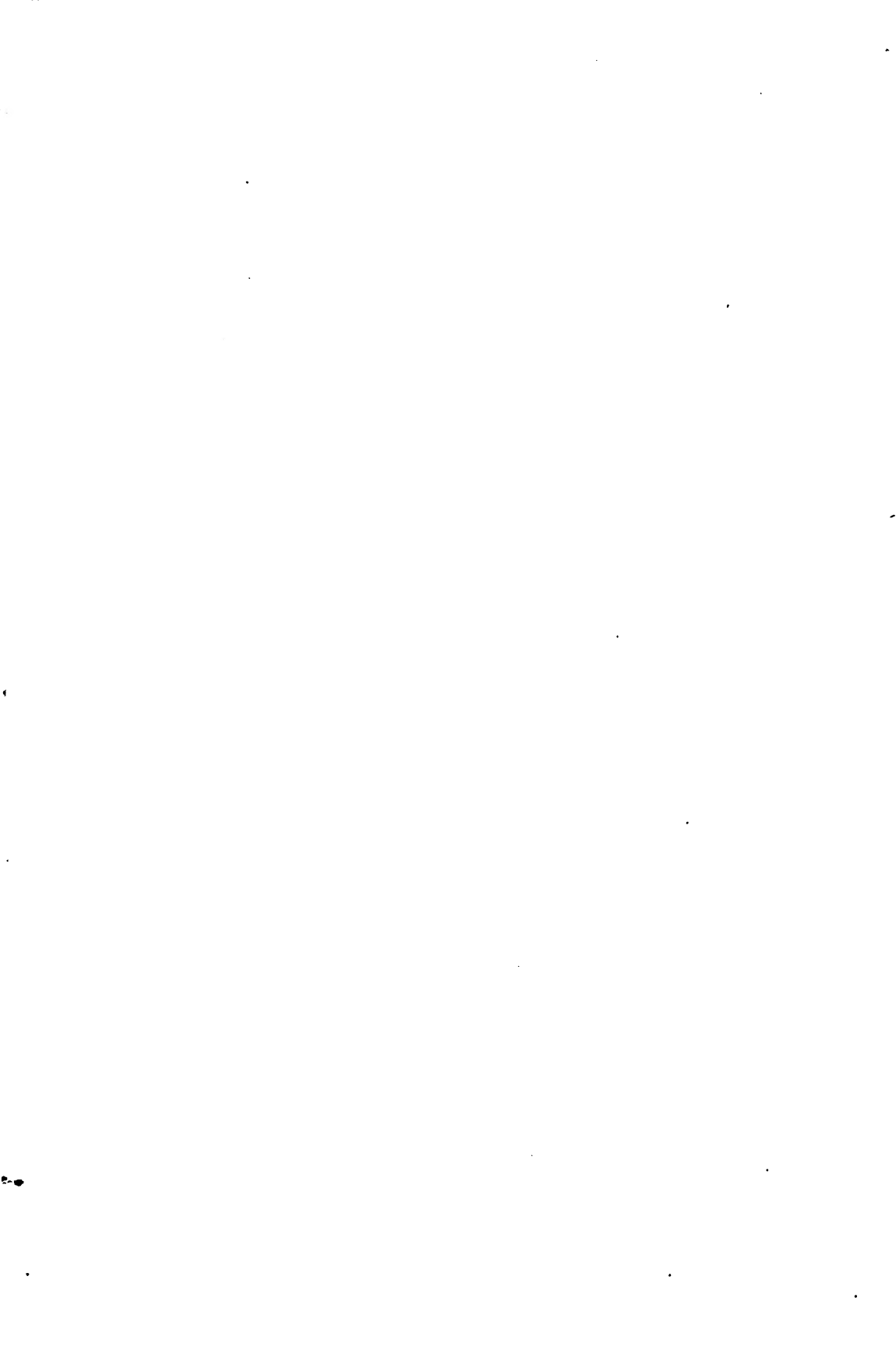


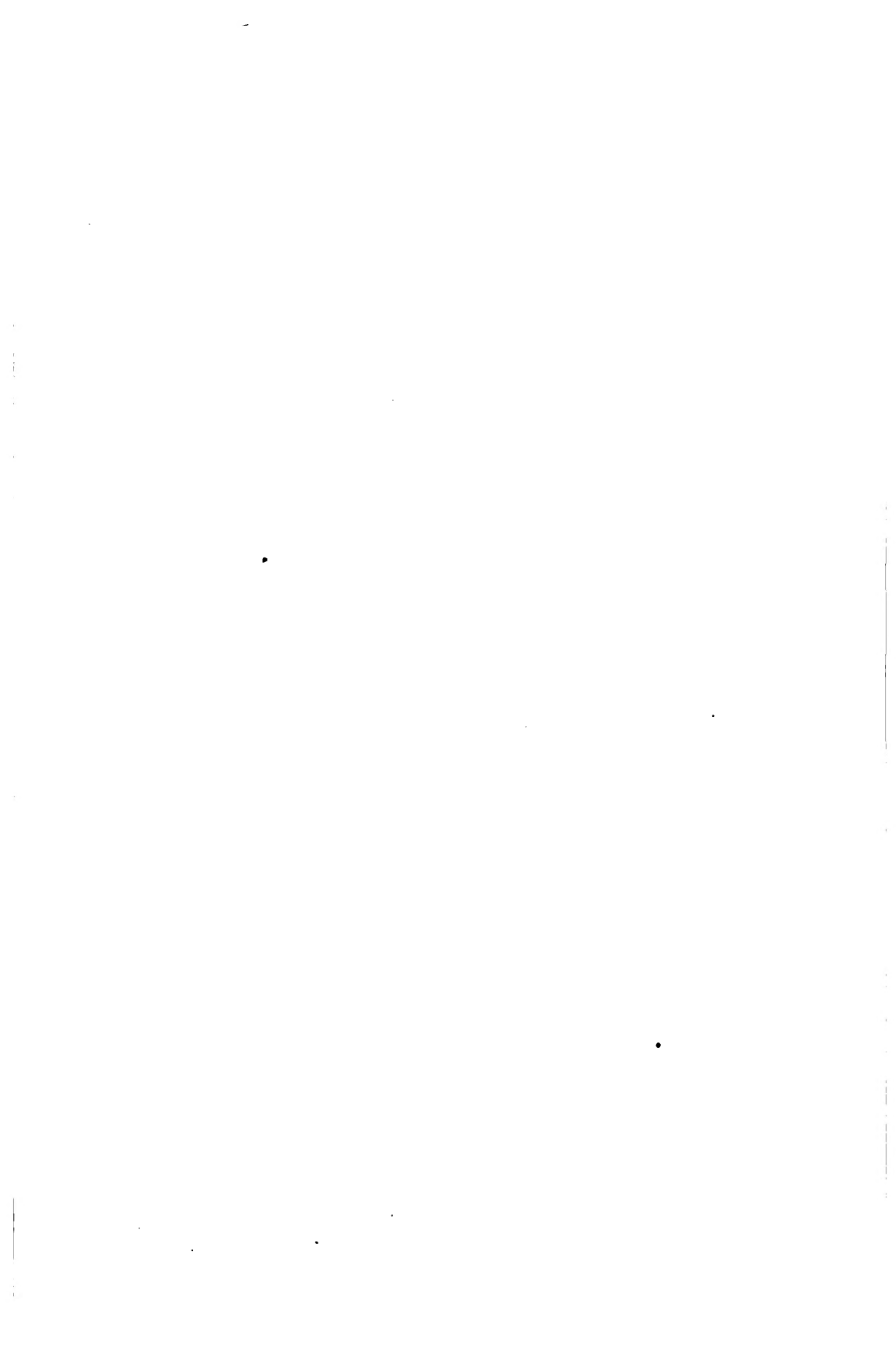
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VOL. IV.

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CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

North's Ex'r v. Perrow and Others.

January, 1826.

Injunction—Motion to Dissolve—What Defendant Must Show.—On a motion to dissolve an injunction, it ought not to be required of the defendant, to invalidate, by full proof, the allegations of the bill: but the burthen of proof lies on the plaintiff to support them. All that is required of the defendant, is, to shew that the evidence of the plaintiff is entitled to no credit.

This was an appeal from the Chancery Court of Lynchburg.

Anthony North filed his bill, alleging, that on the 10th day of March, 1823, Thomas A. North conveyed by deed of trust to Grief Barkdale several slaves and other property, for the purposes therein mentioned; which deed was recorded as to Thomas A. North, on the 11th day of the same month, and as to the other parties, on the 12th day of January, 1824; that on the 19th day of 2 February, *1824, the trustee, having advertised the said property, sold all

***Injunction—Motion to Dissolve—What Defendant Must Show.**—It is true that upon a motion to dissolve an injunction the defendant is considered the actor, and upon him rests the burden of disproving the equities of the bill. Such full and positive proof, however, is not exacted as would be necessary upon a final hearing of the cause, since the effect of requiring such strictness of proof might be to prevent a dissolution until the final hearing. And for the purposes of such motion, defendant's answer is to be taken as true, so far as responsive to the allegations of the bill, and so far as it fully and fairly meets complainant's equities without evasion, and without passing over material allegations. *Ingle v. Straus*, 91 Va. 223, 31 S. E. Rep. 490, citing principal case as its authority.

The settled doctrine is that, where a motion to dissolve an injunction is on the bill and answer, and the answer denies all the equity of the bill, the injunction is dissolved, of course except when from the bill and answer, special reasons may appear for continuance. *Moore v. Steelman*, 80 Va. 240, 341, citing principal case as authority.

And in *McCoy v. McCoy*, 29 W. Va. 187, 2 S. E. Rep. 239, it is said: "If the grounds for asking an injunction are not, as stated in the bill, such as to justify the awarding of an injunction, the defendant, before moving to dissolve it, should file his answer sworn to. If this answer fully and fairly meets all material allegations in the bill, without evasion and without passing over any material allegation, it must be taken as true as far as it is responsive to the bill, and if, when so regarded, it leaves no reasonable doubt on the mind of the court as to the impropriety of continuing the injunction, it should be at once dissolved on such motion. Otherwise it should be continued to the hearing. Of course, the facts thus regarded as true by the court, as stated in the answer, must be supported by affidavit to the answer, and if the answer, as in the case before us, does not verify these facts, but simply states that the respondent believes them to be true, it will not be sufficient. See *Miller v. Washburn*, 3 Ired. Eq. 161; *Brewer v. Day*, 23 N. J. Eq. 418; *North v. Perrow*, 4 Band. 1; *Brown v. Stewart*, 1 Md. Ch. 87. If the answer does not on these principles justify a dissolution of the injunction, upon motion to dissolve it, it may be supported by affidavit or depositions."

The principal case is also cited in *Gallagher v. Moundsville*, 34 W. Va. 736, 12 S. E. Rep. 861.

See further, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

of it that he could get, at the house of the said Thomas A. North; and the complainant purchased, among other property, a negro man named George, who was delivered to the complainant and carried to his residence in another county; that the said slave returned, by permission of the complainant, to his former residence, for a short time, when he was seized by Heyden, a Deputy Sheriff of Campbell county, under an execution in favour of Stephen Perrow against the said Thomas A. North; that the said Perrow threatens to indemnify the Sheriff, and force a sale of the said slave; that the slave possesses a peculiar value to the complainant, having been raised in his family, and if he should be sold, he may be carried off to foreign parts, or exposed to cruelty and hardships, against which no legal remedy could guard. He therefore prayed, that Perrow, Heyden and Hunter, the Sheriff of Campbell county, might be made defendants; and that they should be enjoined from selling the said slave, and be compelled to restore him to the complainant.

The Chancellor refused the injunction, but it was awarded by a Judge of the Court of Appeals.

The complainant died, and the suit was revived in the name of his executor.

Perrow answered, (protesting against the jurisdiction of the Court,) that the judgment on which the said execution issued was for money which the defendant had been compelled to pay as the surety of the said Thomas A. North: that the slave in question, was not, at the time, the said execution was levied, the property of the complainant; but, so far as the creditors of T. A. North were concerned, he was his property: that the deed of trust mentioned in the bill, was fraudulent, and made with the view of protecting the property of the said T. A. North from the claims of his creditors, and not founded on any valuable consideration, or if any, on a grossly inadequate one: that by the deed, nearly the whole of T. A. North's

3 *estate, real and personal, was conveyed for the benefit of the complainant that the complainant was the father of the said T. A. North, and the latter having become much involved in debt, they combined and confederated together, to shelter and protect the property of the son from the claims of his just creditors; and the said deed of trust was the fruit of this combination: that the property sold under the deed of trust, was fairly worth from five to six thousand dollars; but it was so obvious to the company that attended the sale, that the deed was fraudulent, that no person bid for any part of it, but the complainant, who pur-

chased it for about three thousand dollars, except a few hogs, and a small mare, which were bought by one of his sons: that a son-in-law of the complainant was the crier at the sale, and the greater part of it was knocked out to him at his first bid: that after the sale, the complainant permitted the said T. A. North to retain possession of the land, and all his household and kitchen furniture: that as to the slaves, they were removed to the county of Charlotte, in a few months after the sale, by the complainant, but he immediately sent back to the said T. A. North, the same number of other slaves, of equal value, which have ever since remained in the possession, and under the control, of the said T. A. North. The defendant therefore affirmed, that the said deed was fraudulent and void against creditors.

Affidavits were taken to prove the fraudulent intention with which the conveyance was made. The deed of trust recited, that Thomas A. North was indebted to Anthony North, in the sum of \$3000; to satisfy which, the property, real and personal, therein mentioned, was conveyed in trust to Grief Barksdale.

The Chancellor dissolved the injunction; and at a subsequent day, the complainant moved the Court to re-instate it. This motion was rejected, on the ground of want of jurisdiction, as the remedy at law was complete.

From this order the complainant appealed.

4 *Johnson, for the appellant.
Leigh, for the appellee.

January 27. The PRESIDENT delivered his opinion, in which the other Judges concurred.*

Upon the proofs in this case, it is unnecessary to decide the question of jurisdiction. The evidence in the record does not only raise the suspicion of fraud in the deed (as was admitted by the counsel for the appellant,) but is so strong, as, in my opinion, to render it very improbable, if not impossible, that it can be refuted by any testimony hereafter to be taken. On a motion to dissolve, it ought not to be required of the defendant, to invalidate, by full proof, the allegations in the bill. The burthen of proof lies on the plaintiff to support them. Having obtained the injunction on the prima facie evidence of his oath, or other proofs, all that is expected of the defendant is, to shew that it is entitled to no credit. To wait for full proof, before the injunction is dissolved, would produce great delay and much mischief. In no case, could the injunction be dissolved until the cause was ready for a final hearing; and in every case, by an appeal from the decree, the injunction would be continued until the final decision of the case in this Court. There might be more hesitation in affirming the decree of the Chancellor, if the appellant would be deprived thereby of his right to produce further evidence; but that not being the effect of the affirmance of the decree here, for the reasons stated the decree is affirmed.

5 *Wilson v. Shackelford,†

January, 1826.

Vendor of Personal Property—Liability.—By the com-

*JUDGE CABELL, absent.

†For monographic note on Warranty, see end of case.

mon law, the vendor of personal property is not answerable for the quality of the thing sold, unless he either warrants its quality, or makes some false representation in respect to it, or, knowing of the defect, omits to disclose it: and this is the law of Virginia.

This was an appeal from the Chancery Court of Richmond.

Wilson filed his bill, stating that in 1821, he purchased of Shackelford a negro woman and three children, for which he executed his bond payable six months after date, for \$700: that the complainant believed, from the statements and representations of the defendant, that the woman was sound and healthy, and gave him a sound price: that a few days (perhaps the next day) after she came into the possession of your complainant, he disposed of her to one John Brown, who very shortly thereafter discovered that she was diseased, and returned her to the complainant; when she was examined, and pronounced unsound, by a physician of great reputation, and she was taken back by the complainant: that when the defendant was called on to take the woman back, he positively refused, alleging that she was not seriously diseased; and that the medical gentleman was deceived, but proposed to the complainant that he should carry her to South Carolina, (where he was then going,) and that if she was not well before she was sold, that he would do what was right on his return: that, under this agreement, the complainant carried the negroes to South Carolina: that the malady increased while travelling, and before her arrival it was obvious that she was labouring under an inveterate dropsy: that the complainant had her examined by several medical gentlemen, who thought her incurable; and he sold her and her children to a purchaser with a full knowledge of her situation, for \$475, being \$225 less than the sum for which he had executed his bond to the defendant, in addition to the 6 charges and *trouble of removing them: that, nevertheless, the defendant has obtained a judgment for the full amount of the bond: that the complainant, not being able to avail himself of this defence at law, instituted a suit in the County Court of Mecklenburg, for the fraud, but has not been yet able to get a judgment: that an execution has been levied on his property. He therefore prayed that an injunction might be granted to prohibit the defendant from proceeding further with his execution, until the decision of the action for the fraud, &c.

The injunction was awarded, upon condition that the plaintiff should dismiss his action at law.

Affidavits were taken on the part of the plaintiff, to prove the unsoundness of the negro woman in question; and on the part of the defendant, to prove his ignorance of her disease, at the time of the sale. One witness says, in answer to the question put by Wilson, whether Shackelford did not promise that if the negroes proved to be unsound, he would do what was right, "I most think he did;" and another witness, in answer to a similar question, put by the same person, replied, "I believe he did."

The defendant answered, denying that the negro was unsound when he sold her to the complainant, as far as he knew or believed:

that at the time of the contract, there were no indications in her appearance, of unsoundness, nor any suggestion of it by the complainant, and no suspicion of it by the defendant: that the complainant, being a negro trader, carried her to South Carolina; and not realizing as much profit as he expected, seeks his indemnification in this way: that he does not conceive himself bound to repair the losses, if any had been sustained, which the complainant might have incurred in hawking the woman about: that the defendant refused to take her back, and never agreed, or gave the least right to believe, that he would be accountable for any thing that might happen, &c.

On motion of the defendant, the Court dissolved the injunction; and the plaintiff appealed to this Court.

7 *Spooner, for the appellant.
Leigh, for the appellee.

January 28. JUDGE GREEN delivered his opinion, in which the other Judges concurred.

The only ground upon which the appellant can claim relief, is, that the slave which he purchased from the appellee was, at the time of the purchase, affected by a disease which finally proved fatal, but which was not known or suspected by the vendor, at the time of the sale. The charge in the bill, that Shackelford, after the woman was discovered to be diseased, promised to do what was right, is denied by the answer, and not proved. Of the two witnesses who speak upon this subject, in answer to leading questions by the plaintiff, one says, "I most think he did;" and the other says, "I believe he did." If, however, such a promise were made, it would only bind him to do what, in point of law, he was bound to do.

By the civil law, the vendor who sold property at a sound price, was held bound to warrant against all secret defects, whether they were known to him or not; even if he had made no warranty or representation whatsoever, in respect to the qualities of the property 1 Domat. 80. And this rule has been adopted in Connecticut and North and South Carolina.

But, by the common law of England, which is our law, it has been held uniformly, from the earliest times, that the vendor is not answerable for the quality of the thing sold, unless he either warrants its quality, or makes some false representation in respect to it; or, knowing of the defect, omits to disclose it; in which case, the suppression of the truth is a fraud. The same doctrine has been held in many of the United States. (See the cases cited in Peake's Nl. Pri. Cases 115, in the note to Mellish v. Mattheux and others, and in Cooper's Justinian 610, and Dunlop v. Waugh, Peake's Nl. Pri. Cases 123.)

8 *If we doubted whether the rule of the civil law or that of the common law were the most just or convenient, we should be bound to adhere to the latter.

The order dissolving the injunction should be affirmed.

WARRANTY.

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- II. In Sales of Personal Property.
 - A. Definition.
 - B. Assets Descending from Warranting Ancestor.
 - C. Implied Warranty of Title.
 1. General Rule.
 2. Vendor's Possession.
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 - D. Implied Warranty of Quality.
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 - a. Unascertained Article.
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 - F. Sales by Description.
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 - K. Sheriff Not a Warrantor.
 - L. Power of Agents to Make Warranty.
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- III. In Policies of Life Insurance.
 - A. Definition.
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 - I. Agent's Knowledge Imputable to the Principal.
 - K. Burden of Proof.

I. SCOPE OF THE NOTE.

The term—warranty—has a peculiar significance according to the relation in which it is used; whether in the transfer of real estate, the sale of personal property, or in policies of insurance. This article is confined to a consideration of the law re-

lating to warranties in sales of personal property and warranties in policies of insurance; the law of warranties in sales of real property is treated in a separate article, see monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

II. IN SALES OF PERSONAL PROPERTY.

A. DEFINITION.—A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it. *Benj. Sales*, § 600; *Bouv. L. Dict.* 1214; *Chanter v. Hopkins*, 4 Mees. & Welsb. 399.

B. ASSETS DESCENDING FROM WARRANTING ANCESTOR.—Our act, 1 Rev. Code, ch. 99, § 21, p. 368, taken from the statute of Gloucester, and extended generally to common-law warranties, applies only to cases of real assets descending from the warranting ancestor, and not to personal assets, or assets, whether real or personal, accruing from him by devise or bequest. *Worsham v. Hardaway*, 5 Gratt. 61.

C. IMPLIED WARRANTY OF TITLE.

1. GENERAL RULE.—While a warranty of title should only be implied with regard to sales of personal property when good faith requires it. *Byrnside v. Burdett*, 15 W. Va. 702. Yet when a sale of chattels is made there is always an implied warranty of good title by the vendor, where the goods are in the vendor's possession. *Byrnside v. Burdett*, 15 W. Va. 702; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 575; *Cogar v. Burns Lumber Co.*, 46 W. Va. 256, 33 S. E. Rep. 219.

2. VENDOR'S POSSESSION.—The possession of a vendor of chattels is equivalent to an affirmation of title. And in such case the vendor is to be held to an implied warranty of title, though nothing be said on the subject between the parties. But if the property sold be at the time of sale in the possession of a third person, and there is no affirmation or assertion of ownership, no warranty of title will be implied. If however there be an affirmation of title when the vendor is not in possession, the vendor should be subject to the same liability as if he had the possession at the time. *Byrnside v. Burdett*, 15 W. Va. 702.

3. APPLIES TO EXCHANGE OF CHATTELS.—A warranty of title is to be implied from the contract as much in the case of an exchange of horses then in the possession of those making the trade as upon a sale; and this implied warranty is as much a part of the contract as if it had been express. *Byrnside v. Burdett*, 15 W. Va. 702.

4. EXCEPTION TO THE RULE.—A sale of personal chattels implies an affirmation of the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold. *Cogar v. Burns Lumber Co.*, 46 W. Va. 256, 33 S. E. Rep. 219.

D. IMPLIED WARRANTY OF QUALITY.

1. GENERAL RULE.—It is the well-established rule of law that upon the sale of personal property there is no implied warranty as to the quality and the maxim *caveat emptor* applies in the absence of fraud or express warranty. *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Mason v. Chappell*, 15 Gratt. 572; *Wilson v. Shackelford*, 4 Rand. 5; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 575.

In the hiring of a slave even an express warranty of fitness or suitability, though it might be understood to cover essential or mental defects, would not extend to the absence of moral qualities, or of experience in the particular business, unless specified. *Howell v. Cowles*, 6 Gratt. 363.

2. EXCEPTIONS TO THE RULE.

a. Unascertained Article.—If an order is given for an undescribed, unascertained thing, stated to be for a particular purpose, the vendor will be held liable unless it answers, in a reasonable degree the purpose for which it was purchased. *Mason v. Chappell*, 15 Gratt. 572; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910.

For where there is warranty, either express or implied neither the ignorance of the seller nor the exercise of care and diligence can exempt him from liability if the goods do not answer the purposes for which they were sold. *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773.

b. Manufacturer's Warranty.—While it is an established rule of law that upon the sale of personal property there is no implied warranty as to its quality, and that the maxim *caveat emptor* applies in the absence of fraud or express warranty, yet there are several well-recognized modifications of this rule; and one of them is, that where, on an executory contract of sale, goods are ordered for a particular purpose known to the seller, he impliedly undertakes that they shall be reasonably fit for the purposes for which they are ordered, and especially is this so if the seller is also the manufacturer of the goods ordered. *Gerst v. Jones*, 32 Gratt. 518; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910.

For Example, *J. & Co.* were manufacturers of tobacco, and *G.* a manufacturer of boxes for pressing tobacco in. *G.* agreed to furnish *J. & Co.*, during the season of 1870, as many boxes as the latter would use in their business, at the rate of sixty-five cents per box, and under this agreement did furnish said boxes in which *J. & Co.* pressed their tobacco, and shipped a large quantity. Much of that shipped, and some which remained in the factory in the said boxes moulded, in consequence of the use of green and otherwise unfit timber in the manufacture of the boxes, and *J. & Co.*'s damages, arising from the moulded tobacco, thus caused, amounted to nine cents per pound of the tobacco contained in said boxes. On a suit brought by *J. & Co.* against *G.* to recover these damages. *Held*, that *G.* was liable for the same. *Gerst v. Jones*, 32 Gratt. 518.

E. IMPLIED WARRANTY OF QUALITY FROM FULL PRICE.—It is well-settled law, in this state, that in a sale of personal chattels a full price does not import a warranty as to quality. *Mason v. Chappell*, 15 Gratt. 572; *Wilson v. Shackelford*, 4 Rand. 5.

F. SALES BY DESCRIPTION.

1. GENERAL RULE.—The general rule seems to be that in a sale of goods by description, where the buyer has not inspected them, there is, in addition to the condition precedent that the goods shall answer the description, an implied warranty that they shall be saleable or merchantable. *Milburn, etc., Co. v. Nisewarner*, 90 Va. 714, 19 S. E. Rep. 846; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910. See *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910, distinguishing *Mason v. Chappell*, 15 Gratt. 572; *Gerst v. Jones*, 32 Gratt. 518; *Proctor v. Spratley*, 78 Va. 254.

2. WHERE THERE HAS BEEN NO INSPECTION.—The maxim, *caveat emptor*, does not apply to a sale of goods where the buyer has no opportunity for inspection. *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910; *Gerst v. Jones*, 32 Gratt. 518.

In cases like this, the question is not whether the purchaser has had an opportunity of examining the article, but whether he has in fact examined it, and whether the defect is one readily discoverable upon inspection. He is not bound to examine at all, for he has the right to rely upon the judgment of the seller, and to take for granted that the latter

has furnished an article answering the terms of his contract. *Gerst v. Jones*, 32 Gratt. 518.

2. WARRANTY IN CATALOGUE.—Defendant ordered wagons of plaintiff upon the latter's blank form, upon which was indorsed a warranty agreement to replace or pay for broken parts under certain conditions, if said parts were sent to the factory as evidence. The catalogue of the plaintiff, upon which the defendant also relied in purchasing, contained a warranty as to the material and workmanship. One lot of wagons was bought upon the representation in the catalogue alone. The wagons were made of defective material, and repairs for some parts were sent for, but never came, and one wheel was sent but never heard from. *Held*, that defendant was entitled to damages under the warranty in the catalogue, on protection at the factory of the broken or defective parts, although the parts were not sent to the factory. *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714, 19 S. E. Rep. 846.

G. SALE BY SAMPLE.—Unless parties deal with the sample with the mutual understanding that the bulk is like sample, the sale is not by the sample, and otherwise there can be no warranty implied, and the maxim *caveat emptor* applies. *Proctor v. Spratley*, 78 Va. 264.

H. SALE OF SPECIFIC ARTICLE.—Where a specific article is ordered and furnished, the law is well settled that, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for the purpose; and he will not, in the absence of fraud or an express warranty, be held liable however unfit and defective it may be. *Mason v. Chappell*, 15 Gratt. 572; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773.

I. WARRANTY OF MONEY, BANKNOTES, ETC.—*BALDWIN, J.*, delivered the opinion of the court. The court is of opinion that there is no implied warranty of the value of current money of the country, passing from hand to hand, in the course of trade, commerce and other business. This is true, not only of the money made by a law a good tender in the payment of debts and performance of contracts, but is equally so in regard to the notes of banks and bankers, payable to bearer, and circulated by delivery. *Edmunds v. Diggs*, 1 Gratt. 361.

There is but a single guarantee which those who circulated the money of that, or any other kind, can be understood to give, to wit, that it is what it purports to be, genuine and not counterfeit. Beyond that, in the absence of express warranty, or fraudulent misrepresentations or concealment, the receiver takes it at his own risk. There is no implied warranty, whether of title or value, in the circulation of banknotes, any more than of other money. The title to them can never be questioned in the hands of a *bona fide* holder; and on his part he takes them as money, for whatever they may be worth. *Edmunds v. Diggs*, Gratt. 361; *Lyons v. Miller*, 6 Gratt. 440.

The persons transferring impliedly undertakes that the instrument is genuine, in other words that it is what it purports to be; and if it turns out to be a forgery, there is a failure of the consideration, which subjects him to the repayment of the money he has received. Nor is it material whether the person making the transfer, receives the consideration for his own use, or for the use of another; unless he is acting as an agent, and discloses not only his agency, but the name of the principal for whom he is acting; in which case he is not a party to the contract, the contract being made with his principal through his agent. *Lyons v. Miller*, 6 Gratt. 440.

K. SHERIFF NOT A WARRANTOR.—Under Rev. Code, vol. 2, p. 160, when the sheriff has received a

bond of idemnity he is bound to sell the property taken in execution, whether it belongs to the debtor or not, hence it cannot be held that the sheriff impliedly warranted the title of the property in question. *Stone v. Pointer*, 5 Munf. 287. A sheriff selling under execution, with good faith, incurs no responsibility as to title there being no implied warranty, raised by law, under such a sale, the rule *caveat emptor* applies to such a case. *Saunders v. Pate*, 4 Rand. 8.

L. POWER OF AGENTS TO MAKE WARRANTY.—A general agent to sell personal property is presumed to have power to make such warranties with reference to the property as are usual and customary in like sales in that locality. It is competent for the party relying upon such warranty to prove as a usage of trade what warranties are usually demanded by the buyer and given by the agents of the seller in affecting sale of similar articles in that locality. A restriction upon the power of the agent to make the usual warranties in effecting like sales, of which the buyer has no notice or knowledge, is not binding on him. If there be evidence tending to prove what warranties are usually given by agents in effecting like sales, it is for the jury to determine whether, in the particular case, the agent was clothed with the requisite authority. *Reese v. Bates*, 94 Va. 321, 26 S. E. Rep. 865.

A general agent to sell is authorized to do whatever is usual in the market to carry out the object of his agency. But it is for the jury to determine upon the evidence what is usual. It is not necessary for the principal to have notice of the course of business. If such agent, in accordance with the usage of trade of the place of sale, gives a warranty of the quality of the goods sold, which is not in itself unjust to his principal, the latter will be bound by it, although ignorant of such usage. *Reese v. Bates*, 94 Va. 321, 26 S. E. Rep. 865.

M. FORM OF WORDS NECESSARY TO CREATE WARRANTY.—No special form of words is necessary to create a warranty. A representation made by a vendor either at the time when the bargain is concluded, or, if it be a verbal sale, during the course of dealings, which led to the bargain, will or will not be held to be a warranty according to the intention of the parties, to be gathered, with an exception presently stated in case of ambiguity, from the written contract, if the terms of sale be reduced to writing, and if not in writing from the conversation of the parties at the time of or proceeding the contract and during the negotiation and from all the surrounding circumstances. To make such representation a warranty it is not sufficient that it appears to have been an inducement to the buyer, but it must appear, that it entered into the contract of sale, when it was concluded, and was intended by the vendor as a warranty and so understood by the vendee. If this does not appear, it will not be held to be a warranty, and the vendor may or may not be responsible for such representation, if it turn out to be false. If there be a warranty either express or implied, the vendor is always responsible on his contract, if the warranty be broken. But if the untrue representation be not an implied warranty, the responsibility therefor of the vendor will depend on a variety of circumstances, as we have seen. *Crislip v. Cain*, 19 W. Va. 438, 479.

"It is enough, if the words used import an engagement on the part of the vendor that the article is what he represents it to be. Any distinct affirmation of quality, made by the vendors at the time of the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth of the fact affirmed, and an inducement to him to make the purchase, is, if accordingly received and

relied on and acted upon by the purchaser, an express warranty." (Mason v. Chappell, 15 Gratt. 572-8). "The general rule is, that whatever a person represents at the time of a sale is a warranty." Herron v. Dibrell, 87 Ga. 289, 13 S. E. Rep. 674.

An affirmation of quality by the seller of goods at the time of the sale, intended as an assurance of fact and relied on by the buyer, constitutes a warranty. No particular form of words is necessary to constitute a warranty. If the seller assumes to assert a fact, of which the buyer is ignorant, or makes a representation of quality which the buyer relies on as a warranty and is thereby induced to make the purchase, the seller is bound by it as a warranty, whether he so intended it or not. Reese v. Bates, 94 Va. 331, 26 S. E. Rep. 865.

N. BREACH OF WARRANTY.

1. **GENERAL STATEMENT.**—Where goods delivered to the buyer are inferior in quality to what was warranted by seller, the buyer may sue at once for the breach of the warranty without returning the goods or giving any notice to seller. Eastern Ice Co. v. King, 86 Va. 97, 9 S. E. Rep. 506.

2. **ACTION AGAINST PERSONAL REPRESENTATIVES.**—An action on the case for fraud in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness; or by means of a fraudulent concealment of the unsoundness of the slave cannot be maintained against the personal representative of the vendor. And though there is a judgment in favor of the plaintiff, the error will not be cured by the statute of Jeoffails. Judgment should be rendered in favor of the defendant *non obstante veredicto*. Boyles v. Overby, 11 Gratt. 203, and note.

3. **EVIDENCE.**—While the *allegata* and *probata* must always agree it is well settled that under a count in a declaration alleging a warranty, the plaintiff may prove an express or implied warranty, the legal effect of the two being the same. Gerst v. Jones, 32 Gratt. 518.

Upon proof of a warranty that a fertilizer is as good as any other article of like character and price offered upon the same market, a breach of the warranty may be established by proof that when applied in like quantities to the same crop, during the same season, upon the same land, receiving the same cultivation, results were obtained from the warranted fertilizer inferior to those obtained from other fertilizers offered upon the same market at the same price. Reese v. Bates, 94 Va. 332, 26 S. E. Rep. 865.

The jury is justifiable in finding that tobacco was warranted by seller by evidence that seller represented to buyer that "it was sound" and "redried," and "would certainly keep." Herron v. Dibrell, 87 Va. 289, 13 S. E. Rep. 674.

4. **PROPER ACTION.**—When the vendee of personal property, takes from the vendor a warranty of soundness, and gets possession of the property under his purchase, if he becomes satisfied that the property was unsound at the time of the sale, he has a right to pursue one of two courses; either to keep the property and sue the vendor on the covenant, or to return the property in a reasonable time and sue for the purchase money. In the first case, if the vendee keeps the property, and recovers from the vendor the difference between the value of the property sound, as warranted to be, and unsound as it was, at the time of sale, he will have all he is entitled to. In the other case, if the vendor takes back the property, then the contract is rescinded, and if he pays to the vendee the purchase money, there being no question as to expenses for keeping, etc., then the parties are placed in "*statu quo*." Graham v. Bardin, 1 Pat. & H. 206, and note.

The action of trespass on the case, is a proper remedy for the breach of an express warranty of soundness of a slave, or other personal chattel sold, as much so as to the action of assumpsit, with which it is a concurrent remedy, and the party aggrieved may elect between them. In both forms of action, the gravamen is the breach of the warranty, which in the former is treated as a tort, with the appropriate language in declaring for a tort. Trice v. Cockran, 8 Gratt. 442, and note. See monographic notes on "The Action of Covenant" appended to Lee v. Cooke, 1 Wash. 306.

5. THE DECLARATION.

a. *The Declaration a Tort in Action.*—In an action on a warranty of title to a chattel, it is sufficient proof of the warranty, that the vendor affirmed it to be his, and the action lies on such affirmation, yet if the plaintiff does not choose to resort to the appropriate remedy for breach of contract, but sues as for a tort, his count must conform to the nature of the action. Here, the first count is in case for a deceit; the second is certainly not in assumpsit, but in case on the warranty, and in that view is defective. It should have charged, that the defendant by falsely and fraudulently warranting the slave to be his absolute property, sold him to the plaintiff. The wrong consists in the false warranty; which therefore, is of the very essence of the charge. Brown v. Shields, 6 Leigh 446, and note.

b. Form.

(1) **The Breach.**—The law attaches no warranty of fitness, or suitability, or even soundness, to the hiring of a slave. There may be an express warranty of soundness or qualities, and there may be cases in which an implied warranty arises from circumstances; but in either case the warranty must be stated, and the breach of it alleged in the pleading. Howell v. Cowles, 6 Gratt. 398.

(2) **Scienter.**—But a scienter or knowledge of the defendant of unsoundness is immaterial, and need not be alleged in the declaration, nor if alleged need it be proved. Trice v. Cockran, 8 Gratt. 450, and note; Gerst v. Jones, 32 Gratt. 518, 34 Am. Rep. 778.

6. **THE PLEA.**—In an action of debt upon a bond, defendant pleads that the bond was given for the price of goods which he bought of plaintiff, who represented that they were sound and marketable, when in fact they were unsound and damaged, and by means thereof unsaleable; but the plea does not aver a warranty of the quality of the goods; or that the plaintiff knew that the said representations made by him were untrue; or that he used any fraud or art to disguise or conceal their true condition of quality. The plea is defective; and properly rejected when tendered. Cunningham v. Smith, 10 Gratt. 255, 60 Am. Dec. 333, and note.

In an action for the breach of warranty given on a sale of farm wagons, it cannot be contended for the first time on appeal that the wagons were used for other than farm purposes. Milburn Wagon Co. v. Nisewarner, 90 Va. 714, 19 S. E. Rep. 846.

7. **INSTRUCTIONS OF JURY.**—In an action to recover the price of fertilizers sold, where the defense is a breach of warranty of the quality of the fertilizer, it is not error to instruct the jury that they are to look to the evidence for proof of the warranty and its breach, and, if established, they must find for the defendant "such damages" as have resulted naturally from the breach of said warranty, "naturally" here means legitimately, and the instructions leaves it to the jury to determine from the evidence the amount of such damages. Reese v. Bates, 94 Va. 332, 26 S. E. Rep. 865.

8. **MEASURE OF DAMAGES.**—Upon a breach of war-

ranty of personal property sold, the measure of damages is the difference between the value of the article with the defect warranted against and the value it would have borne without the defect. *Thornton v. Thompson*, 4 Gratt. 121; and note: *Eastern Ice Co. v. King*, 86 Va. 97, 9 S. E. Rep. 506.

But in *Thornton v. Thompson*, 4 Gratt. 121, it is said: The price at which the article was sold is the proper evidence at that time, if sound and the extent of the warranty. And the rule is the same whether the purchaser offers to return the article or not. See also, *Boyles v. Overby*, 11 Gratt. 208.

On a warranty of soundness of an animal, it is for the jury to decide what is embraced therein. And on that question, the qualities and uses for which the animal was sold and purchased may be referred to as explaining what was intended to be included in the warranty. *Thornton v. Thompson*, 4 Gratt. 121, and note.

A vendee of a slave, sold with warranty of soundness, tenders the slave back to the vendor, on discovering that he is unsound. The vendor refuses to receive him, and the vendee brings an action to recover damages for the breach of warranty. *Held*, he is entitled to recover the damages he has suffered, though he sold the slave, after the tender, at public auction, and received the proceeds to his own use; without having given notice to the vendor of the time and place of sale. *Graham v. Bardin*, 1 Pat. & H. 206, and note.

9. SET-OFF.—For a discussion of the question as to a breach of warranty being relied on by way of set-off to an action to recover the purchase price of the article warranted. See monographic note on "Set-Off, Recoupment and Counterclaim" appended to *Anderson v. Bullock*, 4 Munf. 443.

III. IN POLICIES OF LIFE INSURANCE.

A. DEFINITION.—A warranty is a stipulation upon the literal truth or fulfillment of which the validity of a contract depends. It is in the nature of a condition precedent, and like that must be strictly complied with, whether material or not. *Home Life Ins. Co. v. Sibert*, 96 Va. 403, 31 S. E. Rep. 519; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. Rep. 361. See also, *Fire Ins. Co. v. West*, 76 Va. 575; *Va. F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191.

B. MATERIALITY.—Where the answers to questions propounded in an application for insurance are made warranties by the contract of insurance, it is a matter of no consequence whether they were material to the risk or not. *Home L. Ins. Co. v. Sibert*, 96 Va. 403, 31 S. E. Rep. 519; *Schwarzbach v. Ohio, etc., Union*, 25 W. Va. 623; *Metropolitan L. Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. Rep. 361. The validity of the policy depends upon the literal truth of such answers. *Metropolitan L. Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. Rep. 361. This removes their materiality from the consideration of the jury; and if any of the answers are false in fact, the policy is thereby forfeited, though they were made in perfect good faith. (P. 652.) *Schwarzbach v. Ohio, etc., Union*, 25 W. Va. 623.

C. CONSTRUCTION OF COURT.

1. GENERAL STATEMENT.—But in determining whether the answers by the insured in the application are warranties or representations, the court leans in favor of construing the policy as making them representations rather than warranties; and if a portion of the policy or application would indicate them to be warranties, but another portion of the application shows that they were to be regarded as representations, the answers to these questions will not be regarded as warranted to be true. *Schwarzbach v. Ohio, etc., Union*, 25 W. Va. 623;

Morotock Ins. Co. v. Postoria Novelty Co., 94 Va. 361, 26 S. E. Rep. 850; *Lynchburg Ins. Co. v. West*, 76 Va. 575.

Because parties are not held to have entered into warranties unless they clearly so intend. *Morotock Ins. Co. v. Postoria Novelty Co.*, 94 Va. 361, 26 S. E. Rep. 850.

2. MISREPRESENTATIONS.—Though the policy be construed as not warranting the truth of the answers of the insured, yet if these answers to specific questions are misrepresentations, the policy will be avoided whether the court or jury regard the answers as material or not; for the parties by putting and answering such questions have declared, that they regarded them as material. (P. 655.) *Schwarzbach v. Ohio, etc., Union*, 25 W. Va. 623.

On an application to a second company for insurance as a "rejected risk" based upon and averring the truth of the statements in the application to the first company, failure to disclose the fact that since rejection by the first company the applicant had been twice examined and rejected as unsound by the medical examiners of the second company is a breach of warranty contained in the application that no proposal or application to insure the life of the applicant had ever been made to any company or agent upon which assured had been rejected, or upon which a policy had not been issued and received by him, and bars any recovery upon the policy. *National Life Ass'n v. Hopkins*, 97 Va. 167, 83 S. E. Rep. 539.

D. CONFLICT BETWEEN STATEMENTS IN APPLICATION AND PROOF OF LOSS.—If a life policy makes the statement of the application on which it is issued warranties, and such application states that the death of the father of the assured was caused by one disease, and the proof of loss made by the beneficiary and offered in evidence by him states that said death was caused by a different disease, on a demurrer to the evidence of the beneficiary, in an action against the insurance company, judgment should be given for the company. *Metropolitan L. Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. Rep. 361.

IV. IN POLICIES OF FIRE INSURANCE.

A. DEFINITION AND NATURE OF A WARRANTY.—"An express warranty," says MAY, quoting from 1 Arnould Ins. § 577 "is a stipulation inserted in writing on the face of the policy, on the literal truth and fulfillment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with." This is the language of the decided cases, and of this court in *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Va. F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191.

B. MATERIALITY.—Whether the fact stated or the act stipulated for be material to the risk or not, is of no consequence, the contract being that the matter is as represented or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of law or the act of God, the insured can have no claim. "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. If the warranty be a statement of facts it must be literally true; if a

stipulation that a certain act shall or shall not be done, it must be literally performed." May Ins. quoted and approved in *Va. F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191.

C. INTENTION OF PARTIES.—Whether a statement is a warranty or not depends upon the intention of the parties, as does the nature and effect of the warranty, when there is one, which is to be gathered from the language used and the subject matter to which it relates. *Va. F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191.

Parties will not be held to have entered into a contract of warranty unless they clearly intended it, and if a policy is so framed as to render it doubtful whether the parties intended that the exact truth of the applicants' statements should be a condition precedent to any binding contract, that construction which imposes upon the assured the obligation of a warranty should not be favored. *Morotock Ins. Co. v. Postoria Co.*, 94 Va. 261, 26 S. E. Rep. 850; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575.

D. AS AFFECTED BY STATUTE.—In Virginia it has been provided by act of assembly approved February 26th, 1900, that no answer to any interrogations made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained unless it be clearly proved that such answer was wilfully false or fraudulently made, or that it was material.

E. WARRANTY AND REPRESENTATION DISTINGUISHED.—A stipulation on the face of the policy, by the assured for the absolute truth of a statement, is a warranty in the nature of a condition precedent, and on its literal truth, or fulfillment the validity of the policy depends. A representation is a statement incidental to the contract. If false, and material to the risk, whether wilful or by mistake, the policy is avoided. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

APPRENTICES.

Who May Bind.—A father may bind his infant child apprentice by indentures to which the child is a party, but indentures of apprenticeship executed by the father, without the child's concurrence, are not only voidable, but void. *Pierce v. Massenburg*, 4 Leigh 493. See *State v. Reuff*, 29 W. Va. 751, 2 S. E. Rep. 801.

And overseers of the poor, under a proper order of the county court, may bind out children within their jurisdiction. *Brewer v. Harris*, 5 Gratt. 285.

Proceedings—Requirements of Statute.—A minor can only be bound as an apprentice by his father, or, if none, by his guardian, or, if neither father nor guardian, by his mother with the consent, entered of record, of the county court of the county in which the minor resides; or, without such consent, if the minor being fourteen years of age agree in writing to be so bound, or unless such minor be found beggaring in such county, or is likely to become chargeable thereto, and, if not so bound, the indentures of the apprenticeship are void. *State v. Reuff*, 29 W. Va. 751, 2 S. E. Rep. 801. See Code of Va., § 2581; Code of W. Va., p. 719.

Same—Under Order of Court—Appeal.—And, if infants are bound as apprentices pursuant to an order of the county court, no appeal lies from such order. *Cooper v. Saunders*, 1 Hen. & M. 413. See Code 1887, § 2681.

Same—Same—Certiorari.—But, where, pursuant to an order of the county court, infants are bound apprentices, though there be no appeal from such order, a writ of *certiorari* lies to bring up the rec-

ord and correct the proceedings. *Cooper v. Saunders*, 1 Hen. & M. 415.

The Contract—Parties—Remedies.—Where the indentures of apprenticeship contain covenants by the master in favor of the mother of the apprentices, and also in favor of the apprentices, but the latter are not parties to it, it is valid, and the remedies will be adapted to the case. *Brewer v. Harris*, 5 Gratt. 285.

Same—Same—Sufficient Execution.—Where the order of court directs a child to be bound out by the overseers of the poor, and only one of the overseers executes the indenture it is sufficient. *Brewer v. Harris*, 5 Gratt. 285.

Same—Binding for Shorter Period.—And, when the statute directs that apprentices shall be bound out till they are eighteen years of age, a binding out till the age of seventeen is valid. *Brewer v. Harris*, 5 Gratt. 285.

Rights and Liabilities—Medical Attendance.—A master of an apprentice is bound to pay for medical attendance on the apprentice, from the very nature of the relation between master and apprentice; and the father of the apprentice is only bound when the services have been rendered at his instance. *Easley v. Craddock*, 4 Rand. 433.

Same—Enticing Away.—Where a child is apprenticed without its concurrence, the contract being void, a party who entices the child away from its master is not liable in damages. *Pierce v. Massenburg*, 4 Leigh 493.

Actions—Proper Parties.—Covenant will not lie in the name of the apprentice on the indenture of apprenticeship entered into by the overseers of the poor without any previous order of court for binding out the apprentice. Such indenture is not a statutory deed, and, therefore, covenant can only be maintained on it in the name of the overseers who are parties to it. *Bullock v. Sebrell*, 6 Leigh 500. See *Poindexter v. Wilton*, 3 Munf. 183.

Same—Same.—An action in behalf of an apprentice, upon his indenture of apprenticeship, should not be brought in the name of the overseer of the poor, but in his own name. *Poindexter v. Wilton*, 3 Munf. 183. See *Bullock v. Sebrell*, 6 Leigh 500.

Quere—Removal—Legal Settlement.—If the apprentice is removed out of the county or corporation in which he was bound, can the court thereof direct the overseer of their poor to send for and bind him to another master; and whether an apprentice so moved obtains legal settlement in the county wherein he is moved by remaining there twelve months during his apprenticeship? *Cooper v. Saunders*, 1 Hen. & M. 413.

F. DESCRIPTIVE EXPRESSIONS.—The expression in a policy, *viz.*: "a two-story frame building standing on leased ground 20x50 feet, also one story frame, 12x16 feet, occupied as a hardware store and dwelling, situated in the town of Antwerp, Clarion Co., Pa." is merely a description of the subject insured, and not a designation of the uses it should be put to, and is no warranty, within itself, that it should be so occupied, during the risk. *Bryan v. Peabody Insurance Co.*, 8 W. Va. 605.

G. KINDS OF WARRANTIES.

1. AFFIRMATIVE.—According to the authorities, warranties are of two kinds, *viz.*: (1) Affirmative, or warranties *in present*, as they are sometimes called, which affirms the existence of certain facts pertaining to the risk at the time of the insurance: an instance of this class is *Va. Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. Rep. 973. There the insured, in answer to a question in the application, stated that a watchman slept on the premises at night. On the night of the fire the watchman was absent, but it was held that the policy was not

thereby avoided, because the answer related to the present, and not to the future—in other words, that the statement was manifestly intended as affirmation of the usual and existing state of things, and had nothing promissory as to the future. *Va. F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191.

2. CONTINUING.—The second kind of warranty, continuing or promissory, is one which requires something to be done or omitted after the insurance takes effect, and during its continuance and if not complied with according to its terms avoids the contract. In the case at bar, the promise of the insured to keep his books in an iron safe or secure in another building falls within this category. The contract is express that the books would be thus safely kept; and if, as is admitted the promise has not been fulfilled, there can be no recovery. *Va. F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191.

3. CONSTRUCTION OF COURT.—The rule is that the court never construes a warranty as promissory and continuing. If any other reasonable construction can be given. *Va. F. & M. Ins. Co. v. Buck*, 88 Va. 517, 18 S. E. Rep. 973.

H. APPLICATION MADE A PART OF POLICY.

1. GENERAL STATEMENT.—It would seem, "that whenever the application is incorporated in the policy as a warranty, the warranty should be regarded as relating only to matters of which the assured had, or should be presumed to have had, some distinct, definite knowledge, and not as to such matters as depend wholly upon opinion and judgment. *STAPLES, J.*, in *Lynchburg F. Ins. Co. v. West*, 76 Va. 575.

2. CONTINGENT RIGHT OF DOWER.—If the application for a policy is made a part of the policy, and is a warranty and covers the applicant's interest in and title to the property, and his answer to the question "what is your title to or interest in the property to be insured?" is "fee simple." *Held*, the fact that the wife of a former owner of the property who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in or title to the property. Nor is it such an incumbrance as, not being mentioned in his answer, will be a breach of the warranty. If in such case the application is not a warranty, the failure to mention the existence of such a contingent right of dower, is not such a misrepresentation as will avoid the policy. *Southern Mut. Ins. Co. v. Kloeber*, 81 Gratt. 799; *Virginia F. & M. Ins. Co. v. Kloeber*, 81 Gratt. 749.

I. AGENT'S KNOWLEDGE IMPUTABLE TO THE PRINCIPAL.—The agent's knowledge of the real condition and situation of the risk is imputable to the principal and estops the latter from setting up a warranty inconsistent therewith. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575.

K. BURDEN OF PROOF.—In an action upon a fire insurance policy the burden of proof is on the defendant to show a breach of affirmative warranties—mere statements of existing facts—by the plaintiff in his application for the insurance. It is not incumbent on the plaintiff to allege such warranties and aver their performance. They are not conditions precedent to his right of recovery. *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 261, 26 S. E. Rep. 850.

Saunders v. Pate and Others.

January, 1826.

Sheriffs—Sale under Execution—Liability as to Title.—A Sheriff selling under execution, with good faith,

*Public Sale.—To What Purchaser Entitled.—A purchaser at a public sale of land, made by a trustee

incurs no responsibility as to title; there being no implied warranty, raised by law, under such a sale. The rule caveat emptor applies to such a case.

Same—Return on Execution—Evidence.—Quære, whether the return of the Sheriff, on an execution, can be used as evidence for him, in a suit by the purchaser of property sold under execution?

Same—Sale under Execution—Indemnifying Bond—Rights of Purchaser In.—Quære, whether the purchaser of property sold under execution, can have the benefit of an indemnifying bond, given to the Sheriff, on the principle of substitution?

This was an appeal from the Chancery Court of Lynchburg.

The bill was filed by Saunders, setting forth the following case: That John Pate obtained a judgment against James Wright, and sued out a Ca. Sa. which was levied by a Deputy of Samuel Hancock, Sheriff of Bedford county; upon which Wright delivered to the said Sheriff, two negro men, named York and Primus, in discharge of his body: that the said negroes were about to be set up to sale to satisfy the said execution, when the sale was forbidden by Read and Robertson, who claimed them, by virtue of a deed of trust, in which they were trustees, to secure the payment of certain debts therein specified: that the Sheriff refusing to proceed, unless he was indemnified, John Pate tendered to the said Deputy Sheriff his bond, with Edmund Pate as his surety, and the said Deputy *proceeded with the sale: that the complainant was the highest bidder, at about \$500; and the negroes were cried out to him, and delivered into his possession, and the purchase money paid: that Read and Robertson brought a suit against the complainant, for the said negroes; in which the plaintiffs proved a superior title, and recovered the said negroes; which judgment was affirmed by the Court of Appeals: that the complainant has fully discharged the said judgment; so that he has twice paid the price of the negroes: that James Wright, the original proprietor of the slaves, is utterly insolvent. He therefore prayed that Hancock the Sheriff, Goggin his Deputy, John Pate, and Edmund Pate his surety, might be made defendants, and that they might be decreed to pay the amount paid upon the purchase at the Sheriff's sale, with interest, &c.

The answer of Goggin, the Deputy Sheriff, states, that he only sold Wright's right and title in the said slaves, and no other: that Wright had previously obtained an injunction to stay Read and Robertson from selling the said slaves under the deed of trust aforesaid; and that he had given the said Saunders, amongst others, as his surety on the injunction bond: that the creditors in the said deed exhibited the deed at the sale; when the complainant purchased the slaves, as the respondent believes, to save himself from the consequences of his suretyship, and prevent the slaves from being carried off by

must look to the title of the grantor of the land; and he is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent; he cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of *caveat emptor* applies. *Fleming v. Holt*, 12 W. Va. 162, citing principal case as authority. To the same effect, the principal case is cited in *Petermans v. Laws*, 6 Leigh 529; *Jones v. Thorn*, 45 W. Va. 193, 32 S. E. Rep. 176.

See generally, monographic note on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 636.

any other purchaser: that at the pressing instance of Pate, and, he believes, of the plaintiff's attorney also, the respondent agreed, upon being indemnified, to sell the property; and he accordingly took John Pate's bond, with Edmund Pate as his surety: that the slaves sold for \$506 50, on a credit till the 31st of May: that the injunction aforesaid was afterwards dissolved, as the respondent understood: that Read and Robertson brought a suit for the said slaves, and recovered them, if to be had, or the said sum of \$506 50, and a sum in damages, equal to the interest of the said sum: that the slaves were proved to have been worth \$150 per annum.

10 *for hire, during the six and a half years that they were kept by the complainant, by virtue of the title he purchased, which would amount to near \$1000: that he conceives he ought not to be compelled to pay the said sum of \$506 50, with interest, as he has never been benefited by the use of it, &c.

The answer of John Pate agrees with that of Goggin, with the additional allegation, that the Sheriff returned the execution with a statement that he had sold the right of the defendant Wright, in the said slaves; and that he offered to pay the complainant the original purchase money, (\$506 50,) with interest from the 10th of March, 1810, and the further sum of \$506 50, with interest from September, 1816, and receive from the complainant the said slaves, and their reasonable hire since he had them; and further, that there is no claim, in law or equity, against a creditor, if the title to property sold under execution, proves defective; as the purchaser takes the right of the debtor, and no other: that a bond of indemnity does not alter the case; because it is taken for the security of the Sheriff or claimant, and not for that of the purchaser, &c.

The return on the execution states, "that James Wright's property in them, (the slaves in question,) only was sold."

The Chancellor dismissed the bill; and the complainant appealed.

Johnson, for the appellant, contended: 1. That Saunders might maintain a suit, because he purchased the slaves at the Sheriff's sale, without any stipulation that he was to get only Wright's title: that the Sheriff's return is not admissible evidence, in his own favor, to prove that he only sold the title of Wright. Besides, having taken an indemnifying bond, he was not at liberty to restrict the title of the property sold, but was obliged to sell the complete title.

2. What remedy has the purchaser?
11 *At common law, the Sheriff was not bound, unless he sold with a knowledge of the defects of title. If he had such knowledge, he would be charged with an implied warranty. *Peto v. Blades*, 5 Taunt. 657. But, he might go into equity, and compel the parties to interplead.

Our Statute gave the Sheriff another remedy to accomplish the same object, viz: an indemnifying bond. The owner is turned over, in the first instance, to the indemnifying bond, unless it proves insufficient by insolvency. 2 Old Rev. Code, 160; Acts of 1812, p. 25, ch. 16; *Carrington v. Anderson*, 5 Munf. 32. These laws were intended to afford, both to the Sheriff and the true owner,

a simple and adequate remedy. *Stone v. Pointer*, 5 Munf. 287, proves that in such case, the Sheriff was bound to sell. The purchaser of the property is protected under the Act of Assembly, as much as he would have been at common law. The plaintiff in the execution is alone liable to any risk, which he has the choice of taking upon himself, or not.

Equity, therefore, has jurisdiction, that the several parties may be brought before the Court, to ascertain on whom the liability may fall. On the ground of substitution, the purchaser has become invested with all the rights of the trustees, who have recovered the slaves; and if they could have sued on the indemnifying bond, so may the purchaser, who has discharged their claim.

Call, for the appellees, contended: 1. That the sale changed the property, because the owner had no redress but by suit upon the bond. He cannot sue the Sheriff, who is liable to nobody. *Stone v. Pointer*, 5 Munf. 287. The Act of 1813, ch. 16, compels the Sheriff to sell, and therefore, secures the purchaser. *Dalt Sh'ff*. 148. In this respect, it is like a venditioni exponas.

2. The purchaser should have defended himself at law; and his failure to do so, cannot give a cause of action against other persons.

12 *3. The purchaser bought without warranty. That this is the general rule of law, appears from the case of *Peto v. Blades*, 5 Taunt. 657. Besides, he was apprised of the claim of the trustees.

4. If the plaintiff was entitled, he had redress at law; for, an action for money had and received would lie.

5. This suit cannot be maintained on the ground of substitution; because, neither the owner nor the Sheriff had a right to sue for the property, as the bond was a bar to such an action. And, therefore, there was no person through whom the complainant could claim.

6. The complainant was surety in the injunction bond, and therefore liable.

7. Lastly, the plaintiff purchased the slaves much below their value, and seeks to make a gain against one who seeks to avoid a loss. The offer made by the appellee Pate was as liberal as the appellant had any right to expect.

January 28. JUDGE CARR delivered his opinion.

John Pate issued a Ca. Sa. against James Wright, which being executed, he delivered two negro men in discharge of his body. At the day of sale of these negroes, Read and Robertson, as trustees, exhibited a deed, by which these slaves were conveyed to them, to secure certain claims; and though they did not forbid the sale, the Sheriff required indemnity. Pate gave it; the property was sold; and the plaintiff was the purchaser. The trustees brought detinue against him, and had a recovery. The plaintiff paid the value assessed, with the damages, and files this bill for the recovery of this money, either from the Sheriff or his Deputy, or from Pate and his surety in the indemnifying bond. Wright, the debtor, is made no party; but it is stated that he is utterly insolvent.

It seemed admitted in the argument, that at common law, a Sheriff selling under exe-

cution, with good faith, incurred no responsibility as to title: that there was no
 13 implied warranty *raised by the law on such a sale. This, indeed, seems to be clear. In the case of the Monte Alegre, 9 Wheat. 616, Thompson, J. delivering the opinion of the court, says, "generally in all judicial sales, the rule caveat emptor must apply, from the nature of the transaction, there being no one to whom recourse can be had for indemnity;" and though this is not, strictly speaking, a judicial sale, the reasoning applies. In 2 Bay's Reports, 170, (a case which I have not had an opportunity of reading, but which is cited in the above case,) the Court decided, that at a Sheriff's sale, caveat emptor is the best possible rule that can be laid down; stating emphatically, that all who attend such sales ought to take care, and examine into the title: that no warranty, express or implied, can be raised on the part of the owner, as to whom the proceeding is compulsory, nor of the Sheriff, who is the mere agent of the Court, nor of the Court itself. In 5 Serj. & Rawle, 225, Duncan J. delivering the opinion of the Court, says, that a sale by a Sheriff excludes all warranty. The purchaser takes all risk. Caveat emptor applies, with all its force, to him. The case cited in the argument from 5 Taunt. Rep. 675, *Peto v. Blaes*, turned entirely on the fraud of the Sheriff in selling property as belonging to the debtor, and concealing the fact, well known to him, that the property was then in possession of the messenger of the assignees of bankrupt; and Ch. J. Gibbs says, if the action lies at all, it lies upon the ground that the plaintiff has been deceived, and is the worse for the deceit.

It is clear, that upon the ground of fraud or deceit, no action would lie against the Sheriff, in the case before us; for the plaintiff, in his bill, states, that when the sale of the slaves was about to take place, the deed of trust was exhibited. The plaintiff then, when he bought, knew perfectly that he was buying property to which there was a claim, and he had the ground of the claim before his eyes. He knew, too, that the Sheriff refused to sell, until he was indemnified. Being thus forewarned, he can claim

14 nothing *on the ground of deception

It is stated, indeed, by the Sheriff in his return, and also, in his answer, that he sold nothing more than Wright's interest in the slaves.

The counsel for the plaintiff acknowledged, that if this were in proof, the Court must consider the plaintiff as buying at his own risk, and, therefore, bound to stand by it; but, he contended, that the return was no evidence, because no part of what the Sheriff is bound by law, to return; and he cannot, by his return, make evidence for himself, or affect the rights of the parties. With respect to the answer, too, that (it was said,) was a substantive, affirmative fact, and must be proved as other facts.

Without canvassing the soundness of these objections, it seems to me clear, that the plaintiff did buy nothing more than Wright's interest in the slaves, and knew well at the time, that he was doing so. The property was set up as Wright's. A deed of trust, which he had given on this property, was brought forward and exhibited. All were

told, (the plaintiff among others,) "Gentlemen, here is a lien." I do not mean that these very words were addressed to them; but, the exhibition of the deed proclaimed this in the strongest terms. The Sheriff, after this, selling the property, whether he declared it or not, sold only Wright's interest; that is, he sold them as Wright's, subject to this lien. This state of things would, of necessity, operate strongly upon the price of the property. Every one would judge for himself. If he thought the deed fraudulent, or, that if fair, there was more property than would pay the debts it was bound for, he would be encouraged to bid something; and he would be regulated by his own judgment, weighing the price against the chances of losing the property, or part of it, under the lien. Under these circumstances, the plaintiff bought two negro men for \$506 50, which are said to be worth \$800 or \$900. He held them six years, the hire being worth, it is said, 150 dollars per annum; and then, when the recovery was had, it was merely the price he had given, with interest on the

15 *money; and the defendant, Pate, offers, in his answer, to take the bargain off his hands, paying up both the sums which he has paid, with interest from the dates of the payments, and receive from him the slaves, with a reasonable hire. And, as the defendant might have been held to this offer, if the plaintiff had closed with it, we must suppose him serious in making it. Taking all these things into view; that it is the settled law of the contract, that a Sheriff, dealing fairly, makes no warranty; that the sale was fair here, and the plaintiff purchased only Wright's title, well knowing what that was; that in consequence, he got the property for about half its worth, and his bargain was offered to be taken off his hands, placing him where he stood; I think he has no right, either at law or in equity, to ask more of any body.

I do not, therefore, think that a case is made, which raises the question of substitution

JUDGE COALTER.

It seems to me that the points made in the argument of this case, as arising under the Act of Assembly, do not arise, and need not be decided.

In the first place, it may be remarked, that this case is not one in which property was levied by the Sheriff, at his own risk, on a *Fi Fa.* against the goods. The execution levied was a *Ca. Sa.* and the debtor being taken, he delivered the slaves in discharge of his body, under the Act of Assembly, which provides, that a debtor in such case may tender to the Sheriff, property to the value of the debt and costs, which he shall receive and proceed to sell, in like manner as in case of goods taken on a *Fi Fa.* But in this case, the law goes on further to provide, that if the property shall be under any lien or incumbrance, so that the whole cannot be sold, (by which I understand to be meant, that the whole title cannot be sold,) a new *Ca. Sa.* or *Fi. Fa.* shall issue for the 16 balance; and the Clerk of the *Court shall, on the return of the Sheriff of the insufficiency, or incumbrance, issue a new *Ca. Sa.* or *Fi. Fa.* if required. But when such property shall have been under

incumbrance, the debtor shall not be at liberty to tender slaves, or personal estate, on a second Ca. Sa. being served.

According to the bill itself, this was a case in which, on a Ca. Sa. executed, the property tendered and received by the Sheriff, was under an incumbrance. It does not allege that any notice had been given to the creditor even of this incumbrance; but states, that on the day of sale, the sale was forbidden by the trustees of the creditors; so that this, at most, was a notification by the incumbrancers, of the incumbrance on the property, that purchasers might know that their purchase must be subject to it. It also alleges, that the Sheriff refusing to proceed, unless indemnified under the Act, the creditor gave bond and security, and the sale went on: that the appellant became the purchaser; after which the trustees brought detinue against him, recovered judgment, which has been affirmed in this Court; and he has paid the value and damages assessed. It appears that the value fixed on the slaves is precisely the same at which they were struck off to the appellant; and that the interest on that sum was taken as the criterion of damages for detention. How these estimates, so advantageous to the appellant, could have taken place, without consent, does not appear, and it may be unnecessary even to conjecture.

How does the case stand on the proofs? The record says that certain exhibits were filed, but by which party is not stated. One of them is a copy of the judgment in detinue, and is the only evidence of that allegation in the bill; of course it must have been filed by the appellant. The other is the copy of the execution and Sheriff's return, and, except the statements in the answers as to that matter, is the only evidence of a sale of the slaves by the Sheriff. Without resorting to one or the other, or indeed to both of these,

there is no proof of that allegation in the bill. Indeed, *the return does not prove a purchase by the appellant. Whether this exhibit was filed by the appellant or not, (though it may fairly be presumed to have been filed by him,) he must resort to it to prove that important allegation, or he must rely on the answers for that purpose; and, in this latter case, must take them entire, at least so far as relates to this point. So too, if the return is relied on as to this matter, it must be taken entire, as the return of a sworn officer. Admit that he would not be bound to take it as true in all its parts, but might have contradicted that part of it which states that the debtor's "right and property only was sold," yet the bill neither suggests a falsehood in this part of the return, nor is there any proof that it is false, although both the answers aver the truth of it. This return then, if used by him as proof of a sale of the slaves, must be taken entire, and as true, until properly contradicted. But, this return neither proves that the appellant became the purchaser, nor that a bond was taken to indemnify the Sheriff; nor is there any proof of these facts, except what is derived from the answers. These, also, if resorted to for this purpose, must be taken entire as to these matters. The Sheriff says that the sale was not forbidden in the usual way, and that no notice had been given to the creditor; that the only

way in which it was forbidden, was by an exhibition of the deed of trust on the day of sale; and that even that was done at the instance of the appellant, who, it was understood, was one of the sureties in an injunction obtained by Wright to stop a sale under that deed; that under these circumstances, and at the instance of Pate, the creditor in the execution, and also, he believes, at the instance of the appellant, he agreed to proceed with the sale, on being indemnified.

But, take the case as stated in the bill, what does it amount to but this? That slaves, not absolutely sold, but only incumbered, had been delivered in discharge of the debtor, who had been taken in execution; and that

on the day of sale, this incumbrance was made known. The debtor, then, had the equity of redemption, which the Sheriff was perhaps bound, under the Act, to sell. The debtor, surely, could not complain of this; and no objection to the sale was made by him. Pate, the creditor, might have stopped. He might have had the merits of this incumbrance investigated, and a sale finally made under it, if so decreed, so as to give him the balance, or get the whole, if he could set it aside; but he was not bound to contest it. He might be satisfied of its justice, or that the property would sell, subject to it, for enough to satisfy his claim. He had a right to force the sale, and purchase in the property, subject to the incumbrance; at least, if not objected to by the debtor, or any one else. He says, he attended for this purpose; but the Sheriff having doubts, whether to proceed or not, he agreed to give bond, &c. The sale proceeded; he bid for the property, it being proclaimed that the debtor's right in it alone was sold; but the appellant outbid him, and became the purchaser. It seems, then, that this bond was given to quiet the Sheriff, and to induce him to do, what it would seem to me, under these circumstances, it was clearly his duty to do, if it had not been given. The return, then, simply shews, that the Sheriff proceeded to do what the law required. There being an incumbrance, he sold only the rights of the debtor, or his equity of redemption.

The sale then, not being forbidden in the usual way, and the bond not being given in the usual way, and the sale being only of the debtor's interest, the trustees very properly brought their suit against the purchaser. The bond is not in the record, and would probably shew that it was not taken under the Act, as, it seems to me, it could not be. Be this as it may, the only proof in the cause, of a sale of the property, shews that the rights of the debtor only were sold. And then, more effectually to shew this, and still further to relieve the case of any doubt, Pate, the creditor, in his answer, offers to step into the shoes of the appellant.

19 *For these reasons, I think the decree must be affirmed.

The other Judges concurred in affirming the decree, and it was accordingly affirmed.

Oswald, Deniston & Co. v. Tyler, Adm'r of Hancock.

January, 1826.

Chancery Practice—Judgment—New Trial—Surprise.*
—Where a plaintiff suffers a verdict and judgment

*Equitable Relief—Judgment at Law.—In Perkins v.

to go against him at law, he cannot apply to a Court of Equity to grant him a new trial, on the ground of his having been surprised at the trial at law, by unexpected evidence, unless he was prevented by fraud or accident from suffering a non-suit. Decided by two Judges out of three.

Appeal from the Chancery Court of Fredericksburg.

The bill was filed by Oswald, Deniston & Co. against Tyler, administrator of Hancock, praying that a new trial might be granted them, in a case in which they were plaintiffs, and the said Tyler defendant. The history of the case, and the various topics of argument are so fully displayed in the following opinions, that any other report would be superfluous.

Stanard, for the appellants.

Leigh, for the appellee.

January 28. The Judges delivered their opinions.*

20 *JUDGE COALTER.

On the facts as they are in proof, I consider it as most clear and apparent, that if the case had been before the Court of Law, as it is now before us, the appellants would have had a judgment for their debt.

The agent of the appellants had put into the hands of their attorney, a bond to bring suit on, and which he knew to be justly due from the intestate of the appellee. He had no knowledge of the existence of the fact out of which the defence grew; nor had he the least suspicion that such fact existed, or cause to suspect that such defence could or would be relied on, otherwise he could have

Clements, 1 Pat. & H. 158. It is said: "The rule is that where a party litigant has been impleaded in a court of law, having a plain legal defense, which he has failed to make, and against whom judgment has been rendered, he will not be entertained in a court of equity, unless he allege and prove, (if denied or not admitted,) a sufficient excuse for the failure, no matter how clear his case upon the merits, and how great the hardship, (and in its nature penal, the consequence as involving the loss or forfeiture of a just defense,) of being denied relief in a court of equity. This rule, or principle, is so well settled by a uniform and almost unbroken series of decisions of our own court of last resort, early and late, coming down to the very last volume of Grat-tan, (the 10th,) as to render it unnecessary to do more than to refer to a few of the latest cases. See *Oswald v. Tyler*, 4 Rand. 19; *Faulkner v. Harwood*, 6 Rand. 125; *Slack v. Wood*, and *Aller, Walton & Co. v. Hamilton*, 9 Gratt. 40, 265; *George v. Strange*, and *Meem v. Rucker*, 10 Gratt. 46, 106, and the earlier authorities therein cited and approved."

And, in *Slack v. Wood*, 9 Gratt. 42, it is said: "In the case of *Floyd v. Jayne*, 6 John. Ch. R. 479, CHANCELLOR KENT states the settled doctrine and practice of the court of equity, as well as of courts of law, to be, that a party is not entitled to relief after verdict upon testimony which with ordinary care and diligence he might have procured and used upon the trial at law. And he adds that 'it would be establishing a grievous precedent, and one of great public inconvenience, to interfere in any other case than one of indispensable necessity and wholly free from any kind of negligence. This doctrine has been fully recognized in this court by repeated adjudications. *Berne v. Mann*, 5 Leigh 304; *Oswald v. Tyler*, 4 Rand. 19; *Faulkner v. Harwood*, 6 Rand. 125. And to the same effect are *De Lima v. Glasell*, 4 Hen. & M. 309; *Turpin v. Thomas*, 3 Hen. & M. 190; *Tapp v. Rankin*, 9 Leigh 478; *Donnelly v. Ginatt*, 5 Leigh 559; *Haden v. Garden*, 7 Leigh 157; *Turner v. Davis*, 7 Leigh 227; *Auditor v. Nicholas*, 2 Munf. 81; *Arthur v. Chavis*, 6 Rand. 142; *Fenwick v. McMurdo*, 2 Munf. 244."

See principal case also cited on this subject in *Chapman v. Harrison*, 4 Rand. 343; *Green v. Judith*, 5 Rand. 30; *Faulkner v. Harwood*, 6 Rand. 127.

See further, monographic notes on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

*JUDGES GREEN and CARR did not sit: the former having decided the cause as Chancellor; and the case having been argued before the latter came into this Court.—Note in Original Edition.

met and defeated it. He was not only kept ignorant thereof, but lulled into security, (whether intentionally or not, it is not material to decide,) by the acts and declarations, as well of Hancock, in his life-time, as of his administrator after his death. The defence, therefore, was a complete surprise on him.

If Hancock himself had made this defence, it would not only have been a surprise, but a palpable fraud; and if intentional fraud cannot be brought home to the appellee, Tyler, his administrator, yet the effect of the defence by him is the same, upon the appellants, as if it had been made by his intestate; and there is no more reason, that I can see, to protect his estate from the consequences of such defence in the hands of his administrator, than in his own hands. But, even the administrator, Tyler, is not altogether clear of blame in the premises.

But, moreover, this claim originated in trust and confidence. That trust was, at least, so far abused by Hancock in his life-time, as that papers were left by him, out of which this unjust defence grew; and thus, in effect, a breach of that trust and confidence has arisen; which furnishes, it seems to me, a distinct head of equity in this case.

The facts establishing these positions are as follows: Oswald, Deniston & Co. 21 residents of Great Britain, had several stores in this country, prior to the Revolution. They appointed Laird as their general agent, to wind up their affairs after the Revolution, and to collect and secure their debts, &c. It was necessary for him to have a sub-agent or collector of the concerns growing out of two of the stores; and, on the recommendation of one Muschett, he appointed Hancock, a relation of Muschett, (and concerned with him at that time or afterwards, in mercantile transactions,) to that trust; Muschett becoming responsible for his transactions therein. In consequence of this responsibility, Muschett took a mortgage on some slaves of Hancock, for his security, which was recorded. Hancock went on collecting, &c. until about the beginning of the year 1803; when, becoming intemperate, he could no longer be confided in, and a change of agency became necessary. A correspondence took place between Laird, Muschett and Hancock, on this subject; and it was ultimately agreed that Muschett should succeed to the agency, on the same terms that Hancock held it: and the books and papers were accordingly delivered over to him. It seems, however, that Muschett still anticipated employing Hancock in the business, as far as he should deem it safe to do so. Muschett accordingly proceeded with the agency. In May, 1804, a settlement took place of Hancock's agency, between him and Murdock, the clerk of Laird; and in April, 1805, he and Muschett gave their bond for 3991 2 6, the balance due, after correcting some small errors in the previous settlement, with interest from the 16th of May, 1804. This bond was delivered to Laird, and remained in his possession until it was delivered to the attorney to bring suit on. It was no part of the concerns which Muschett had an agency in; on the contrary, he was a co-obligor, and, as to the appellants, as much a principal in the bond as Hancock; though, as between them, he was security

only. It of course was never put into his hands for collection; nor could it have been supposed that he would be employed as agent to collect a debt due from himself.

22 *This being the known and undoubted state of the case, Muschett and Hancock, who had been in trade together, make a settlement of their accounts in September or October, 1805; in which, Muschett falling in debt to Hancock, he charges himself with the whole amount of the said bond of 399l. 2 6; although, on the day of its date, he had paid 97l. 18 10½, part thereof, being commissions then due on his collections, and of course, as between them, took upon himself the payment of the balance of the debt.

This being the situation as between those parties, and Muschett now having his indemnity in his own hands, he gives Hancock a release of the mortgage on the slaves, which is proved and recorded on the 21st of October, 1805. This shews that the settlement was before that date, and as the interest between them is calculated up to the 1st of September, 1805, I conclude that it took place about the latter date. This release contains, on its face, a statement which was probably understood, on the trial at law, to be an acknowledgment by Muschett, the agent, that the collections by Hancock were fully paid off; whereas, in fact, it could only have had reference to the settlement of the accounts aforesaid; as it is no where pretended that the debt was ever paid by Hancock, otherwise than by Muschett charging himself there with it, as aforesaid.

On the 16th of December, 1805, and of course after this settlement, Hancock writes to Laird, and instead of informing him of that settlement, and that Muschett had thus, in fact, (if it was so considered,) collected that debt, he tells him he is going to Dumfries on the 26th, to make a final settlement, of all mercantile transactions, with Muschett and his sons; and asks to be furnished with a statement of interest arising on the settlement made in 1804, and also the amount of interest on the settlement in April, 1805; and also with a copy of the bond. This shews, conclusively, that he knew Muschett had not this document in his possession. On the 21st December, Laird answers his letter, and informs him that the bond

23 granted by him *and Muschett on the 2d of April, 1805, was for 399l. 2 6, bearing interest from the 16th of May, 1804. Interest to the 2d of April, 1805, is 21l. 1 6½; which makes the whole due on that day, 420l. 4 0½; when a payment was made by Muschett of 97l. 18 10½; leaving a balance due Oswald, Deniston & Co. "by you and Muschett," of 322l. 5 2, with interest. He then goes on to remind him how this debt originated, and to press him for payment.

From this time, until the death of Hancock, he was repeatedly pressed for payment, and as often promised it, as is in proof, by Laird, and Murdoch his clerk, and never once pretended or stated that he had paid it to Muschett, though he alledged that Muschett was in his debt. He well knew that the settlement between him and Muschett, was no payment; and it is the most charitable view that can be taken of his conduct, to say, that probably he forbore mentioning that settlement to Laird, not wishing his partner and

friend to be pressed for the money. In fact, however, it is charged in the bill, and I do not understand it to be denied in the answer, that Muschett was at that time insolvent; though that state of his affairs was then only known to his partner Hancock. If this was the fact, there was a fraudulent intention in making this settlement and concealing it, if it was intended thereby to throw the loss on the appellees. The answer, after insisting on the power of Muschett and Hancock to make the settlement so as to discharge Hancock, admits the insolvency of Muschett, and says that that is the reason why the appellants now seek to charge Hancock's estate, &c.

Tyler, his administrator, was also pressed for payment, and invariably promised it, even down to within a few months before the suit, when he wrote a letter, proposing arrangements for the payment; and never before that refused payment; nor even after the suit, was this payment, as it is called, to Muschett, ever intimated to Laird, although, in his answer, he states that he had for a long time intended to insist on this ground of defence. It is true, he also states, that he

made it known to the clerk of Laird, 24 *and that both he and his counsel knew the claim would be contested. But, so far from proving any such notice, the reverse is proved; and the fact is, that Laird had no intimation or suspicion, nor had his attorney, (as is proved by them both,) of this defence, until after it was made. In short, the attorney did not believe that any serious defence was intended.

It is true, that a motion was made for a continuance, at one time, in which some transaction with Muschett is mentioned; but no explanation is given; and the attorney for Tyler says it would have been refused, if asked for. As Muschett was a co-obligor, and had made the only payments that were made (for he made another payment besides that above mentioned,) the agent, if he had known of this motion, might well have supposed that some further discount was claimed as a payment by Muschett, or that something was supposed to be due to him or Hancock, as agent, which ought to be credited; the principal credits given, being payments in that way; and the agent knowing that nothing of this kind could be shewn, he would not have deemed it necessary to attend the trial. It does not appear, however, that he knew of that motion.

The agent, in his deposition, proves that he had no suspicion of any such defence, and that he believed the letter of Hancock, requesting a statement, was merely to enable him and Muschett to settle their accounts: that payment never had been refused, either by Hancock or Tyler; but that the latter, as late as May 21st, 1810, (shortly before the suit,) had, by letter, promised payment. This letter is in the record. The clerk of Laird also proves frequent applications to Hancock, who never alleged a payment to Muschett. The Judge who tried the cause, also proves, that the evidence satisfied his mind of the correctness of the verdict; and there was nothing to induce the plaintiff's attorney to suffer a non-suit.

The surprise caused by this unjust and

groundless defence, is therefore clearly proved.

25 *The answer, though it states as aforesaid, that he told the clerk of Laird the nature of this defence, yet admits that it was only a few days before the trial, that he had found the settlement above referred to, and which evidently formed the chief ground of defence, though, he says, he had long before abundant proof of that settlement. Wherein that proof consisted, he does not state; and it is not pretended, that he gave notice after finding the settlement. In short, he proves no notice whatever; but the reverse is clearly proved, both by the agent, and the attorneys on both sides.

The intestate Hancock, had received the monies of the appellants, as their agent and collector; had failed to pay, and never has paid, the monies so collected; and they must lose this just debt, in consequence of a surprise in setting up an unjust and groundless defence, unless equity can relieve.

But it is said, this must be the result, because the attorney for the appellants failed to suffer a non-suit. It may be worthy of remark, as farther excuse for him, that the defendant had wished for a continuance at the trial Court, in order to make his defence yet stronger; and he might have supposed it safer for his clients to take the chance of a trial on the then evidence, (which the Judge proves was altogether circumstantial,) than to suffer a non-suit. But be this as it may, shall a mistake of an attorney, in this respect, arising from his total ignorance of the real facts of the case, subject a party to the loss of his debt, where a surprise, if not a fraud, is clearly proved? In other words, is there no case in which a plaintiff at law can excuse himself for not suffering a non-suit? The attorney for the appellants states, in his deposition, that he did believe after the trial, that Muschett had a right to collect this debt, and that Hancock had made a proper payment: that he was entirely ignorant of the manner in which it originated, &c. and believed that there could be no chance

thereafter to resist the evidence, and 26 therefore he did not *suffer a non-suit, as he otherwise would have done. He denies that he moved for a new trial, as stated in the answer, as there was no ground for such motion.

Suppose a defendant to a suit on a bond, gives notice that he intends to rely on certain set-offs, but in a subsequent conversation with the plaintiff, who satisfies him that he can repel those set-offs, he agrees not to insist on them, but still makes the defence; and the attorney, not knowing of these facts, (his clients, as in this case, not being present,) fails to suffer a non-suit. Must the plaintiff lose his debt? This fraud could have been guarded against, by suffering a non-suit, as well as the surprise in this case. Surely, I think, equity would relieve against such fraud. The objection, then, if I am right in this, is not universal and inflexible. It must depend on the nature of the case that is made out.

This Court has uniformly, and in many cases, gone farther in extending their equitable relief, beyond what would be sanc-

tioned by British decisions; on the reasonable and proper ground arising out of the nature of our Judicial jurisprudence, the dispersed situations of clients and attorneys, and the uncertainty when suits can be tried, &c. But I think, such a case as that above put, and indeed this very case, would be relieved against in England.

In *Richards v. Symes*, 2 Atk. 319, an issue had been directed out of Chancery, to ascertain whether the mortgage in question was given to the defendant. Of course, he was plaintiff in the issue. On the trial, the defendant in that issue, in order to discredit one Bere, the most material witness for the plaintiff in the issue, produced a person to swear that this witness was not in England, at the time he swore to the fact. Several affidavits were read, on the motion for a new trial, to prove that Bere was in England, when he swore to the fact; and it was insisted, that the credit of Bere being invalidated, as aforesaid, weighed greatly with the jury, and was the principal reason that induced the verdict, and that the plaintiff

27 was only *prepared to support his general character; otherwise he could have given the same answer he is now prepared to do, had he been aware of the objection. The Lord Chancellor says, this application comes after a long time, &c. The ground for a new trial is surprise, &c. A great many objections have been made to the motion, and amongst others, that this is an application for a new trial, after a verdict, found by a special jury, upon a trial at bar. He agrees that formerly some countenance was shewn to this objection, and a distinction taken between trials at bar, and at Nisi Prius; because the latter are subordinate to the former, and therefore not of so solemn a nature. But this objection has been over-ruled, &c.

But the main ground on which he goes, is, that it was proved that notice was given to the party, a fortnight before the trial, that they would, on the other side, attempt to prove Bere abroad, which, though it was not so particular as to point out the very place where they would shew him to be, was sufficient notice for the plaintiff to prepare to encounter this evidence. Another reason which weighed (though that does not appear to have been insisted on by the counsel) was, that the new trial is asked by the plaintiff at law; and if it had been better made out, he would not have inclined to grant it, because it was in his power to have been non-suited; for, if his counsel had been of opinion that there was evidence, of which they were not apprised, and too strong then to encounter, he might have advised him to suffer a non-suit, and then he might have come back for new directions, &c. The Lord Chancellor, however, does not pretend to say, that no new trial can be granted, where the party might suffer a non-suit. But, the execution of the mortgage to the defendant, the plaintiff in this issue, was the very point in dispute, and Bere was the principal witness; so that if he had not been notified that he would be discredited, and had been surprised in that respect, he could not fail to see the propriety of a non-suit. He was

present too, to aid his counsel. 28 *Moreover, he had notice, and a fair opportunity to meet the evidence. I

can see no more danger in relieving a plaintiff, in a case of surprise properly made out, than to relieve a defendant in such case.

But, suppose the agent of the plaintiffs had been informed of the verdict, in time to apply for a new trial at law, and had made out the case that now appears before us. Would he have been correctly told, that although he knew of no defence, much less of that which was set up, that he should have attended from Court to Court, in order to aid his counsel in this suit on a plain bond, the payment of which had never been refused, but always promised; and because he did not do this, although completely surprised by the evidence and defence set up, the verdict must stand, though manifestly against justice? And would not this decision have been the more extraordinary, if the Judge had certified, as he has proved in this cause, that there was nothing in the case to admonish the counsel of the propriety and necessity of suffering a non-suit? I should rather be disposed to think, that had a non-suit been entered, and the whole matter had appeared to the Court afterwards, and before the end of the Term, the non-suit even ought to have been set aside, and a new trial granted, instead of putting the party to begin *de novo*. I think I have seen such practice in the old District Courts.

In *Bright, executor of Crisp v. Eynon*, 1 Burr. 390, an action was brought on a note for the payment of money. The defence set up was a discharge by the testatrix under her hand, as it was alleged, though the body of the paper was written by the defendant. He called two witnesses, who said they believed the name subscribed to be her hand; but their knowledge of it was slight; one of them having only seen her sign a receipt. The question on the trial was, whether it was forged or not? There were various circumstances proved on both sides; and though that fact is not stated, they serve to shew, that the nature of the defence was known to the plaintiff. The two witnesses, however, *who believed it to be her hand, were not opposed by any witnesses to the contrary, and the reason given was, that the plaintiff had no opportunity of getting it inspected. Two questions were left to the jury; first, whether it was forged? secondly, whether it was not obtained by fraud, and without her knowing the contents, and effect of the discharge? The plaintiff took his chance with the jury, who found a verdict for the defendant, and then moved for a new trial. Lord Mansfield says, "Trials by jury could not subsist now, without a power somewhere to grant new trials. A general verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is reasonable doubt, or perhaps certainty, that justice has not been done." In our case that certainty exists.

He enumerates several causes for setting aside verdicts, and amongst others, "that the parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore, could not come prepared to answer." He does not confine such case of surprise to the defendant alone. The parties may be surprised; and the very case was a motion by the plaintiff for a new trial,

who might have suffered a non-suit, so as to have taken time to inspect the paper. He goes on to say, "that for a good while, the granting of new trials was holden to a degree of strictness so intolerable, that it drove the parties into a Court of Equity, to have, in effect, a new trial at law, of a mere legal question, because the verdict, in justice, under all the circumstances, ought not to be conclusive; and many bills have been entertained on this ground, and the question tried over again at law, under the direction of a Court of Equity; and therefore, of late years, the Courts of Law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases." He goes on then to consider the case. "If the matter in dispute was of great value,"

(it was only 60l. there, but from one to 30 two thousand dollars here.) "I will *not say that all the suspicious circumstances might not be a ground for a new trial, to give the plaintiff an opportunity of getting the instrument inspected, by persons acquainted with her hand; though, I think, upon the evidence laid before the jury, the verdict, in that respect, was right. What I go on, is, the apparent fraud &c. in obtaining the discharge, if she really signed it." He then goes into the circumstances in proof on both sides, and finally says: "The attention of the jury was artfully drawn to the heinous nature of the charge of forgery only; and I left the question of fraud to them, without any express direction, that the circumstances spoke fraud apparent. The same jury might, on re-consideration, find a different verdict." On the whole, he was for granting a new trial, in which the other Judges concurred.

If Lord Mansfield would have been right in granting a new trial, even as to the point of forgery in this case, had it been a matter of great value, in order that the plaintiff, who was present, and might have suffered a non-suit, might come better prepared; surely in this case, where he was not present, where he proves, that a false case was made (innocently or not by the administrator, makes no difference,) which he had no reason to expect, and therefore could not come prepared to answer, he ought to have had a new trial at law, had he come in before the adjournment, and made out his case there. Shall it be said that he would have been repelled there, because he did not attend the trial, though being apprised of the event, he came in during the Term? I hope not. If he would have been excused at law, and obtained a new trial there, (as I cannot doubt that he would,) whence comes it, that a Court of Equity will be more rigid and less inclined to protect a party against surprise and the most manifest injustice, than a Court of Law would and ought to be? Courts of Law had formerly held parties to intolerable strictness, (says Lord Mansfield,) in consequence of which, equity interfered. They,

however, afterwards pursued equity in this *respect. Are they now to take the lead, and is equity even not to go as far as they would and ought to go?

The excuse is as good for not appearing during the Term, as at the trial; and if Equity will not relieve when a Court of Law would, it must be for reasons, of which

I am not able at present to appreciate the weight. Doubtless, should that be the decision of this Court, it will be right. But, until better advised my opinion is, that even in England, where their judicial system is such as to guard against surprise and accidents of this kind, infinitely more than we can, a new trial would be granted in this case, either at law or equity; at law, if the case could have been presented there; or in equity, if the party, without culpable neglect, (as in shewn in this case,) could apply no where else. We, necessarily, in my humble opinion, go farther than in England, in granting equitable relief against judgments at law. It would be no difficult matter, to shew this to have been the uniform course of this Court, from the earliest reports of its decisions, to the present day. The decisions have not been entirely uniform, I admit; sometimes more liberal of relief, and again less so. But, the uniform course repeatedly declared by our ablest and most experienced Judges, as necessarily arising out of our jurisprudence, and the nature of our territory &c. has been to enlarge the equitable jurisdiction. I admit that it ought not to be too latitudinous; and the latter decisions seem to me to be more properly guarded than the earlier.

I am not disposed to depart too hastily from those landmarks; and at all events, if I have at all succeeded in shewing that this would be relieved against in England, or even to raise a great doubt, whether it would or would not, I will be borne out by the great current of our own decisions, in granting relief here. Why is it that we see a great pressure in this State to get into Courts of Equity, in all cases requiring considerable investigation and patience of enquiry, but because of the circumstances aforesaid, so often recognised by this Court? I think, therefore,

32 *it holds a fortiori here, that the inestimable trial by jury will cease to be the favourite tribunal in civil causes, unless it is supported both by Courts of Law and Equity, by a liberal hand in granting new trials, as heretofore has been the practice. Who will quietly sit down under the loss of thousands of dollars, because he has not attended from year to year, and at great expense, the progress of a suit on a bond, the payment of which had never been denied, in order to see whether some gun-powder plot may not blow him up at the trial, and defeat his just claim, unless his attorney suffers a non-suit; when that attorney, an able counsellor in this Court, and the enlightened Judge before whom this cause was tried, concurred in the opinion, that the safest and most proper course was, to submit the case to the jury, on the circumstantial evidence that was before them? Mankind ought not to be driven by the course of judicial proceedings, to such misanthropic suspicions of their fellow-men; and I think the argument by the counsel of the appellants, was very strong to prove, that no man should be bound to entertain such suspicions. Why that feeling in the country, evincing the necessity of interposition by Courts of Equity, which

produced the late Acts of Assembly, giving this Court appellate jurisdiction, in cases of refusals of injunctions, even in the country, and appeals from their dissolution? Mankind will not sit down under the enormous injustice, presented by this and similar cases. They will call for arbitration laws, or some other means of escape from it.

In these general views of sound policy, I think myself supported by the great current of authorities in this Court, down to the present day, and which it would be too tedious now to pass in review.

There is one case, however, in this Court; *Tarpley's adm'r v. Dobyns*, 1 Wash. 185. There the bill alleged that the dealings were in specie; and on a settlement in 1779, a bond was given for 54l. current money: that afterwards, a payment of 6l. 10, was made in specie; and that

33 *the defendant still acknowledged himself further indebted, which could not have been, if the debt had been subject to the scale of ten for one: that the plaintiff brought suit; and not suspecting that the defendant would contend that the debt should be scaled, he was unprepared to prove the defendant's declarations, tending to shew that he considered it as a specie debt. The bill was demurred to. The demurrer was sustained by the County Court, and that decree affirmed in the High Court of Chancery. The President delivered the opinion of this Court:

"We feel no difficulty in declaring that both decrees are right. Although the appellant might have resorted to a Court of Equity in the first instance, if his case would bear it, it is now too late, after having made his election to take a trial at law. As to the surprise, which is made the pretext for this application to a Court of Equity, it ought not to benefit him; since, when he discovered a disposition in the appellee to avail himself of his legal advantage at the trial, he might have suffered a non-suit."

Although, in this case, the bond was given for current money, and not specie, yet I presume, that under that clause of the fifth section of the Act of 1781, commonly called the scale of depreciation, which provides, "that where other circumstances arise, which, in the opinion of the Court before whom the cause is brought to issue, would render a determination agreeable to the above table unjust, it shall and may be lawful for the Court to award such judgment, as to them shall appear just and equitable," the party had his remedy at law to recover what was just, on proving those circumstances; or, as would seem to be insinuated by the Court, might originally have come into equity, in order to shew the mistake in giving the bond for current money instead of specie. Yet, having elected his remedy at law, it was decided to be too late to resort to equity. It would seem, too, that in that case,

34 the party was not surprised. *The defence at law lay on the surface of the paper, and when he discovered, (being present, as we must presume from the case,) that the defence was to be made, he proceeded to take his chance before the

jury. The attorney, too, when he brought the suit, must have seen, from the face of the bond, that this debt was paid.

In *Hawkins v. Depriest*, 4 Munf. 469, the failure to suffer a nonsuit was expressly insisted on. The bill alleges that the appellee sold to the appellant a quantity of land, containing acres for £ , which he promised to pay: that he executed a deed, and being informed it was necessary to acknowledge the receipt of the money, he gave a receipt on the back of the conveyance, without having received it: that when he instituted a suit for the money, the defendant, taking advantage of the receipt, prevailed at law, and refuses to pay the money. The bill calls for a discovery of the land purchased, the price, and how much has been paid.

The defendant pleaded the judgment in bar; and also answering, admits the purchase, but says he made a full payment, and that the complainant had no legal or equitable claim on him for one cent.

A copy of the record of the suit at law, was produced; which was an action of assumpsit for the price of a tract of land, said to be sold and conveyed for the price of 300l. It appeared, that on the trial, on the plea of non assumpsit, the witnesses proved that the defendant agreed to give to the plaintiff 100l. for two tracts of land; that this evidence was objected to, as not supporting the declaration; and the Court refused to let it go to the jury: to which opinion, there was an exception, but no appeal taken.

Two certified copies of deeds, both recorded in July, 1791, were filed; shewing, that the plaintiff in fact sold and conveyed two tracts of land to the defendant for fifty pounds each, on one of which a receipt was endorsed, but none on the other.

35 *Sundry depositions were taken in the Chancery suit, from which it appeared that no money was paid at the time of writing the receipt, which a subscribing witness considered a mere matter of form: that afterwards, the defendant paid about 52l. and claimed credits for some tobacco and corn, and also for work done; which credits, except the tobacco, being disputed, he determined to stand a suit. The County Court allowed a credit for 6l. for tobacco, and decreed the balance of 42l. with interest. This decree was affirmed by the Superior Court of Chancery in Richmond, and that decree was affirmed in this Court.

In this case, the plaintiff at law had failed, as well from the badness of his declaration, on which, if not the whole, at least some of his evidence, was excluded; and also, because a groundless and unjust defence was set up. He was thus doubly admonished of the propriety of suffering a non-suit. How could he doubt of the propriety of a non-suit in such a case? If the evidence was improperly rejected, he could also have appealed. But, after failing to do either of these, he comes at once into equity, to recover his debt thus lost at law. It is there insisted upon, that he should have suffered a non-suit at law; that the merits had been tried there, &c. He gets relief, however, and why? Because the defend-

ant had set up what he must have known to be a groundless and unjust defence; and the plaintiff is not to be punished by the loss of his debt, because, even with all these circumstances in his case, he failed to suffer a nonsuit.

The receipt, in that case, on the deed, was under the usual acknowledgment of livery of seisin, and is in these words: "Received, on the day of the within indenture, of Robert Hawkins, for said land, full satisfaction;" and opposite to the signature is a scroll. It does not state that it is sealed. It is evidently a mere formal matter on its face; no sum mentioned, and, I presume, on every ground, was no estoppel at law. The bill is not framed on that ground. The counsel says, it might, perhaps, have been an estoppel.

36 *The ground of the decision is not stated in the report; but, from the arguments set up on both sides, and the manner in which the failure to suffer a non-suit was relied on, I presume no such grounds was seriously insisted on, as giving equity jurisdiction. In fact, he was unprepared to meet the defence. If he had offered the evidence that was before the Court of Chancery, and his other evidence had been received, can any one say he ought not to have prevailed at law? I think not. It could not have been rejected, for the instrument in fact was not sealed.

If that decision is law, surely relief ought to be granted in this case.

Why does a Court of Equity relieve a defendant at law, who has paid part of the debt, and has a receipt, but who fails to make defence and produce it on the trial? Because he was not bound to suspect that the plaintiff had failed, or would be so unjust as to refuse to give him credit; and the immorality and want of conscience, in taking this legal advantage, is too shocking to the moral sense of mankind, to be tolerated in any country, or under any circumstances.

This was probably the ground of the last case. The defendant at law had obtained a receipt, as a matter of form, on the back of the deed, when not one cent of the money had been paid; and it might have been bad law, (though I give no opinion on that point,) if the jury had been instructed, that such receipt, even if under seal, without further proof of payment, was not to be received as evidence of that fact. But, without these efforts at law, he gets relief here against this fraudulent defence. So here, if the fact be that this debt is unjustly lost, in consequence of a defence, which, if made by Hancock himself, would have been a palpable fraud in fact, and by which he ought not to gain; what more can his administrator say, than that he found the papers out of which the defence grew; that he made it honestly, believing it to be a just defence? But, if it is not so in fact, and if the consequences are

37 the same to the appellants *as if he had known the injustice of the defence, how can he, in conscience, claim these unjust consequences? Is it conscientious to do so, if the defence was in fact unjust? He does not stand as an innocent purchaser. He represents the man

whose estate justly owes this debt; and who, himself, could not have benefited that estate, by making this defence.

But, Hancock was a trustee; and if he really intended this settlement with his co-obligor, (an insolvent man, whose circumstances were probably known to him,) to operate as a discharge of himself, and thus to save, out of the wreck, his own debt due from Muschett, it was a fraud; and this in fact, is the amount of the defence. This settlement, having this effect, it is now insisted on, that it was competent for them to make; and if he is to be supposed to intend the consequences of his acts, it was an intended fraud. In such case of trust and confidence, although more might have been done at law, yet this Court has recognised the principle that relief is proper in equity, on account of the appropriate jurisdiction of that Court in such cases. *Spencer & White v. Wilson*, 4 Munf. 130.

In *Fenwick v. M'Murdo*, 2 Munf. 244, this Court reviewed many of the leading cases of injunctions, and lay down the general doctrine thus.

The principle, settled on solemn argument, and due consideration of those cases, ought not to be disturbed, which is, "that where a cause has been once fully heard and decided in a Court of Common Law, having competent jurisdiction of the cause, a Court of Equity ought not to interfere, unless fraud, or surprise be suggested and proved, or some material and adventitious circumstance had arisen which could not have been foreseen or guarded against."

This defence could not be foreseen nor guarded against. The facts, from which it arose, were altogether in the knowledge of the other party. The only negligence that could be charged on the agent, is, his failure to attend, from Court to Court, a trial of an action on a bond, without
38 knowledge *even that it was defended seriously. It had been continued for years, during the war, on the ground that the defendants were alien enemies; and the letter, a few months before the suit, promising payment, was well calculated to induce a belief that no serious defence was intended. That merely asked some further delay, until some negroes could be sold, which the distributee of Hancock wished to purchase.

On the whole, I am of opinion that the decree ought to be reversed.

JUDGE CABELL.

The appellants residing in Great Britain, and having many debts due to them in Virginia, contracted at various mercantile establishments, in this State, before the Revolutionary war, employed John Laird as their general agent for the settlement and collection of the said debts. Laird, in the year 1796, appointed Mungo M. Hancock, the intestate of the appellee, as a sub-agent, for the settlement and collection of that portion of the debts aforesaid, that had been contracted at Aquia and Colchester. This appointment was made on the recommendation of James Muschett, who became responsible to Laird for the fidelity of Hancock's agency. In January, 1803, Hancock having become addicted to

irregular habits, was dismissed from the agency, and the said Muschett was appointed to succeed him, and to complete the collections which he had begun. More than two years thereafter, viz: on the 2d of April, 1805, a final settlement was had between Laird and Hancock, on account of his collections for Oswald, Deniston & Co. and he was found in arrear 399l. 2 6, for which sum he executed his bond to them, with the aforesaid James Muschett as his surety. This bond was never entrusted to Muschett; for, being one of the obligors, it was rather his duty to pay, than his right to receive, the money for which the

bond was given. It always remained
39 with Laird *or his clerk Murdock; a fact well known, both to Hancock and to Muschett. When Tyler, the administrator of Hancock, was first applied to, after his qualification, he made no objection to the payment of this bond; but becoming afterwards convinced that the claim was unjust, he determined to stand a suit; which was brought in the Superior Court of Fairfax county. He put in the plea of payment, on which issue was joined. Judge Dade, who instituted the suit, says in his deposition, that he always understood it was a case which was to be defended on its merits. The attorney, however, to whom the cause was afterwards consigned, seems not to have been apprized of that understanding; and although the cause was continued once, if not oftener, at the instance of the defendant, on the ground of the absence of a material witness, he informs us in his deposition, that until the trial of the cause, he considered the plea of payment as "sham plea, and thrown in as a matter of course, and for delay; except so far as to cover some credits, which he knew the defendant was entitled to." When, therefore, the cause was called for trial, he went into it in full confidence that he wanted no evidence but the bond; and that the defendant had no evidence to resist the judgment he was disposed to demand. On the trial, however, the defendant introduced evidence, which proved that James Muschett (surety in the bond) was a collector for Oswald, Deniston & Co. under John Laird; and he then introduced a statement, proved to be in the hand writing of the said Muschett, purporting to be an account between Hancock and the said Muschett, in which Muschett charges Hancock to John Laird, for the amount of the bond now in controversy. He farther introduced the copy of a release, executed on the 21st of October, 1805, by Muschett to Hancock, of a lien which Muschett had taken from Hancock, in August, 1802, on some slaves, to indemnify him for the responsibility he was under, as surety for Hancock's faithful discharge of his agency. The consideration of the release, as expressed in the release itself, is, that Hancock

40 *had made "a satisfactory settlement with John Laird, agent of Oswald, Deniston & Co." There does not appear to have been any other evidence whatever, introduced on the trial; nor shall I enquire, whether the evidence was or was not sufficient to defeat the plaintiff's action. Their attorney seems not to have doubted its

sufficiency; and instead of suffering a nonsuit, submitted the case to the jury, who found for the defendant.

The appellants filed their bill in the Court of Chancery for the Fredericksburg district, praying for a new trial of the cause. The bill was dismissed. The appellants appealed to this Court; and the only question is, whether a new trial ought to be granted.

One of the grounds on which the appellants rest their claim for a new trial, is the allegation in the bill, that the settlement of accounts between Muschett and Hancock, and the pretended payment by the latter to the former, of the bond in controversy, was designed as a fraud upon the appellants. This charge is not only unsupported, but is contradicted by the evidence adduced by the appellants themselves. Hancock was the nephew of Muschett; had lived in his family for many years; and appears to have been extensively connected in merchandize with him and his sons. The appellants have produced a letter, written in December, 1805, by Hancock to Laird, informing him that he intended in a few days to go to Dumfries, for the purpose of making a final settlement of all his mercantile and other transactions with James Muschett and his sons, and requesting Laird to send him a copy of the bond in controversy; in which, it will be recollected, that Muschett was his surety. The statement, or account, which the appellants complain of as being fraudulent, is not dated; but there can be very little doubt, that it was made at the time indicated in this letter. The account embraces individual and mercantile transactions; transactions with James Muschett, (described as James Muschett, sen.)

with John M. Muschett, with Charles H. Muschett, with James *Muschett, sen. & Co. with John M. Muschett & Co. and with H. M. & Co. (probably Hancock, Muschett & Co.) and it appears that Muschett fell deeply in Hancock's debt. It will be recollected, that Muschett had then been nearly three years, and was at that time, collector for Laird, as the agent of Oswald, Deniston & Co. to whom Hancock's bond was due; and as it was ascertained that he was thus deeply indebted to Hancock, what could be more natural than that he should undertake, in consideration thereof, to pay to Laird the debt due by Hancock, and for which he was surety; and that, in consequence of such undertaking, he should introduce it in the settlement, and charge Hancock with the bond which he was thus to pay? Where was the fraud in this? They do not pretend, that this settlement between them amounted to a payment or discharge of the bond. They both knew they possessed no such power. Hancock took no receipt against the bond, and no evidence even of the settlement. The settlement does not appear to have been entered on either of their books; although, being merchants, they may be presumed to have kept regular books, in which were entered all transactions deemed important. It was found, after Muschett's death, on a loose sheet of paper, without date or signature, pinned to the folio of Muschett's ledger,

in which Hancock's account was kept. From all these circumstances, it would appear, that even as between the parties, it was not intended as an actual settlement, but merely as a statement to shew how the accounts would stand, in case Muschett should, according to his engagement, pay Hancock's debt to Laird. The release executed by Muschett to Hancock, on the 21st of October, 1805, of the lien on the negroes, which had been given in 1802, does not vary the aspect of the case in this particular. The lien, it may be observed, was given shortly before Hancock's irregular habits had caused his removal as agent; before he had had any settlement with Laird, and when the balance due from him

on account of his collections, not being ascertained, *may have been apprehended to be very large. But when, on the 2d of April, 1805, the precise balance due to Laird was ascertained, and when in October of the same year, it became manifest to the parties, that Muschett owed Hancock more money than Muschett was bound for as his surety, to Laird, it would have been highly unjust to continue the incumbrance on Hancock's property. Muschett's proper indemnity was in his own hands; in the greater debt that he owed Hancock. The settlement referred to in the release, was the settlement between Hancock and Laird, of the 2d of April, 1805, and not the settlement between Hancock and Muschett. The subsequent conduct of Hancock is a proof of the rectitude of his intentions. Murdock, the clerk of Laird, made frequent applications to him for payment of this bond. On these occasions, Hancock informed him that Muschett owed him money; and from this circumstance, taken in connexion with the circumstances above mentioned, I think it highly probable, that he also told him of Muschett's agreement to pay the bond for him; but he never intimated that Muschett was authorized to collect the bond from him, nor that he himself was released from the obligation to pay it.

There was no fraud on the part of Muschett or Hancock; and I have gone into this branch of the subject, not because I think it necessary to the correct decision of the cause, but for the purpose of removing unmerited imputation from the memory of two men long since consigned to the grave.

I come now to those grounds for a new trial, alleged in the bill, and supported by testimony, or which may be admitted to be so supported. And here it will not be necessary to go minutely into the evidence; it will be sufficient to state the general results, or the facts which, it is contended, the testimony establishes.

Let it then be considered that the verdict of the jury, although it may have been correctly found, according to the evidence exhibited on the trial, will, nevertheless, work injustice between the parties, if not set aside. Let it be conceded that the appellants, their agent Laird, and their attorney, had no intimation of the nature of the evidence, which the defendant intended to adduce in support of his plea of payment. Let it even

be conceded that they did not believe, that the defendant intended any opposition to the judgment which the appellants were in pursuit of. And let it be farther conceded, that they had been previously apprised of the real intentions of the defendant, and of the nature of the evidence on which he relied: that they could and would have introduced such evidence on their part, as to deprive the testimony of the defendant of all its weight, and to establish, clearly and incontrovertibly, their right to the judgment which they demanded. Let all this be conceded; and I am still decidedly of opinion, that the new trial ought not to be granted.

Applications to Courts of Equity for new trials, are extremely rare in England, even on the part of defendants at law; since the Courts of Law exercise the same jurisdiction, and to the same liberal extent. As early as the reign of Charles 2d, (Curtis v. Smalridge, 1 Ch. Cas. 43,) the rule was distinctly laid down, that a Court of Equity will not award a new trial to avoid a judgment at law, "on account of any evidence or matter which might have been used in the first cause, and of which the party then had knowledge," unless some satisfactory reason be assigned, why the party did not avail himself of it, in the trial at law. And I understand the same principle prevails, where the application is not to avoid the whole judgment, but seeks partial relief only. It cannot be necessary to refer to cases to establish this principle. It is to be found every where. The English Courts have very rarely departed from it. Our own Courts, whilst they have never denied its obligation, have, unfortunately, (I humbly think,) been too often seduced into forgetfulness of it, by a tender regard to the hardship of particular cases.

44 Hence, the variation "to be found in the decisions of this Court, and which has sometimes exposed us to the imputation of having no certain system. Hence the course, which has been sometimes pursued, of allowing the defendant to come into equity, to get relief for a payment, on the ground that the payment having been in the knowledge of the plaintiff, it was against conscience in him not to allow it. Hence, also, the practice of allowing the defendant to come into a Court of Equity, after a trial at law, to demand a disclosure of facts from the plaintiff, instead of holding him to demand the discovery before the trial, to be used at the trial.

These remarks are not necessary to the decision of this cause; but they are suggested by the occasion, and they are thrown out as indications, that I am disposed to return to and guard with greater caution, the line which has been wisely drawn between the jurisdictions of Courts of Law and Equity.

But, a new trial or other relief, will frequently be extended to those who were defendants at law, under circumstances where it would be refused to those who were plaintiffs; and this, not because defendants are greater favourites than plaintiffs with Courts of Justice; but because of the different ground which they occupy. Relief is

granted to defendants, because they cannot redress themselves. Thus, if the trial of a cause once commences, there is no mode by which a defendant can escape from it, whatever may be the circumstances which forbid him to expect a just decision. He must await the verdict; and then, if the Courts do not afford him relief, he is without redress. But, the situation of plaintiffs at law is very different. If they find themselves deceived in their own testimony, and think they can strengthen it; or if they be surprised by the introduction of unexpected testimony on the part of the defendant, and believe that it will be in their power at some other time, to explain, rebut or disprove it; they can afford themselves the opportunity of doing *so, by suffering a non-suit, and commencing their action de novo.

The case before us, is one in which plaintiffs at law are seeking to be relieved from a judgment, which they voluntarily permitted to go against them; and this of itself, is sufficient to shew the inapplicability of all, or nearly all the cases, which have been referred to on their behalf.

The allegation of fraud being put out of the case, the only remaining ground on which the appellants can rely, is the surprise at the trial by the introduction of unexpected testimony.

If the case of the plaintiffs applying for a new trial on such ground, be not materially different from that of a defendant, making the same application on the same ground, whence comes it that no case has been found, where the English Courts have granted a new trial on the ground of surprise? The case of Bright, ex'or of Crisp v. Eynon, 1 Burr. 390, may, at first view, be supposed to sanction the granting a new trial to a plaintiff, on this ground. But, if that case be examined, it will be found, that it was decided expressly and solely, on the ground that it was contrary to evidence. None of the Judges but Lord Mansfield said any thing on the ground of surprise; and even he gave no opinion on it, farther than to say, that "if the matter in dispute was of great value, I will not say that the suspicious circumstances might not be a ground for a new trial." If this, and some other general expressions of his, be regarded as the expression of an opinion by that great Judge, that a new trial ought, in any case, to be granted a plaintiff on such ground, I have only to say, that neither he, nor any other Judge in England, has ever acted on that opinion, so far as I am informed. Nor am I aware of any such case in our own Courts.

The only case that looks that way, is the case of Hawkins v. Depriest, 4 Munf. 469. But that was not the case of an application to equity for a new trial, but a bill for substantive relief on the merits of

46 a case originally and *exclusively proper for the Chancery jurisdiction. The ground of the decision were not given by the Court. But it is believed, that the Court must have gone on the ground I have mentioned, viz. that the case was originally and exclusively proper for the jurisdiction of a Court of Equity; for, the party there, having given a deed acknowledging the re-

ceipt of the purchase money, he was estopped in a Court of Law, from saying that he had not received it; and therefore, never could have recovered at law; and the Court of Equity rightly decided, that it was not deprived of its jurisdiction by a previous nugatory and improper resort to a Court of Law.

There is not only no adjudication supporting the claim of the appellants, but there is direct authority against it. The case of *Richards v. Symes*, 2 Atk. 319, was an issue out of Chancery, in which a new trial was prayed for on the part of the plaintiff. The Chancellor observed, "there is another reason that weighs with me; that the new trial is prayed for on behalf of the plaintiff at law; and if it had been better made out, I should not have inclined to grant it; because it was in his power to have been non-suited; for if the counsel had been of opinion, that there was evidence they were not apprised of, and too strong for them to encounter, they might have advised him to suffer a non-suit; and then he might have come back to this Court for new instructions, who would have ordered another issue at law, notwithstanding the non-suit." It is impossible not to be struck with the resemblance, or rather the identity of the case supposed by the Lord Chancellor, and that under consideration. In this case, as in that, the plaintiffs were met by "evidence they were not apprised of, and too strong for them to encounter." In this case, as in that, the counsel "might have advised them to suffer a non-suit."

The case of *Tarpley's adm'r v. Dobyns*, 1 Wash 185, strongly resembles this in principle. There, the plaintiff at law had failed to produce evidence, (which

47 evidence *was in his power,) merely because he did not suppose the defendant would make such defence as would render that evidence necessary. But, being surprised in this particular, by the defendants unexpectedly making a defence, which made that testimony indispensable, he, like the appellants in this case, did not suffer a non-suit, but submitted the case to the jury, who found against him. He then filed his bill in equity, stating all the circumstances, and praying that the defendant should be decreed to pay him his debt. There was a demurrer to the bill for want of equity, which demurrer was sustained. Judge Pendleton, in delivering the opinion of the Court, says; "although the appellant might have resorted to a Court of Equity in the first instance, if his case would bear it, it is now too late, after having made his election to take a trial at law. As to the surprise which is made the pretext for this application to a Court of Equity, it ought not to benefit the appellant in the present case; since, when he discovered a disposition in the appellee to avail himself of his legal advantage at the trial, he might have suffered a non-suit."

It is no objection to the application of this case to the one under consideration, that in *Tarpley's adm'r v. Dobyns*, the plaintiffs ought to have known, from the very terms of the bond, that it would be incum-

bent on him to prove, at the trial, the very fact which the course of the defendant made it necessary for him to prove. He was, in fact, surprised; and the surprise, whether produced with, or without cause, ought to have admonished him of the propriety and necessity of a non-suit. Nor do I think the case would be varied, even if the surprise were produced by the fraud of the defendant; for even in such case, I would say, in the spirit, if not in the very words, of Mr. Pendleton, "when the plaintiff discovered a disposition in the defendant to avail himself, at the trial, of the advantage which his fraud had given him, he ought to have suffered a non-suit."

48 *Although I am decidedly of opinion, that a new trial ought never to be granted by a Court of Equity to a plaintiff at law, merely on the ground of surprise at the trial, from whatever cause that surprise may have arisen; yet, there are cases, in which a new trial ought to be granted to him. I would grant it where the verdict was against evidence; as in the case of *Bright, ex'r of Crips v. Eynon*, 1 Burr. 390; and as is done in every day's practice; I would grant it, where the damages given by the jury are very inadequate to the injury he had sustained. I would grant it, where there had been any improper conduct on the part of the jury. In short, I would grant him a new trial in all cases, in which, under similar circumstances, I would grant one to the defendant, except where, from the nature of the case, he might have redressed himself by suffering a non-suit. This exception excludes cases where the application, as in the present instance, is founded on mere surprise, produced by the introduction of unexpected testimony at the trial. I would not grant a new trial in any such case, unless the party was prevented by fraud or accident from suffering a non-suit.

But, if there be any case, in which a plaintiff who has failed to suffer a non-suit, is entitled to a new trial on the mere ground of surprise at the trial, I should not think that this is one of them. As to the appellants being out of the country, that is entitled to no consideration. They had an agent, Laird, to whom was committed the management of all their concerns. He lived in George Town, but a few miles from the Court of the county where the cause was tried. From the time that he committed the bond to the hands of the attorney, he took no care, and made no enquiry, concerning the suit. The attorney who instituted the suit, "always understood it was to be defended on its merits;" and he who succeeded him, ought to have known it; for, the cause was once, if not oftener, continued at the instance of the defendant, on the ground of the absence of a material witness. That

49 witness was the clerk of *Muschett; and the object of his testimony was announced to be the verification of some accounts between Hancock and Muschett, on which the defence rested. This circumstance ought to have shewn, that the plea had not been thrown in as a sham plea, and for mere delay, and was well calculated to indicate the nature of the defence. If this

fact, together with the opinion of the first counsel, had been communicated to Laird, it would have been his duty to attend to the trial of the cause; and if either he or his clerk Murdock, had attended, the result would have been different; for both of them, as appears from their evidence in the cause, were acquainted with facts, sufficient to insure a verdict for the appellants. In the case of *Bateman v. Willae*, 1 Sch. & Lefr. 201, Lord Redesdale said, that "a bill for a new trial is watched in equity with extreme jealousy, and it must see that injustice has been done, not merely through the inattention of parties." I entirely concur in this opinion. Men must bear the consequences of their own acts; and those who shut their eyes to the light, ought not to be permitted to complain that they do not see. In this respect, I cannot distinguish between the parties and their attorneys.

I am for affirming the decree of the Chancellor.

The PRESIDENT.

The application to the Court of Chancery, in this case, is, to be relieved against a verdict which was found for the defendant, upon what was conceived, at the time, by the parties, a fair trial at law. No objection was made to it in the Court of Law; nor did the plaintiffs complain of it then. The material allegation in the bill is, (although the plaintiffs went to trial, on the plea of payment,) that they did not dream that any attempt would be made to prove the payment insisted on; and that no instruction was given to their counsel, nor did they, or their agent, attend the trial. Upon the facts in the case, it

50 does not appear that "any fraud was practised by the defendant, by which this negligence, on the part of the plaintiffs, was produced; nor does it appear that there was any obstacle, imputable to the defendant, to prevent their counsel, after the testimony was disclosed, from suffering a non-suit. He freely submitted the case to the jury, and took the chance of a verdict in his favor.

The application, then, for relief, is solely on the ground that great injustice has been done them, in the trial at law. It seems to me very clear, that if a party neglects to avail himself of his remedies for injustice done there, a Court of Equity ought not to interfere; nor ought a plaintiff to be permitted to deprive his adversary of his trial at law, when nothing is imputable to him. Otherwise, the jurisdiction of a Court of Law would soon be supplanted by that of the Courts of Equity. Neither the neglect of a party, nor his ignorance of his rights at law, furnish any ground for the interposition of a Court of Equity. This doctrine is the more reasonable in its application to plaintiffs at law than to defendants. The former always have it in their power, in a case like the present, to be relieved against surprise on the trial, if any, by suffering a non-suit. They are not compelled, as defendants are, to submit their case to the jury. Though the case of *Tarpley's adm'r v. Dobyns*, 1 Wash. 185, is not, in its circumstances, like the case before us, the principle on which it was

decided, is strictly applicable. The Court went on the ground, that the relief asked for in equity, might have been had by suffering a non-suit; and no sufficient excuse for omitting it, being alleged and proved, they affirmed the decree, and dismissed the bill. I admit that this Court, in their solicitude to do justice, may, in some cases, have encroached upon these principles; but they have never been directly over-ruled.

I am of opinion, therefore, to affirm the decree.

Decree affirmed.

51 *M'Mahon v. Spangler.

January, 1826.

Chancery Practice—Dissolution of Injunction.—It is a correct course of proceeding, for a Chancellor to dissolve an injunction, upon the defendant's tendering a deed to the plaintiff, or filing it with the papers, without requiring it to be approved by the Court, before the injunction shall be dissolved.

Evidence—Parol Evidence Rule.—The general rule is that parol evidence cannot be admitted to contradict, explain, or alter a written agreement; but may be received to prove fraud, mistake or surprise, in the execution of it. But in the latter case, the evidence must be strong and clear.

Same—Affidavit.—An affidavit taken by a party, may be read in the cause, although the party taking it may wish to suppress it, because it operates against him.

This was an appeal from the Staunton Chancery Court. The following opinion will give a complete history of the case.

Wickham, for the appellant.

Johnson, for the appellee.

January 31. JUDGE CARR.

The defendant Spangler and his sister, the wife of Key, were each entitled to an undivided moiety of a tract of land descended to them from their father. Spangler was desirous to sell his share, and offered it to different persons. At length he made a contract with the plaintiff M'Mahon, which is in writing, signed and sealed by the parties, and dated the 15th of July, 1819. This contract expresses that Spangler had sold to M'Mahon, "all his right, title, interest and claim, in and to a certain tract or parcel of land, in the county of Rockingham, on the North river, adjoining Major Robert Grattan, containing by estimation 300 acres, and which formerly belonged to Frederick Spangler, deceased, (a division of which, is hereafter to be made, and it is understood, that when the division is made,

***Chancery Practice—Dissolution of Injunction.**—See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

†**Contracts—Construction—Parol Evidence.**—It may be laid down as a rule of construction established beyond question, that a written contract must be construed by the terms used therein if plain and intelligible; that extrinsic proof is not admissible for the purpose of adding to, or detracting from, or explaining, or in any wise varying the plain meaning of the instrument itself; that extrinsic proof may be heard only for the purpose of explaining a latent ambiguity or of applying ambiguous words to their proper subject matter. It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense. *Findley v. Findley*, 11 Gratt. 437, 438, citing the principal case to the point. The principal case is also cited in *Weidebusch v. Hartenstein*, 12 W. Va. 764.

See generally, monographic note on "Contracts" appended to *Enders v. Board of Public Works*, 1 Gratt. 384; monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

the improvements are to be on that part of the land hereby intended to be secured to the said M'Mahon,) together with all
 52 *the appurtenances, &c. for and in consideration of the sum of \$2600, to be paid, \$700 in hand, \$100 by the 19th instant, \$400 on the 1st of May, 1820, \$300 in a gig and harness worth that amount, by the 1st of October, 1820, \$550 by the 1st of October, 1822, and \$550 by the 1st of October, 1824;" Spangler to make a deed, after the division should be confirmed by the Court of Chancery. In execution of this contract, the plaintiff gave his bonds, and has paid the \$700, (which was a payment in hand,) the \$100 and the \$300. A division was made by the commissioners, and Spangler having gotten the part which had the improvements, delivered it over to the plaintiff who still holds possession of it. Upon the division, the commissioners found that the whole tract contained only 269 acres; and of this, they considered 119 acres, with the improvements, an equal share. Spangler removed to the State of Ohio, without executing a deed to M'Mahon for the land. He assigned the \$400 bond to the defendant Clayton, who sued on it, and recovered judgment. It is to injoin this judgment that the bill is filed.

The grounds of injunction are two: 1st. That there was a mistake made by the scrivener in drawing the agreement, the real contract being, that Spangler sold to M'Mahon, not his interest in the land for \$2600, but that he sold him 150 acres of land, with the improvements, at \$17 $\frac{1}{3}$ per acre, making the sum of \$2600. 2d. That even if the contract be rightly expressed, the whole tract was estimated by both parties at 300 acres, and being found 31 acres deficient, the plaintiff is entitled to a deduction for the deficiency, which ought to come out of the bond first due after the discovery: Spangler answered, denying directly and positively, that there was the slightest error in the written contract; or that he sold by the acre; but that he sold his moiety, whatever it might be, for the gross sum of \$2600: that he had given Key a full power to make a deed, and supposed it had been done: that he would make one with all convenient speed.

53 *On a motion to dissolve, the chancellor considered that the written contract must stand, there being no sufficient evidence of mistake; and ordered, that on Spangler's executing and tendering to the plaintiff, or filing among the papers in the cause, a deed with a general warranty for the 119 acres of land, the injunction be dissolved. The appeal is from this order.

The first objection taken to the order was, that however the case might be upon the merits, the chancellor ought not to have dissolved the injunction, upon the tendering a deed to the plaintiff, or filing it with the papers, because this did not give the plaintiff that security and safety on the subject of title, which he was entitled to; that neither the parties, nor the clerk, were judges of the sufficiency of the deed; and that the Chancellor should have refused the motion to dissolve, with leave to renew, when a deed should be filed, and submitted to him for inspection.

I think this objection rather specious than solid. It will be remarked, that there was never any difficulty between the parties, on the subject of title. Though the injunction was dissolved, yet the cause remained in Court. When the deed should be executed, if the defendant tendered it to the plaintiff, he would of course consult his counsel, and unless he thought it a sufficient deed, would reject it. If he did, the defendant would either make another, according to the requisition of counsel, or he would file the deed he had made, with the clerk, and demand the order of dissolution from him. Suppose the clerk to grant it, and the execution to issue, M'Mahon might instantly apply to the Chancellor by petition, submitting to him the deed, and making his objections; and whether it should be in or out of Term, the Chancellor would examine the deed, and stop the execution at once, if he found it insufficient. Thus, no mischief could result to the plaintiff, and I do not think this objection can be sustained.

We come now to the merits, and first, as to the alleged mistake in the agreement. For the authorities on the

54 *subject generally, of admitting parol evidence in a case of this kind, I refer to Ratcliffe v. Allison, 3 Rand. 537, not long since decided. The general rule is, that parol evidence cannot be admitted to contradict, explain, or alter, a written agreement; but, may be received to prove fraud, surprise or mistake in the execution of it. But the books all tell us, that in this latter case, the evidence must be strong and clear. The solemn acts of the parties, under their hands and seals, are not to be blown away by loose and vague conversations. In the case before us, the bill asserts that the scrivener, having first written the heads of the agreement correctly, made the mistake complained of, in the copy; and that this was not perceived, until after the contract was executed. The answer is positive and direct, in contradicting this. The plaintiff, then, must make it out by satisfactory evidence, out-weighting the answer. To increase the difficulty of the plaintiff's task, there are some circumstances strongly corroborating the answer. The first of this is, that the bill itself shows, that there was never any claim made by Spangler, to more than an undivided moiety of a tract supposed to contain 300 acres; and that he wished to sell only his part, never expressing any intention of selling any part of the portion which would fall to Key. Another, and a very important circumstance, as it seems to me, is, that the contract as stated by the bill, is so widely different from that expressed in the agreement executed, that it is difficult to conceive how the one could be mistaken for the other. Observe; the bill states, that Spangler sold the plaintiff 150 acres of land, with the improvements, at \$17 1-3 per acre; the contract says, that he sold him his right, title, interest and claim, in and to the land, for \$2600: The one a sale by the acre of a specified number of acres; the other, a sale in gross of his interest. M'Mahon does not say, that he did not read over the contract, that he was intoxicated, or in any other way deprived of

the use of his reason, for the time. And can we easily imagine, how a man who had made an important contract for 150 acres of land, at so much the acre, and had caused this contract to be reduced to writing, should read it over, or have it read to him, and not discover that it was set down as a purchase in gross of an indefinite quantity of land?

Let us see now what is the evidence to convict the scrivener of mistake. George Clack says, Spangler offered to sell to him his land, which he afterwards sold to the plaintiff, stating that his undivided moiety would be 150 acres; cannot be certain, but his impression is, that he offered the part with the improvements; has heard him make the same offer to others. Thomas Clack heard a conversation after the contract, between M'Mahon and Spangler, his recollection of which (after 2 years,) is, that Spangler did not positively admit, that Bush had made a mistake in drawing the contract; but said that if he had, it should be corrected. W. E. Clark was the plaintiff's bar-keeper; heard many conversations, before the contract, between the parties; in one of which, Spangler said, there were 300 acres in the tract: that one half was his; and that he would warrant to the plaintiff 150 acres. After the survey, and the deficiency discovered, Spangler came to the plaintiff's house, and told the affiant, that he would make satisfaction to the plaintiff. Mr. Williams says, that after the contract, Spangler asked him, in presence of the plaintiff, if he had not surveyed the land, and if it would not hold out 300 acres. He answered, he thought it would be thereabouts. He understood the defendant to say, he had sold the plaintiff 150 acres. Peter Roller. Spangler offered to sell him the land; said there were 300 acres, and he owned half, 150: that he could get either part, with or without the improvements. John Roller. The land was offered to him; rather thinks at 150 acres. He said the whole tract was 300 acres, and offered his part. This is all the evidence upon the subject of the mistake. I mean all, but those affidavits taken after the appeal; which, though if earlier taken, they would not change my opinion. I cannot

think ought to be used to impeach a decree made before their existence. Now, I ask, does the evidence prove that the contract made, and the contract signed and sealed, were different? Not one of the witnesses pretends, that he heard the contract made. The conversations, at best, are loose and casual, related, after the lapse of two years, by persons not at all interested, in understanding or remembering them. Most of them may be explained, by adverting to the fact stated in the bill, that Key gave Spangler leave to sell either part; and if he sold the part unimproved, it would of course (on the supposition that the tract was 300 acres,) contain 150 at least. In all cases, he spoke of selling his part, his half, &c. In my opinion, if there were no other evidence in support of the contract but the answer and the circumstances, it would be unshaken by these affidavits.

But, there is other and important evi-

dence; the affidavit of Bush the scrivener. It was objected by the counsel for the appellant, that this ought not to be read, because it was not taken by the plaintiff. How does this appear? The affidavit bears on its face, to be regularly taken by the plaintiff, and is qualified to before a magistrate. It is in the record with the other evidence. No exception is taken to it, and we see that the Chancellor acted upon it; for he notices it in his opinion. There is, to be sure, appended to it, a note signed by Bush; but whether this be taken as evidence or not, (for it is not on oath,) I do not think it affects the affidavit. Without it, the evidence stands, like every other, unobjected to. With it, we see, that the affidavit was written at the request of M'Mahon, and that after hearing it read, he refused to have it taken at that time. But I hold, that a party cannot suppress evidence which he has had taken, because he finds that it makes against him. After the witness is examined, his evidence is in the hands of the commissioner of justice; it belongs to the cause, and ought not to be withheld. But I take it, no party can object to the reading an affidavit, in

the Appellate Court, which was read in the Court below, without objection. It was said, that there was no necessity for the plaintiff to except to this affidavit, because it was not taken by the defendant; but it was an affidavit filed in the cause, and which would of course be read, if not excepted to. The plaintiff, therefore, if he did not wish it read, ought to have excepted. If he had done so, the other party might, at once, have had it taken over again, or he might have shewn by other evidence, that it was in fact correctly taken.

I think, upon these grounds, that the affidavit is good evidence; and it is most decisive to shew, that there was no mistake. He states, that he first made a rough draft of the contract, altering it to suit the views of the parties: that then he wrote it over fair, and read it to them distinctly more than once: that they seemed perfectly satisfied, and executed it. The point was against the plaintiff, without this evidence; but this puts it beyond all question. It is but justice to this witness to say, that the counsel, I think, mistook in saying that he was contradicted, both by plaintiff and defendant, with respect to the written memorandum, from which he drew the agreement. They do not state, that they lodged with him a written memorandum to draw the contract by, but that Bush first drew the rough notes, under their direction, and then drew the contract from these; and Bush states the same substantially, in his affidavit.

With respect to the last point, that the land turning out only 269, instead of 300 acres, there ought to be a deduction; even supposing there ought, it would not disturb this decree. The whole deficiency would be 31 acres; half of this, 15½ acres. These, at \$17½ per acre, would amount to \$268 61; and there will be, after these \$400, now in contest, are paid, \$1100 of the purchase money still due. But, nothing is clearer than that this contract, as it is

written, presents a purchase, not by the acre, but in gross. It is not now necessary to pronounce the law arising on this 58 *aspect of the contract. There is abundance, without touching it, to say that the order dissolving the injunction is right.

The other Judges concurred, and the order of dissolution was affirmed.

Coalter v. Hunter, &c.

Hunter v. Coalter.

February, 1826.

Watercourse—Right of Land Owner to Divert—Adverse Possession.*—No person has a right to divert a water-course on his own land, so as to turn it from the land of his neighbour lower down the streams; and if he claims that right from long enjoyment of it, he must prove that he has had adverse possession for upwards of twenty years.

Same—Diversion by Land Owner—Redress—Equity Jurisdiction.—If the party, who is injured by such an act, restores the stream to its original channel, Equity has not jurisdiction to grant redress, as it is a proper case for damages at common law. The only ground of equitable jurisdiction is, to prevent a threatened injury.

Tail-Race.—The law does not give any power to condemn land for a tail-race.

Mills—Establishment—Certainty Necessary.†—What degree of certainty is necessary, in an order for establishing a mill.

The first of these cases was an appeal from the Staunton Chancery Court; and the second, an appeal from the Superior Court of Law for Rockingham county. The subjects of the two were so connected, that they were argued and decided at the same time.

In the case Coalter v. Hunter, the bill was filed by Hunter, Crawford, Samuel Black and James Black, setting forth the following case: That about 26 or 30 years before the filing of the bill, Samuel and James Black having erected a saw-mill on their land, situate on the south fork of Shenandoah river; but finding that the stream which gave it motion was too small to make it useful, obtained leave of James

59 Crawford, (who owned the land immediately *above,) to change the course of a stream called Coles' run, and bring it into the stream which supplied the mill: that they accordingly obstructed the ancient course of Coles' run, and caused it to unite with the mill stream: that before Coles' run was so changed in its course, it passed through the lands of Frame, Stewart and Cocke; and when it was turned, the said Frame was present, (as the complainants believe,) and gave his consent: that the complainant Hunter purchased a tract of land, adjoining the lands of the complainants Samuel and James, below on the stream, united as be-

***Watercourse—Right to Divert—Prescription.**—It is established by many authorities that one man can by prescription gain a right of way over another man's land: that one man can by prescription gain a right to back water or flow water over another man's land by means of a mill dam or the like. Many incorporeal rights or easements can be established by prescription. *Eells v. Chesapeake, etc., Ry. Co., 49 W. Va. 65, 38 S. E. Rep. 480.* citing principal case to the point.

The principal case is also cited in *Stokes v. Upper Appomattox Co., 3 Leigh 334; Nichols v. Aylor, 7 Leigh 558; Moore v. Steelman, 80 Va. 340; Cornett v. Rhudy, 80 Va. 714; Boyd v. Woolwine, 40 W. Va. 289, 21 S. E. Rep. 1022.*

†**Mills—Establishment.**—See monographic note on "Mills and Milldams" appended to *Calboun v. Palmer, 8 Gratt. 88.*

fore mentioned, from the heirs of Adair, on which there was a saw-mill, erected after the junction of the two streams; which circumstance was his chief inducement in making the purchase: that at the time of the purchase, the complainant Hunter knew of no claim of any person to divert the water, though he had lived in the neighbourhood for many years: that he has continued the saw-mill, and intends to build a grist-mill for the manufacture of flour, and has obtained leave of the County Court of Augusta, though opposed by a certain Thomas S. Coalter, who has purchased, about five years ago, the land formerly belonging to the said Frame; although the said Frame has not only consented to the union of the said streams, but has acquiesced for twenty years thereafter, during which he resided on the land: that notwithstanding, the said Coalter has assumed to himself the right of removing the obstruction, and turning the said stream into its ancient channel. This he does, by entering on the land of the complainant Crawford without any permission, and repeats it as often as the obstruction is replaced, for the purpose, (as the complainants have heard,) of building a saw-mill; in consequence of which conduct, the saw-mill of the complainant Hunter has been stopped for want of water. The complainants therefore pray, that the said Coalter may be perpetually restrained from removing the said obstruction, or in any manner interrupting the water as it has flowed since the union of the streams.

60 *Coalter answered, admitting that the Blacks owned the saw-mill mentioned in the bill, which has now gone to decay, and is entirely useless: that it is true, that Coles' run, was turned out of its ancient channel some twenty odd years ago, after the complainants Samuel and James had built their mill aforesaid, for the purpose of rendering it more useful to the proprietors; but he does not admit that it was so turned, with the consent of all persons concerned: that he is informed, that the said Cocke and those who claimed under him, and the said Stewart never did give any consent: that the permission given by Frame, and Crawford the ancestor of the complainant, was merely a temporary indulgence to the Blacks, who paid no consideration therefor, and who agreed to use the said water, merely at the will of the said Frame and Crawford: that their acquiescence is only to be referred to the use thus granted: that the respondent purchased the land he now holds, upon the information that the said Blacks had no title to the said water, but held it only as tenants at will: that in order to turn the said water into its ancient channel, nothing more is necessary than to remove a dam erected across it, made for the purpose of forcing the water into the new channel; and that dam has now been removed for about three months: that it was in this situation, when the bill was filed in this cause, &c.

An injunction was awarded upon filing the bill. Many depositions were taken, the purport of which was, that the use of the water of Coles' run, was originally

applied for, and granted, as alone, without consideration; and its enjoyment afterwards, was never claimed as a right: that this alone continued for upwards of twenty years, when Coalter, who had acquired the land below the point at which the water had been diverted, removed the obstruction, and restored the water to its former channel.

The Chancellor perpetuated the injunction, and Coalter appealed to this Court.

61 *The case of *Hunter v. Coalter*, was an application made by Hunter to the County Court of Augusta, to establish a mill and dam, for which leave was granted by the said Court. An appeal was taken to the Superior Court of Augusta county, and afterwards removed to the Superior Court of Rockingham.

The writ of *ad quod damnum* recites, that "whereas Andrew Hunter is desirous of building a water grist-mill and dam, and other water works on Black's saw-mill branch in this county, he owning the lands on both sides of the said branch," &c. The inquiry of the jury states that "no dam will be necessary to take the water out of said creek: that the seat of said mill, &c. will be on said Hunter's land: that the greater part of the head race will also be on his land; but that the upper part thereof, for about seventeen poles from where the water will be taken out of the creek, will be on the land of Samuel Black, for which said Black has agreed to receive from said Hunter the sum of twenty dollars already paid, as appears from said Black's receipt, &c. This sum we consider a sufficient compensation for the damages, &c. We find that no grounds will be overflowed above the mill or head race. We find that there is a tail-race at present now used as such, and which has been so used for about ten or eleven years, and previous to Dr. Thomas S. Coalter's purchase of the land adjoining said Hunter, about seven years. The said tail-race returns the water into the creek from which it is taken. It passes through the land of said Hunter, for about twelve poles from the seat of the mill; after which it leaves said Hunter's, and passes through the said adjoining land of said Thomas S. Coalter, for about eleven poles, into the said creek. The said Hunter proposes to use said tail race, if permitted by the Court. In that case, we find that damage to said Coalter will be twenty-seven dollars, if the said tail race is kept sufficiently open, that water from the wheel will not overflow any ground out of the banks thereof. In case the said tail should not be established by the

62 *Court, said Hunter proposes to cut a new tail race from the mill to his line, which will pass through the lands of said Hunter about twenty-five poles. If said Hunter is permitted by the Court to continue such new tail race, through said adjoining land of said Coalter, into said creek, it will pass through the land of said Coalter about 32 poles, commencing &c. We find that the damage to said Coalter will be \$230. But if said Hunter should not be permitted to continue said tail race, as last mentioned, then the water from where

his tail race last mentioned would stop at his line, would overflow part of the said adjoining land of said Coalter, and passing near the line between said Hunter and Coalter, would cover some low and some marshy ground belonging to said Coalter, and finally pass into the South river. In that case, the damage to said Coalter would be \$1000. We find that the water could not return into said creek, or pass into any other stream, except in the modes above mentioned; unless some other tail race should be cut, from which also, the water would have to pass through said Coalter's land; and we know of no other route, by which the water could be made to pass through said Coalter's land, by which he would receive less damage, than by the routes above mentioned. We further find, that in any of the plans before mentioned, no ground will be overflowed above or below the seat of said mill, and except as before mentioned, and that no mansion house, office, curtilage, garden or orchard, will be overflowed: that navigation or fish passage will not be obstructed; and that the health of the neighbours will not be annoyed, except in the last case, which we think the health of the neighbours may be annoyed."

The County Court decided, "that the said Andrew Hunter have leave to build his grist-mill and dam, and other water works, prayed for agreeably to the inquiry of the jury, heretofore returned."

The defendant Coalter appealed to the Superior Court of Law. That Court reversed the decision of the County

63 *Court, and denied the application of Hunter for leave to erect the mill, &c.

From that decision, Hunter appealed to this Court.

Leigh and Johnson, for Coalter, in both cases.

Attorney General, for Hunter, in both cases.

A great part of the argument turned upon the evidence; and it was contended by the counsel for the appellant in the first case, that the permission originally given to turn the water of Coles' run, was without consideration, and might be revoked at any time; and that the subsequent enjoyment of that privilege, must be referred to the original grant, and could not be considered adversary. Upon this state of facts, they argued that Hunter, and those under whom he claimed, could not acquire a right to the use of the water, by any length of possession. They contended, that the case of *Bealy v. Shaw* and others, (on which the Chancellor relied,) did not support the position contended for on the other side; but on the other hand, confirms the doctrine, that the possession must be adverse, to give a title to the enjoyment of a water right. This position is proved by *Eldridge v. Knight*, Cowp. 214. *The Mayor of Hull v. Horner*, Cowp. 108. *Halcroft v. Heale*, 1 Bos. & Pull. 400. *Campbell v. Wilson*, 3 East. 294. 2 Wms. Saunders, 175, note 2.

As to the case of *Hunter v. Coalter*, Hunter had no right to make the water pass through Coalter's land, and no jury can, under our law, grant such permission.

The Act of Assembly only gives permission to condemn land for an abutment. Besides, the inquisition is irregular, in finding several damages in three several aspects of the case. It ought to have been quashed.

The counsel for Hunter contended, in the case of Coalter v. Hunter, that the latter had the enjoyment of the use of the water in question, for more than 20 years; 64 and "that a jury might presume an adverse possession. The case of Bealy v. Shaw, fully supported the Chancellor's opinion. The pretended loan was indefinite, and amounted to a gift. It was sustained by a sufficient consideration, in the labor and expense which Hunter was induced to bestow, in the erection of various water works, and which would become utterly useless, if the permission were withdrawn. He referred to 1 Phill. Evidence, 128, to shew that a possession of twenty years will be presumed to be adverse. Denn v. Barnard, Cowp. 595, and Elmendorf v. Taylor, 10 Wheat. 153, establish this position. Hunter was a purchaser without any notice of this latent claim of Coalter; in which case he would take the property discharged from it. Sugd. 6. Ib. 512. Newman v. Chapman, 2 Rand. 93. Coalter was prohibited by the law against pretended titles, from buying this contested right.

As to the case of Hunter v. Coalter, it is true that the Act of Assembly does not give a right to condemn land, for a tail race, in express terms; but it is embraced in the enquiry which the jury are required to make, whether the land will be overflowed, &c. Whenever a grant is made, every thing passes under it which is necessary to its enjoyment. 1 Saund. 323, n. 6. Hawton v. Frearson, 8 Term. Rep. 50.

February 1. JUDGE CABELL delivered the opinion of the Court.

In the first of these cases, Hunter claims the right to the diversion and use of the water of Coles' run, and founds his claim on more than twenty years possession by himself, and those under whom he claims.

It is abundantly proved by the evidence in the cause, that the use of the water in Coles' run was originally applied for as a loan; that it was granted without consideration, as a loan; and that its 65 subsequent enjoyment was "never claimed, otherwise than as a loan; and the bill puts it on this ground. The loan continued for more than twenty years, when Coalter, who had become the owner of the land below the point at which the water of the run had been diverted, wanting the water for his own purposes, removed the obstruction which caused the diversion, and restored the water to its ancient channel. Hunter filed his bill to injoin this proceeding, and the Chancellor granted, and afterwards perpetuated the injunction.

The Chancellor founds his opinion on a dictum of Lord Ellenborough, in the case of Bealy v. Shaw, 6 East. 208, that "twenty years exclusive enjoyment of water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament." This doctrine of Lord Ellen-

borough, understood as he intended to apply it, is perfectly correct; but the language which he uses, even in that case, and in the sentences immediately preceding, will shew that he never thought of applying it to a case like this. He says, "the general rule of law, as applied to this subject, is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own lands, without diminution or alteration. But, an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by the means of the exercise of certain trades; yet, if the occupation of the party so taking or using it, have existed, for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right;" and then follows the remark on which the Chancellor relies. It is clear, then, that he meant an enjoyment adverse to the right of the other party. He meant an enjoyment that excludes the idea of its being founded and continued in the loan, leave or favor of the other party. It is of the very nature of presumptive proof, 66 *that it yields to that which is positive. When a loan is positively proved, now can we presume a grant?

The law on subjects of this kind is well laid down in Campbell v. Wilcox, 3 East. 294. That was a right of way. The party who had been obstructed in the use, had been in possession of it for more than twenty years. The Judge at Nisi Prius instructed the jury, "that if they were satisfied that the enjoyment of the way was adverse, and that it had continued upwards of twenty years, it was sufficient ground for presuming a grant; that the use of a road, as matter of right, by those who claimed it, and submitted to as matter of right, by the possessor of the land through which it passed, was to be considered as an adverse enjoyment; but, that if the enjoyment had been by leave or favor, or otherwise than under a claim of right, it would repel the presumption of a grant." This instruction was concurred in by the whole Court of King's Bench. If authority were desired, in a case so strongly supported by reason, it would be difficult to imagine authority more apposite.

Upon the merits, therefore, the decree of the Chancellor should be reversed, and the bill dismissed.

But, if the merits were otherwise, the bill should be dismissed for want of jurisdiction.

If Hunter had been in the actual enjoyment of the use of the water, and had reasonable ground to apprehend that Coalter intended to deprive him of that enjoyment, an application to the Chancellor to prevent this threatened injury, might have been proper. But, Coalter had actually removed the obstructions in the bed of Coles' run, and had restored the water to its ancient channel, before the application made to the Chancellor. There was, then, no ground for his going into equity. A Court of Law was open to him,

and was the proper forum for trying the right to the use of the water, and for giving damages for any obstruction of its enjoyment. On this ground, also, the decree should be reversed, and the bill dismissed with costs.

67 *As to the case of Hunter v. Coalter, it is clearly not a case for a mill under the Act of Assembly. The law gives the Court no power to condemn lands for a tail-race; and this point is sufficient to put an end to the case, without deciding the other questions made in the argument.

But, if this were a proper case for a mill, the order giving leave to establish it was rightly reversed for its uncertainty. The jury suggested three plans, in each of which the damages were different, and in one of which the health of the neighbourhood would be injured. The County Court established the mill generally, without confining the applicant to either plan.

The judgment of the Superior Court is, therefore, correct, so far as it reverses that of the County Court, and gives the costs in the said County Court; but is incorrect in not having dismissed the petition. It is, therefore, reversed; and this Court proceeding, &c. dismisses the petition. But, the appellee, being the party substantially prevailing, is to recover all costs.

Sallust v. Ruth, &c.

February, 1826.

Slaves—Importation—Statute—Application of.—The Act of 1778, prohibiting the importation of slaves into Virginia, applies only to those slaves who are brought in with the consent of the owner; and not to those imported by wrong-doers.

This was an appeal from the Superior Court of Law of Montgomery county.

Ruth and her six children, brought an action of assault and battery against Sallust, to recover their freedom. The defendant pleaded that the plaintiffs were 68 slaves; on which *plea issue was joined. On the trial, the defendant filed a demurrer to the plaintiffs' evidence; all the material parts of which are fully stated in the opinion which follows. The Court decided in favor of the plaintiffs; from which judgment, the defendant appealed.

Leigh, for the appellant.

Johnson, for the appellees.

February 6. JUDGE CARR delivered his opinion.

This is an action brought by Ruth and her children against Sallust, claiming their freedom. The ground on which they rest their claim, is, not that they were never rightfully held in slavery, but, that being slaves in the State of North Carolina, they were imported into this State, in violation of the Act of 1778, and are, therefore, under the third section of that Act, free. The defendant in the Court below demurred to the evidence; upon which demurrer, judgment was given for the plaintiffs, and the defendant appealed.

The case, as presented by the evidence, seems to be this: Some years prior to 1780, John May, residing in Anson county, North Carolina, owned a negro slave called Esther. He died, leaving this slave in possession of his wife Susanna May. What

was the exact nature of Susanna's interest in this slave, we do not know, except from the evidence of Judith and Elizabeth Lowry, daughters of Susanna, who both say that she belonged to their mother. After the death of John May, Esther had a daughter called Ruth, the plaintiff in this action. Susanna May married Lewis Lowry; who, about the time of Gates's defeat (16th of August, 1780,) carried Esther and Ruth, (then about 5 years old) to South Carolina; with what intention, whether to avoid the enemy, or to sell the slaves, we are not informed. There, they were taken

from his possession, and carried 69 *to Virginia. Elizabeth Lowry saw them in possession of Pigg, near Camden, and heard her mother claim and demand them. Pigg refused to give them up. He carried them to Pittsylvania, the county of his residence, (as his wife E. Gray tells us) and held them there as slaves, till his death. He had a bill of sale for them, which his wife, and Corder and wife, say, they saw; but neither of them tells us, by whom it was given. In 1784, Pigg made his will, in which he directs these slaves to be sold, and that the buyer should be told, that there was a dispute in the title, of which he was to take the risque. E. Gray tells us, that this provision was inserted in consequence of a claim set up to the slaves, by Lowry and May, about three years before the date of the will. After the death of Pigg, his widow administered on his estate. She married Adam Gray, who, in 1791 or 1792 (see Goodson and Wall's evidence) took Ruth to the county of Montgomery, and sold her to the defendant Sallust. In 1794, Robert Lowry went before a Justice of the peace to prove his right to Ruth; but the Justice refusing to act, he brought an action of detinue for her. The writ is dated, 19th of August, 1794. At the October rules, 1794, security for costs was required of the plaintiff; and not being given, at the November rules, it was ordered, that the suit be dismissed; which order, at April Court, 1795, was set aside, security entered, and the declaration filed; and at June Court, 1795, (the record shewing no plea pleaded, or issue joined,) a jury was sworn, and returned a verdict for the plaintiff for the slave Ruth, if to be had, if not, the sum of 64l. her value. The day after this trial, the slave was sold to the defendant Sallust. The bill of sale is signed by R. Lowry, John May, and John Lowry. The price was 80l. which, the witness Wales tells us, he saw paid. Lowry was never in possession of Ruth, after the sale of her by Gray to Sallust.

The first question arising on this case, is, did the importation of these slaves into this Commonwealth, by Pigg, 70 *amount to such a violation of the Act of 1778, as entitled the slaves to their freedom?

It was contended, (though, as it seemed to me, not with much confidence,) that by the act of importation, the forfeiture was incurred, and the slaves entitled to their freedom, though Pigg, the importer, should be found to have no property in them. This would be giving to the general words of the statute, a most harsh and revolting

construction. The Act is highly penal. It inflicts on the importer 1000l. penalty, for every slave imported; and the loss also of all property in the slave. But, surely, these punishments were intended for the guilty violator of the law only, not for the innocent sufferer by that violation also. It could never be the intention of the Legislature to say, that if a man residing in another State, was so unfortunate as to have his slaves stolen from him, and brought into Virginia, he should incur either the penalty of 1000l. or the forfeiture of his property. Against such a construction, both reason and authority cry aloud. By the 1st chap. of the Statute of Gloucester, 2d Institutes, 283, is among other things enacted, "that the disseisee shall recover damages in a writ of entry founded on a disseisin, against him who is found tenant after the disseisor." Upon this clause, Littleton, sec. 685, puts this case. If a man be disseised of land, and the disseisor enfeof B. C. and D. and livery of seisin is made to B. and C. but D. was not present, nor ever agreed to feoffment, nor ever would take the profits, &c. and after B. and C. die, and the disseisee bringeth his writ in the per against D. he shall shew all the matter in defence, and the demandant shall recover no damages against him; though he comes directly within the letter of the Statute, being found tenant of the freehold. Upon which my Lord Coke observes, "Here it appeareth that Acts of Parliament are to be so construed, as no man that is innocent or free from injury or wrong, be by a literal construction, punished or endamaged."

71 *In *South v. Solomon*, 6 Munf. 12, a tenant for life of slaves, had brought them into the State, contrary to law; and the question was, whether this would entitle them to their freedom. The Act of 1792, under which this question arose, differs from that of 1778, with respect to the importation of slaves, in nothing but requiring a residence of 12 months to complete the forfeiture. The words of the 2d section are, in every other respect, equally broad with those of the law of 1778. Upon this case, Judge Roane, delivering the opinion of the Court, says: "The Court is of opinion, that the 2d section of the Act of 1792, only extends to cases of slaves brought in by the absolute owner of them, and not to such as are brought in by wrongdoers, or by those having only a limited interest in them. We are not disposed to give a construction to the general words of an Act, which would subject the property of innocent individuals to loss, by the acts of third persons." I conclude, therefore, that if Pigg, the importer, had no property in the slaves Esther and Ruth, his importation of them did not forfeit the right of the true owners, or entitle the slaves to their freedom.

How stands the question of Pigg's title? The record making part of the evidence demurred to, shews a recovery of Ruth from the vendee holding under Pigg by Lowry the North Carolina claimant. The admissibility of this evidence cannot come in question on the demurrer. Besides, it was produced by the plaintiffs themselves, as a

part of their case. It was said, however, that it ought not to prejudice them, being *res inter alios acta*. Let it be remembered, that the plaintiffs, acknowledging that they were slaves before their importation, claim freedom solely through the violation of the law. To ascertain this violation, we are forced upon the enquiry, whose property they were; and it is upon this question of property, that we resort to the record. To establish that point, I think it not only admissible, but decisive evidence, unless the effect of it can be destroyed by the

objection taken, that it was altogether *a fraudulent and collusive proceeding to evade the law. Looking into the origin, and tracing the progress of the transaction, I confess that I can see nothing like collusion in this North Carolina claim, but on the contrary, strong marks of an adversary title, seriously prosecuted. In the very commencement of Pigg's possession, we see that Mrs. Lowry claimed and demanded the property of him. We are told, that the claim was renewed about 1781 or 1782. In Pigg's will, dated in 1784, he considers it so serious a claim, that he directs the slaves to be sold with a disclosure of the dispute, and a sale of his right only. When R. Lowry, in 1794, came to Virginia to prosecute his claim, we hear of no communication with Sallust. He went to a justice, and when he refused to act, he employed a gentleman standing high in the profession, (Allen Taylor, if I mistake not,) and the suit was immediately brought. This did not look like collusion. At the October rules, security for costs was demanded, and not being entered, there was an order of dismissal at the November rules. This has very much the appearance of a real adversary proceeding. At the April Court 1795, this order of dismissal was set aside, security given, and the declaration filed. In the June following, the verdict and judgment were rendered. It is true, that we see nothing in the record of a plea or issue joined, and if the question were, whether this omission constituted such error as would reverse the judgment on appeal, I suppose there would not be much difficulty. But, where it is adduced as a proof of collusion, I confess that it has very little weight on my mind. We all know how loosely and carelessly these things are done in the hurry of a law trial; and the verdict of the jury proves, that they must in fact have been sworn upon the very point in issue between the parties; for they find for the plaintiff the slave in the declaration, if to be had, if not 64l. her value. The sale too, of the woman, has every appearance of a real transaction. The price was a full one, for a woman, at that day; 16l. more than the

73 *jury valued her at; and Walls, the witness states, that he saw the money paid. I cannot see any thing of collusion in all this.

It is objected, that Lowry himself said he was only one of the heirs who claimed the negro. The answers to this, seem to be, 1st, that the verdict (even if this hearsay of Lowry be received,) overweighs it; 2d, that whether the title be in Lowry alone, or in him jointly with others, it is

equally decisive to shew, that Pigg had no title. Nor does the fact that the bill of sale was signed by John May, and John Lowry, as well as Robert, prove any thing as to property, in my mind. We know that a man often requires surety in such cases. Sallust might well have learned caution; for, this was the second time he was paying for the slave, in the course of three years. He might therefore have said to Robert, "you live out of the State; your right may be hereafter questioned; you must therefore give me surety;" and the other two may have signed the bill of sale with this view. If it be said that this is conjecture merely, I answer, that the transaction is one of that dubious character, upon which nothing but conjecture can be founded, and this seems quite as plausible as any other.

But it is objected, that this sale of the slave in Virginia, by Robert Lowry, connects him with the original importation: that it is a sanction of that importation; and subjects him to the forfeiture denounced by the Statute; and that, to permit such a proceeding, would open an easy door to the evasion of the law. I answer, that whenever a case is brought before us, shewing probable grounds to suspect such evasion, I shall be as prompt as any one to enforce the Statute. But we must not forget, that it is a penal law, and should be taken strictly. It seems clear from the whole context, that the prohibition to sell, extends to those cases only, where the original importation was in violation of the law, and forfeited the property. Here I have shewn (I think,) that it was not so;

and when we consider, that between 74 the importation and the sale, there was a lapse of 15 years, and that the parties to the different transactions were wholly changed; it seems difficult so to connect them, as to make them one. A child of five years old, is brought from Carolina, without the consent of her owner. She grows up; passes through several hands; at length, her owner comes after her, and recovers her by suit. She has been 15 years an inhabitant of the State. This is her home; here are her connexions; and, instead of breaking up these connexions and carrying her to a strange land, her master sells her here. This certainly was no sin against humanity. It does not come within the letter of the law; nor do I think it opens such a door to the evasion of the Statute, as should induce us to stretch this penal law, so far as to take it in.

The other Judges concurred, and the judgment was reversed.

Stuart's Heirs, &c. v. Coalter.

February, 1826.

Equity Jurisdiction—Settlement of Title or Bounds to Land.—A Court of Equity has no jurisdiction to settle the title or bounds of land between adverse

***Equity Jurisdiction—Settlement of Title or Bounds of Land.**—A court of equity is not the proper tribunal to try legal titles, and a bill bringing before this court the dry legal title to lands is demurrable. *Overseers of Poor v. Hart*, 8 Leigh 8, citing principal case as authority. And in *Davis v. Settle*, 48 W. Va. 37, 36 S. E. Rep. 564, it is said: "Equity will not try conflicting titles to land, unless it is incidental in administering relief, under some known head of equity jurisdiction; and, to bring a suit under the

claimants, unless the plaintiff has an equity against the defendant claiming adversely to him. An equity against other persons will not give such jurisdiction.

Chancery Practice—Partition—Principles Governing—Title to Land.—The power of a Court of Equity to decree partition, is governed by the same principles which govern cases of partition at law. It may decide on the rights of the parties to participate in the division, but not on the simple question of title to the land.

Same—Bill—When Multifarious.—A bill in equity, which includes many defendants who have dis-

known head of jurisdiction to remove cloud from title, the plaintiff must be in possession, for, if not in possession, he may sue at law in ejectment. That equity will not settle title or bounds of land between adverse claimants is settled by a multitude of cases. *Steed v. Baker*, 13 Gratt. 380; *Stuart v. Coalter*, 4 Rand. 74; *Lange v. Jones*, 5 Leigh 192; *Hill v. Proctor*, 10 W. Va. 69; *Cresap v. Kemble*, 26 W. Va. 608. And the plaintiff must have an equity against the adverse claimant, no one else will do; an equity against other persons will not give jurisdiction. *Davis v. Settle*, 48 W. Va. 36, 36 S. E. Rep. 566. To the same effect, the principal case is cited in *Ambler v. Warwick*, 1 Leigh 268; *Lange v. Jones*, 5 Leigh 192, 194, 195, and *foot-note* (in this case, the first headnote of the principal case is reaffirmed, and JUDGE CARR says that the case of *Stuart v. Coalter* was on a very much considered, and very correctly decided; and that he was entirely opposed to a departure from the principles settled therein; *Steed v. Baker*, 13 Gratt. 380; *Sulphur Mines Co. v. Boswell*, 94 Va. 485, 27 S. E. Rep. 24 (in this case, it was said that the principle enunciated in the principal case and laid down in its first headnote has been steadfastly adhered to); *Collins v. Sutton*, 94 Va. 128, 26 S. E. Rep. 415; *Johnston v. Jarrett*, 14 W. Va. 236; *Hudson v. Putney*, 14 W. Va. 573; *Hitchcox v. Morrison*, 47 W. Va. 206, 34 S. E. Rep. 966. And, it is no ground to come into equity to settle a land title, that there is another party claiming a legal title who holds back and will not sue. *Bush v. Martins*, 7 Leigh 324.

The principal case is distinguished in *Ambler v. Warwick*, 1 Leigh 211; *Steed v. Baker*, 13 Gratt. 388. See further, monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

Chancery Practice—Want of Jurisdiction—Effect.—In *Miller v. Miller*, 25 W. Va. 508, it is said: "It is clearly law, that if a court of equity has no jurisdiction, and this is apparent on the face of the bill, the court must dismiss the bill at the hearing (unless from the record it may appear probable, that a case, in which a court of equity would have jurisdiction could be stated by a legitimate amendment of the bill, when it should be allowed). If the court fails to dismiss the bill, the appellate court must dismiss it; for no other decree can be rendered, when it is apparent that the court had no jurisdiction of the case, and no legitimate amendment of the bill could give it jurisdiction. (*Stuart v. Coalter*, JUDGE CARR's opinion, 4 Rand. 78; *Coleman v. Anderson*, 29 Gratt. 480; JUDGE ANDERSON's opinion, p. 480; *Thompson v. Railroad Companies*, JUSTICE DANIEL's opinion, 6 Wall. p. 187.)" To the same effect, the principal case is cited in *Hudson v. Kline*, 9 Gratt. 386.

See principal case quoted from in *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 100, 26 S. E. Rep. 390.

Chancery Jurisdiction—Full Relief.—There is no question better settled than where a court of chancery has jurisdiction for one purpose, it will not send the parties back to a court of law, but will retain the jurisdiction for all purposes and do complete justice between the parties. *Western, etc., M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 287, citing principal case.

See further, on this subject, monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

***Chancery Practice—Partition—Question of Title.**—See on this subject, *foot-note* to *Currin v. Spraul*, 10 Gratt. 145, where it is shown that, by statute, the rule laid down in the principal case—that, in order to entitle a plaintiff to equitable relief in respect to partition, he must show a clear legal title—has been changed, so that a court of equity may take cognizance of all questions of law affecting the legal title to land, that may arise in the partition proceedings. See principal case cited on this subject in *Currin v. Spraul*, 10 Gratt. 147; *Ransom v. High*, 37 W. Va. 841, 17 S. E. Rep. 414; *Cecil v. Clark*, 44 W. Va. 664, 30 S. E. Rep. 217.

†Same—Bill—When Multifarious.—A bill is multifarious, which embodies various separate, distinct, and numerous objects, interests and parties. *Sadler v.*

tinct interests, is multifarious, and therefore erroneous.

Ejectment—Against Whom It May Be Brought.—An ejectment may be brought against several persons in possession of any part of the tract of land claimed by the lessor of the plaintiff.

This was an appeal from the Staunton Chancery Court, where Thomas S. Coalter, filed his bill against Robert Stuart, Reuben Withers, John Coalter, Francis

75 Adair, *William Adair, James Adair, and John Adair. The case stated is briefly as follows: The land in question was owned by the heirs of John Switzer, who sold it to John Coalter, the brother of the complainant. A conveyance was made by some of the heirs to John Coalter, but the others had never parted with the legal estate. The bill, however, states, that all the heirs either have made, or are ready to make, a conveyance at any time. It also alleges, that although the contract was made solely in the name of the said John Coalter, and the title papers taken in his name, yet the purchase was for the benefit of the complainant, as well as the said John: that the complainant has been put into peaceable possession of his undivided part of the said land, his right to which is not contested by his brother; that he has since discovered that a part of the boundary is disputed by some of the coterminous tenant, viz: Stuart, Withers, and the representatives of Adair: that the complainant wishes to obtain a partition of the said land with his brother; but this cannot be effected, in consequence of the uncertainty produced by this contest of the boundary: that he also wishes to have the question of boundary settled, but he has not the legal estate, by which he could go into a Court of a Law, and if he had, it would require a multiplicity of suits to settle all the questions. He therefore prays, that the true boundary may be settled and adjusted; that he may be quieted in his possession within that true boundary; and that a partition may be made, between the complainant and his brother.

The representatives of Adair answered, contending that their boundary line was the true one; and John Coalter acknowledged that the contract, though made in his name, was principally for the benefit

Whitehurst, 83 Va. 48, 1 S. E. Rep. 410, citing principal case.

The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants, for this would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he had no connection. A defendant may therefore, in such case, demur. *Crickard v. Crouch*, 41 W. Va. 510, 23 S. E. Rep. 729, quoting with approval from the principal case.

A bill in equity, which includes different defendants who have distinct interests, is multifarious. *Linn v. Patton*, 10 W. Va. 199, citing the principal case as its authority.

On the subject of multifariousness, the principal case is also referred to in *Washington City Savings Bank v. Thornton*, 83 Va. 166, 2 S. E. Rep. 193; *Smith v. Zumbro*, 41 W. Va. 681, 24 S. E. Rep. 656.

See further, monographic note on "Multifariousness (In Equity)" appended to *Sheldon v. Armistead*, 7 Gratt. 264.

Ejectment—Against Whom It May Be Brought.—The plaintiff may sue in one ejectment all persons in possession of any part of the land he claims. *Beckwith v. Thompson*, 18 W. Va. 138, citing the principal case as so holding.

See further, monographic note on "Ejectment" appended to *Tapscott v. Cobbs*, 11 Gratt. 172.

of Thomas S. Coalter; and declared his willingness to make partition with the complainant.

The Chancellor decided in favor of the complainant, and the defendants appealed to this Court.

76 *Wickham, for the appellants, made four points:

1. The bill is nothing more than an ejectment brought in a Court of Chancery. It is not competent for a person having an equitable title, to sue in equity one who holds an adversary title, asserting the legal title in his trustee.

2. The appellee has not only brought one ejectment in equity, but he has brought several ejectments in one suit, for distinct tracts of land, held by distinct titles.

3. If such a suit could be maintained, it must be on averment and proof, that the trustee refused to bring an ejectment, in his own name. But here, there is no such averment or proof. The trustee never objected to assert his legal title.

4. The Switzers are not before the Court. They claim a part of the legal title, and ought to be made parties.

Leigh and Johnson, for the appellee.

The jurisdiction may be sustained on two grounds:

1. The plaintiff comes with an equitable title, which could not be asserted in a Court of Law. The assignee of a bond could bring a suit in equity before our Statute; yet, he might have called on the legal owner to bring a suit against the obligor. A cestui que trust may injoin an execution against his trustee, in a suit brought by a third person; and he is not required to use the name of the trustee.

The object in coming into this Court, was, to ascertain what the subject was to be divided. Tenants in common have an original right to go into a Court of Equity for partition.

2. On the ground of a bill of peace, the appellee had a right to resort to equity. *Mitt. 127. Lord Tenham v. Herbert*, 2 Atk. 484. *Mayor of York v. Pilkington & al.* 1 Atk. 282.

It is objected, that Switzer's heirs ought to have been parties. If this objection

77 *would be, that the cause must be sent back, to have them made parties. But it was not necessary. They have sold their interest, and have nothing to claim.

February 7. The Judges delivered their opinions.*

JUDGE CARR.

The bill states, that John Switzer died intestate, seised and possessed of a tract of land within the Beverley manor, in the county of Augusta: that the heirs of said Switzer entered upon the said land, and remained in possession thereof, until a few years since, when they sold it to a certain John Coalter, a brother of the plaintiff's: that some of the heirs made a deed to the said John, (which is exhibited,) and the others have either executed deeds, or are ready to do so at any time: that although the contract was made with the heirs by

*The PRESIDENT absent.

the said John, and the conveyances taken to him, the purchase was for the benefit of the plaintiff, as well as the said John: that accordingly, the plaintiff has been put into possession of his undivided part of the said land, his right to which is not disputed by his brother: that since the purchase, the plaintiff has had the land surveyed, a plat of which is exhibited: that this plat, as he believes, correctly describes the boundaries of the land; but he discovers, that a part of the boundary is controverted by some of the coterminous tenants, to wit: Robert Stuart, Reuben Withers, and the heirs and devisees of Neil Adair: that the plaintiff is desirous of making partition with his brother, but cannot, because of the uncertainty caused by this dispute about the boundary: that he is anxious also, to have the question of boundary settled, but not having the legal title, cannot go into a Court of Law; and if he could, it would require a multiplicity of actions. He therefore prays, that his brother John,

78 and the coterminous *tenants, may be made defendants: that the true boundary of the land may be settled: that the defendants be compelled to deliver to him any land within the boundary, of which they may be found in possession; and that partition be decreed between himself and his brother.

The defendant John Coalter answers, stating that his interest in the land is one seventh part: that he wishes a partition: is ready to convey, &c.

The coterminous tenants answer, shewing various objections to the plat, and pretensions of the plaintiff; deducing their titles, which seem entirely distinct, and unconnected with each other; and each one contending for his lines, as heretofore established and understood.

Evidence was taken, surveys had; and the Chancellor, on hearing, established certain lines; from which decree, the appeal is taken.

It was contended in the argument, that this was a case, of which equity had no jurisdiction. This question will of course be considered first, as jurisdiction precedes discretion; and before we undertake to decide what ought to be done in a cause, we should always ascertain whether we can rightfully do any thing. I will not quote authorities to shew, that where a general demurrer would hold to a bill, the Court, though the defendant answers, will not grant relief upon the hearing of the cause. The doctrine is too well settled. To deny it, would be to say, that however unfit the cause for equity, the defendant, by failing to demur, could oblige the Court to entertain jurisdiction. Nor can I conceive, that in deciding the question of jurisdiction, we should be influenced at all by the case made by the evidence. It is the province of the bill to state the case. It is from this we must judge. If the evidence fit the case stated in the bill, it could of course have no influence. If it made a different case, so far from giving jurisdiction where the bill did not, it would prevent a decree, where the bill was perfect; for the allegation and the proof must "jump together."

79 *The bill places the jurisdiction

on three grounds: 1. That the plaintiff wants partition, and cannot have it without the aid of equity. 2. That there is a trust between the plaintiff and his brother, who has the legal estate; which the plaintiff not having, cannot try the question of boundary, at law. 3. That if he could, there must be a multiplicity of suits, to avoid which, equity takes jurisdiction.

I will first shew, from authority, the general rule, that equity cannot hold plea of land titles; and then enquire, whether the plaintiff's case falls within, or is taken out of, that rule.

In Welby, appellant, v. The Duke of Rutland, respondent, 6 Bro. Parl. Cas. 575, the bill charged, that the plaintiff, and those under whom he claimed, had been in possession of the manor of Denton, for more than one hundred years: that the defendant had set up a claim to it, and exercised several acts of ownership, which might hereafter bring a cloud upon the plaintiff's estate, and prevent his selling it. The bill therefore prayed, that the defendant might set forth his claim, and produce his title papers: that the testimony of the plaintiff's witnesses might be perpetuated, and proper issues directed to try the defendant's claim to the manor, &c. The defendant pleaded and answered. The case was heard and dismissed by Lord Chancellor Apsley; and on appeal to Parliament, the appeal was dismissed, and the decree affirmed. In the discussion of the case, the law on the subject was laid down in the clearest and strongest manner. It was said, "the general practice of Courts of Equity, in not entertaining suits for establishing legal titles, before they have been tried at law, is founded upon clear reasons; and the departing from that practice, then there is no reason for so doing, would be subversive of the legal and constitutional distinctions, between the different jurisdictions of Courts of Law and Equity; and though the admission of a party in a suit, is conclusive as to matters of fact, or may deprive him of the benefit of a privilege, which, if insisted on, would 80 exempt him from *the jurisdiction of the Court; yet, no admission of parties can change the law, or give jurisdiction to a Court, of a cause, of which it hath no jurisdiction. Agreeably hereto, the established and universal practice of Courts of Equity is to dismiss the plaintiff's bill, if it appears to be grounded on a title merely legal, and not cognizable by them; notwithstanding the defendant hath answered the bill, and insisted on matter of title; and it can make no difference, whether the legal title be insisted on by the answer, or by the plea: that nothing hath a greater tendency to introduce uncertainty in the law, than the giving way to new exceptions to general, settled and known rules of practice in Courts of Justice; and therefore, no such exceptions ought to be allowed, but upon the clearest grounds. The general known practice of Courts of Equity has been to dismiss bills brought like the present, for establishing a legal title, and for a perpetual injunction, before such title has been

tried and determined at law. The exceptions to this general rule of practice are but very few, well known, and founded on strong and clear reasons; but the appellant's case fell not within any of these exceptions, and consequently ought to be governed by the general rule. The bill was entirely new, and without a precedent." To shew that this, though the argument of counsel, is considered as the true doctrine on this subject, Maddock, vol. 1, p. 135, lays down the rule precisely as it is here, and refers to this case alone, in support of his position.

Chancellor Kent, also, in *Abbott v. Allen*, 2 Johns. Ch. Rep. 519, says: "This Court may, perhaps, try title to land, when it arises incidentally; but it is understood not to be within its province, when the case depends on a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference. This was the doctrine laid down by the respondent's counsel, in the case of *Welby v. Rutland*, 6 Bro. Parl. Cas. 575; and it appears to

81 have been sanctioned by the "Court."

The case here referred to, is the one from which I have extracted the above remarks. The Chancellor also refers to *Wightwick's Reports*, 184, where the same doctrine (he says) is discussed at large, and emphatically laid down by Baron Wood, and not denied by the other Barons. The cases above cited acknowledge that there are a few exceptions to the general rule. They will be found of the class described by Mitford, 127. He says: "Where one general legal right is claimed, against several distinct persons, a bill may be brought to establish the right. 2 Atk. 484. Thus, where a right of fishery as claimed by a corporation, throughout the course of a considerable river, and was opposed by the Lords of Manors, owners of land adjoining, a bill was entertained to establish the right, against the several opponents, and a demurrer was overruled." 1 Atk. 282. But, even where the bill is to try one general right against many claimants, and so to save a multiplicity of actions, it is generally required that the plaintiff shall have established his title at law, before he comes into equity; and Mitford adds, if he has not done so, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold. 2 Atk. 391. In 1 Atk. 284, *Mayor of York v. Pilkington*, &c. Lord Hardwicke says: "It is a general rule that a man shall not come into a Court of Equity, to establish a legal right, unless he has tried his title at law, if he can; but this is not so general an objection as always to prevail;" and he refers to two cases in *Precedents in Chancery*. I find them to be thus: *Bush v. Western*, Prec. in Chan. 530. The plaintiff had been in possession of a water course, upwards of 60 years. Defendant disturbed him in the use of the water. He brought his bill to be quieted in his possession. Objected, that his remedy was purely legal; but the Court over-ruled the objection, considering, I presume, that a possession of upwards of 60 years was

equal to a decision of law in his favour; and therefore, the bill to quiet his possession was proper, as otherwise

82 *the plaintiff would have had to bring continual actions of trespass for every disturbance. The other case is *Dorset v. Girdler*, Pre. in Chan. 531. Bill to examine witnesses in *perpetuum rei memoriam*, to establish his sole right of fishery. Demurrer, for that plaintiff had not verified his title at law. But the demurrer was over-ruled, and this difference taken by the Court, that "if one is out of possession, having only a right to fishery, &c. he who brings such bill ought never to be allowed to do so, but a demurrer to it will be good, because he may and ought, first to enter his action and establish his title at law, &c. for the party having a remedy at law, the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering the truth. But, if a man is in actual possession, and is only threatened with disturbance by another who pretends a right, he has no other way in the world to perpetuate the testimony of his witnesses, but by such a bill as this. 2 Atk. 483, *Lord Tenham v. Herbert*. Bill to establish a right to an oyster fishery, and to be quieted in the possession of it, against defendant, who claims the piece of ground where the fishery is. Demurrer, as it is a matter properly triable at law. Lord Chancellor: "Undoubtedly there are some cases, where a man may come, by a bill of this kind, into this Court first; and there are others, where he ought first to establish his right at law. Where a man sets up a general exclusive right, and the persons who controvert it with him, are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this Court first; which is called a bill of peace, and this Court will direct an issue to try the right. But, where the question about a right of fishery is only between two Lords of Manors, neither can come into this Court, till the right is first tried at law. This is in the nature of an ejectment bill," &c. *Renison v. Ashley*, 2 Ves. jun. 459. Bill for discovery and delivery of a settlement, under which plaintiff claimed, and other title deeds,

83 *and possession of the estate. Demurrer to all the relief, and all the discovery, except of the settlement, for want of equity, and answer admitting the settlement, and offering to produce it. Lord Chancellor: "This is a pure ejectment bill, as to the title to the land. The only allegation calling for an answer, is as to this deed. The Court will direct it to be produced at the trial, but no more. The plaintiffs have no right to a discovery of the pedigree, unless they lay a foundation for it; otherwise, no man would bring an ejectment, which had any complication in it. The cases cited for the bill go no further than this; that the loss of the instrument with the affidavit, entitles the plaintiff to a decree quoad the matter; the loss of a bond gives a right to a decree for the money, and so of a deed. I agree, no general demurrer could be put into such a bill.

The jurisdiction is transferred to a certain extent. But what is the equity here? Is it possible for me to decree, that the deed shall be delivered up? There is no allegation of infancy, a term outstanding, or that possession was gained by undue means. The plaintiffs state, that under colour of a legal title, the defendant entered as heir, which title they deny. The only relief I can give, is to enable them to make out their title at law." He adds: "This is another of the fishing bills, which I do not like to see in this Court." 1 Bro. Ch. Cas. 572, *Weller v. Smeaton*. Bill to be quieted in the possession of a mill, and that defendants may pull down works above it, and be restrained from erecting others. Demurrer, because plaintiff had not established his right at law. Allowed.

I will refer to but one case more, *Speer v. Crawter*, 2 Meriv. 210. It is important in its bearing on this subject, both as containing the strong opinion of that able and learned Judge, Sir W. Grant, and as giving the best account of a sort of jurisdiction, exercised by equity for a while, respecting the boundaries of land; which he considers as originating in consent, which was disapproved of by their greatest Chancellors, and soon abandoned. He cites the 84 "case of *Wake v. Conyers*, 2 Cox. 36, where Lord Northington refused this jurisdiction, which he said had been "assumed of late;" and two cases, in which Lord Thurlow had done the same. He then adds: "In the same case of *Wake v. Conyers*, Lord Northington says, that in his apprehension, this Court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of the parties. I concur (he says) in that opinion, and think that the circumstances of a conclusion of boundaries furnishes, per se, no ground for the interposition of the Court."

Having shewn that this Court has no jurisdiction to interpose in questions of real property, unless some equity be superinduced by act of the parties, let us see whether any such foundation is furnished by this case.

The plaintiff wants a partition; but, in a suit in equity for partition, the legal title of the parties is never meddled with by the Court. The jurisdiction is not given by Statute, but assumed from the extreme difficulty and inconvenience of proceeding at law. In exercising this jurisdiction, equity has considered itself bound by the principles, which govern cases of partition at law; and these being only between joint-tenants and tenants in common, the question of title cannot well arise. The individual rights of the parties to participate in the division, or to call for it, may come up; but not the simple question of conflicting title to the tract of land. Accordingly, it is established by the cases, that a plaintiff who comes into equity for partition, must shew a clear legal title. If there be doubt about that, he will not be aided. See *Wiseley v. Findlay*, 3 Rand. 361, where this subject was examined. This case, then, where the bill prays a settlement of boundary, and that the defendants be decreed to deliver to the plaintiff any land of

his they may be in possession of, cannot be a proper case for partition in equity.

But there is another objection. The equity, as to partition, does not reach, or affect in the slightest degree, the 85 "coterminous tenants. They are wholly unconnected with it. They have done no act superinducing equity, and cannot, by the acts of others, be drawn away from the proper tribunal for deciding legal titles. This applies also to the ground relied on, that as between the plaintiff and his brother, or the heirs of Switzer, there is a trust which gives equity jurisdiction. The coterminous tenants, holding distinct tracts of land, by distinct and unconnected titles, have nothing to do with this trust or equity. If the brother refuses to permit the plaintiff to use the legal title, for settling the boundaries at law; or the Switzers refuse to convey; a bill against them for these purposes, would receive proper aid. But, it is no where suggested that John Coalter had refused to proceed at law, or to suffer the plaintiff to use his name; and as to the Switzers, they are no parties, and it is expressly stated, that they have either all conveyed, or are ready, at any time, to convey.

It is said, that this proceeding will save multiplicity of suits at law, and therefore equity should interfere. The first answer to this is, that it would not save multiplicity of suits; for, John Coalter might have sued, in one ejectment, all persons in possession of any part of the tract he claimed; *Coleman v. Dick & al.* 1 Wash. 239; but secondly, this is not one of those cases, where equity does interfere to prevent multiplicity of actions. That interference is given only in cases, where one general right is invaded, as a right to a sole fishery of a river, &c. *Mittf.* 147. But here the rights of the parties were separate, distinct and unconnected; and the bill was for that reason also demurrable. In *Mittf.* 146, it is said, "The Court will not permit a plaintiff to demand by one bill, several matters of different natures, against several defendants; for, this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he had no connexion. A defendant may, therefore, in such case, demur." See also, 2 Mod. 234. *Harrison & Clure v. Hogg*, 2 Ves. jun. 323.

86 "I think the decree should be reversed, and the bill dismissed; perhaps without prejudice to the legal rights of the plaintiff, or rather of his trustee.

JUDGE GREEN.

John Coalter having purchased a tract of land from the heirs of Switzer, two of whom had conveyed to him, and the other five of whom had not conveyed, Thomas S. Coalter filed his bill against John Coalter, Robert Stuart, Reuben Withers, and the heirs of Adair, alleging, that although the purchase was made by John Coalter, it was made for his benefit as well as for John's. He does not state what proportion belonged to each; but states, that he has been put into the peaceable possession of his undivided part, John not contesting his right:

that he is desirous of having a partition with his brother; but that having no legal title, he cannot proceed at law, for that purpose; and that the other defendants being coterminous tenants of other lands, dispute the boundaries, which prevents a partition; and that these boundaries cannot be settled at law, without a multiplicity of suits. He therefore prays, that the defendants, the coterminous tenants, may state in what points they dispute the boundaries: that the Court may settle and adjust the true boundary; and that he may be quieted in possession accordingly, and the defendants decreed to deliver to him possession of any land within the true boundary, which they may have taken possession of; and that partition between him and his brother may be decreed. It is not alleged, that John refuses to make partition; and the heirs of Switzer, who have not conveyed, are not made parties. It appears also, that the coterminous tenants held severally, and do not claim under the same title.

The question is, whether a Court of Equity has jurisdiction to give the relief prayed for. I think not. It has always been held as a general rule, that equity cannot hold pleas of land; 20 H. 6, 32, 87 b; and in the case of the Earl *of Worcester v. Sir Moyle Fynch, 2 And. 163, pl. 89, and 4 Inst. 85, it was held by all the Judges of England, that if the question whether there was such a Manor as A. in deed or reputation, at such a time; or whether lands in B. were at that time parcel of the Manor or not; or if a disseisin be alleged to be committed of Black-acre, at the time of a bargain and sale made to the complainant thereof; or if A. conveys land to B. and A. has only a matter of equity to be relieved by, or only a right at the time; or when any title of freehold, or other matter determinable by the common law, comes incidentally in question in Chancery, that in all these cases, the Court of Equity has no jurisdiction; and such matters should be tried at common law, and not in Chancery; that the party may be relieved by writ of error, attain, or action of a higher nature; and, that if the plaintiff prays discovery from the defendant, without which he cannot sue at common law, and the defendant makes title to the land, the plaintiff cannot proceed for the land in Chancery; for otherwise, by such a surmise, inheritance, freeholds, and matters determinable at common law, should be determined in Chancery. To this general rule, there is an exception, where the plaintiff has an equity against the defendant himself; as, if a tenant holds adjoining lands of his own, and fraudulently or carelessly, contrary to his duty to preserve the rights of his landlord, confounds or destroys the evidence of the boundaries. There the landlord, who cannot sue at law, during the Term, or who could not, after the Term, establish his boundary at law, may sue the tenant in equity; not for the purpose of establishing his boundary, but for having a decree that the tenant shall transfer to him so much of his land as will make up the original quantity, belonging

to the landlord. In such case, if the actual boundary was proved by the tenant, the suit would fail; and in this way the question of boundary may properly be discussed, and virtually settled in Chancery.

88 *It appears that for a short time, some sort of jurisdiction was assumed by the Court of Chancery, in respect to boundaries. The cases are collected in 4 Vin. Abr. 422, 423. But, the jurisdiction which originally arose from consent by analogy to common law writs, was soon repudiated. This subject was examined by the Master of the Rolls in *Speer v. Crawter*, 2 Meriv. 410, in which all the former cases were cited. In this case, the Master of the Rolls concurring with the opinions of Lord Northington and Lord Thurlow, affirms that there is no jurisdiction, unless some equity be raised by the acts of the parties; and observes, that to the exercise of the jurisdiction upon such equitable grounds, no objection has ever been made. "But, on what principle can a Court of Equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the legal mode, in which questions of property are to be decided?"

There is in this case no shadow of equity between the plaintiff and the defendants, who claim title to the adjoining lands; and any equity between him and the holders of the legal title, the Switzers, who have not conveyed, and John Coalter, cannot affect them, unless there was a fraudulent combination between them and the holders of the adjoining land, to injure the plaintiff, which is not suggested; and even in that case, they could not be called upon in equity to ascertain the boundaries. The only relief the plaintiff could have, would be, to aid the plaintiff so far as to compel the owners of the legal title, to permit him to sue at law in their names. John Coalter, in whom is the legal title to an undivided two-sevenths of the land, might sue at law, and establish the boundary of the entire tract of land, and he is not stated to be unwilling to sue. Indeed, he might have sued all who claimed any part of the land, in one ejectment, if they were in possession of the controverted land; so that a resort to equity does not prevent multiplicity of suits.

89 *The observation that the plaintiff has no equity against the adversary claimants of the land, is an answer to all the cases cited by the appellee's counsel, in which the jurisdiction is founded on the equitable nature of the plaintiff's title. In the case of an assignee of a bond, there is, in equity, a privity of contract between him and the debtor. In the case of property seized under execution, which is conveyed in trust for another, the relief given to the cestui que trust, is upon the equity of preserving the specific property to the true owner, when it is of such a nature as not to be compensated in damages; an equity, which exists in favor of the legal, as well as equitable owner. The property might be eloiigned, and an action of detinue might not restore the specific prop-

erty; but land cannot be eloiigned. In the case of a tract of land conveyed to be sold for payment of debts, and the property claimed in whole or in part, by another, the court may, in proper cases, interfere, at the instance of the debtor, to prevent a sale, until the question of title is determined; because a sale might do him irreparable injury. But, in that case, the title of the adverse claimant could not be settled in equity, or in that suit.

Nor can the equitable jurisdiction, to decree partition, justify an investigation of the legal title of one, who claims adversely against all who claim partition. Where several claim to be entitled to partition, the Court may enquire, as between them, which of them are entitled to come into the partition; and thus incidentally determine the legal title as between them. But, even in that case, if the legal title of one party is disputed by the others, as if they allege the deed, under which he claims, to be forged, the bill for partition will not be entertained, and the parties will be left to litigate the title at law. This subject was examined in the late case of *Wiseley v. Findlay*, 3 Rand. 361. In this case, there does not appear to have been an adversary possession; and the partition might have been made without involving the coterminous tenants in the suit.

90 *This seems to be a bill quia timet, not justified by the principles, upon which such bills are allowed. If this jurisdiction of the Court of Chancery could be sustained, all cases of title and boundary of lands, might be transferred to it, contrary to the Bill of Rights, which declares, that "in controversies in respect to property, the ancient trial by jury is preferable to any other, and ought to be held sacred."

There is another objection to this bill. It is multifarious. It calls upon Stuart, Adair and Reuben Withers, claiming severally different parts of the land claimed by the plaintiff, to defend one suit. They claim nothing in common; neither is at all interested in the defence to be made by the other; and yet, if the plaintiff succeeded against one only, he would be liable to pay the costs of the plaintiff, expended in the prosecution of his claims against the others. It is not alleged, that the whole controversy between all the parties, depends upon the establishment of one line. That is not the fact; and if it were, the possession of one of the defendants might give him a right, which the other had not.

I think the decree should be reversed, and the bill dismissed.

JUDGE COALTER.

As to the question of jurisdiction, I understand it to be admitted, that as no demurrer was filed to the bill on that ground, we are not confined to the statements in the bill alone, in considering that question; but if the proofs or documents in the cause, (all pertinent to the issue, as in this case,) shew a ground of jurisdiction, which, had it been relied on in the bill, would have supported that jurisdiction on demurrer, it must be looked to and considered, in the same manner as if stated in the bill. If this be correct, it will be found, that the following circumstances, having, as it

seems to me, a strong bearing on this point, *are to be found in the cause, in addition to the grounds alleged in the bill.

It appears from the survey returned by order of Court, in the cause, that almost the whole controversy, as it respects boundary, which exists between the appellee and the Adairs, and also between him and Stuart, depends on the establishment of the Beverley Manor lines; as both parties claim to hold by those lines.

The Beverley Manor, is a large tract, comprehending a considerable portion of Augusta county. It was sold off in parcels to settlers. Amongst others, one Patton obtained a deed for a considerable tract, binding on some of the southern limits of the Manor, and part of which is now claimed by the appellee. Stuart, an ancestor of the appellants of that name, obtained another tract adjoining Patton, and binding also on the southern boundary of the Manor. After this, Stuart obtained a grant from the Crown for lands on the south of the Manor, and calling to be bounded by the Manor line, and joining, not only his own lands within the Manor, but those also of Patton. So too, some one else, under whom the Adairs claim, obtained, in like manner, a grant from the Crown adjoining Stuart's grant aforesaid, and calling for the Manor lines, to wit: a portion of that line called for by Stuart's grant, and two other of the Manor lines lying east of it. One of the Manor lines, then, is common to both of these grants, and as it cannot exist in two places, if it is rightly determined to exist in one place in regard to Stuart, it must exist in the same place, as to the Adairs. The establishment of this line, too, must fix one of the corners of the next line eastward, where the Adairs alone are interested; and so, vice versa, the establishment of that line must fix one of the corners of that which bounds Stuart's land. Thus, if E. F. is established as the true Manor line as to the Adairs, this fixes F. as the corner of the line, by which Stuart is to be bounded, and of course, his pretensions must be negatived; but in establishing this line,

92 all *the evidence and circumstances in relation to the lines A. B., B. C., C. D. and D. E. are to be weighed, and are equally important to the Adairs and Stuart. So if G. F. is established as the true Manor line in regard to Stuart, and in a contest with him, it fixes F. as a corner of the line of the Adairs, and of course, disaffirming their pretensions. But, whether this is the true line or not, depends not only on the evidence as it regards the lines A. B. &c. as aforesaid, but on the evidence concerning the lines G. H., I. K., J. L., L. M. and indeed all the other lines laid down in the plat, in relation to this part of the boundary. It is an unquestioned fact, then, as to this matter, that although Stuart and the Adairs claim distinct tracts by distinct titles, the question of boundary, so far as the Manor lines are concerned, depends precisely on the same evidence in relation to every portion of the plat and controversy as to each. The case cannot be correctly decided differently as to these par-

ties; for, if decided differently, one or the other of those decisions must as surely be wrong, as that the same thing can exist in two places at the same time.

It seems, then, that if each controversy is to be correctly decided; in other words, if there ought not to be opposing decisions, the matter ought to be settled in one suit, if that be practicable. Suppose two suits are brought for the purpose, and in that against Stuart, F. G. is decided to be the Manor line; such decision might have, and probably would have, considerable influence in the controversy with the Adairs. They ought to guard against this, by giving Stuart all their aid: for in deciding the matter as to Stuart, the whole survey and evidence, as well as it regards the Adairs as Stuart, are important in that controversy, and must be considered. But the Adairs, not being parties, are not bound by that decision, and they have the question tried over again on the same surveys and evidence; and Z. Y. are fixed as the boundaries or Manor lines. Which verdict is to prevail? And if both are

93 to stand, the boundaries of the appellee are entirely destroyed; for no one can say which is the Manor line. Thus two suits, depending on precisely the same surveys and facts, and in which there may be different decisions, are to go on at precisely double costs and trouble to all parties.

Had this ground of jurisdiction been stated in the bill, would it have been proper to have sustained a demurrer, and to have turned the parties round to several suits at law? It may be said that one ejectment could have been brought against all the defendants, so as to have tried the matter in one suit. If this could be, had not that action been barred by length of time, yet from the evidence, it seems probable this would have been the result; at least as to some of the lands, and some of the parties; and if the party had been driven to his writs of right, it might have been very unsafe to have counted for his whole tract of land against all the defendants. His safest course, in either action, most probably would have been by separate suits.

Although consent of parties will not give jurisdiction, yet, if to a bill framed on the real facts as they now appear, the defendants had admitted those facts, and submitted their case to the jurisdiction of the court, as the safest and best course for all the parties, would it have been expedient, after the whole matter was thus fully and fairly before the Court, to have dismissed the bill for want of jurisdiction? I am not prepared to say that it would. I have not had access to many of the authorities cited on this point; but I think the principles laid down in the case of the Mayor of York v. Pilkington & al. 1 Atk. 282, go to support the jurisdiction in this case.

There was another difficulty in this case. Thomas Coalter has only the legal title to a small undivided portion of this land; the title to the residue still remaining in the other heirs of Switzer; so that he might have found some difficulty in suing at law. This title, it is true, they may be willing to make, as the bill states; but when it

will be in the power of the party to get it in, does not appear. *They are numerous, and may be dispersed; and in the mean time, if the boundary can be settled, there will be no actual controversy remaining, and partition may be made.

On the whole, and believing that few cases can occur, so peculiarly situated as this, I incline to support the jurisdiction of the Court, instead of turning the parties around to the variety and number of suits at law, which their case may require; in which there may be contradictory decisions on the very same evidence, both of which cannot be right.

This inclination, however, is not without many doubts, which are greatly increased by the opposing opinions of my brethren.

JUDGE CABELL, was of opinion that the decree should be reversed; which was entered as the decree of the Court.

95 *Smith and Others v. Smith, &c.*

February, 1836.

Chancery Practice—Specific Execution of Award—Bill—Sufficiency of.—A bill in Chancery, which makes out a case for a specific execution of an award, but does not pray for general or special relief, is sufficient, if no objection be taken by the defendant, and he answers on the merits of the complaint, and submits himself to the decree of the Court. Quære, would this objection be sustained on a demurrer to the bill?

Equity Jurisdiction—Specific Execution of an Award.—Equity has jurisdiction to decree specific execution of an award, where the remedy at law is inadequate.

Arbitration and Award—Award—On Whom Binding.—Where some only of several distributees submit their interest to arbitration, the award will be binding on the parties to the submission, as far as their interests are concerned.

Same—Same—Mistake of Law.—When parties submit a question of law alone to arbitration, the award is binding, though contrary to law.

Same—Same—How Construed.—Awards are to be construed liberally; and, therefore, the terms "heirs at law," in an award respecting personal estate, may be construed to mean "all a testator's children living, and the child or children of any of them who died in his life time."

Partition—Tenants in Common.—Tenants in common of personal estate cannot have partition at common law; and, therefore, a Court of Equity is the proper tribunal to decree a partition of it.

Bills—When Plaintiff Allowed to Amend.—In what cases a plaintiff should be allowed to amend his bill.

This suit was originally brought in the County Court of Albemarle, and afterwards removed by Certiorari, to the Staunton Chancery Court.

John Smith, William Grayson, William Wood, and Claudius Buster, for himself

*For the sequel of the principal case, see Merritt v. Smith, 6 Leigh 486.

†**Arbitration and Award—Award—Mistake of Law.**—Where a matter is left to arbitration, upon a mere naked question of law, the award thereupon cannot be disturbed for a mistake of the law. Mayor of Richmond v. Judah, 5 Leigh 320, citing the principal case as authority. An award cannot be invalid upon the ground that the arbitrator erred in his judgment, either upon the law or the fact. Pollock v. Sutherland, 25 Gratt. 92, citing principal case as its authority.

The court will not interfere with an award merely because it would have given a different decision in the particular case. City of Portsmouth v. Norfolk County, 31 Gratt. 734; Mathews v. Miller, 25 W. Va. 828, both citing principal case as authority.

See further, monographic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

‡**Bills—When They May Be Amended.**—As a general rule, the court will, at any time before the hearing, grant leave to amend where the bill is defective as

and his son, John Buster, filed their bill setting forth the following case: that a controversy having arisen between the complainants and Thomas Smith and Susanna Smith, respecting the right of property in three negroes, to wit: Robin, in the possession of the said Thomas Smith, and Milly and Maria in the possession of the said Susanna Smith, the parties mutually submitted the said controversy to the final determination of five persons, by a writing under their hands and seals, in the penalty of \$1000: that the said arbitrators decided, that the three slaves above-mentioned should be equally divided among the heirs of Thomas Smith, deceased, by virtue of which the complainants became entitled to their proportion of the said slaves;

96 that the complainants fully *performed the award on their parts, but the said Thomas and Susanna Smith still retain the said slaves, pretending that the award was illegal.

The bill proceeds to state, that inasmuch as the complainants cannot have an adequate remedy in a Court of Law, there being no form of action in which a specific performance can be decreed, &c. they call upon the defendants to answer whether the submission was not entered into as stated in the bill; whether the award was not made as alleged, &c. But there is no prayer for relief, either general or special.

The answer of Susanna Smith states, that her father, Thomas Smith, by his last will, bequeathed to her a negro woman named Winifred, whom he was to receive at the death of the mother of the defendant; that the defendant was then a married woman, being married to a certain Thomas Smith, now deceased; that not long after the death of her said father, her mother gave up the said negro woman, together with her child, which the defendant always understood she was delivered of, after the making of the said will, and before the death of her father; which said woman, and her child named Milly, now in dispute, have been held by the defendant upwards of sixteen years; that the child of the said Milly, named Maria, also in dispute, is now about four years old; that the defendant's brother, Thomas Smith, who was residuary legatee of his father, assigned over to the defendant all interest that he might have in the said Milly and Maria. The defendant denies that she ever insisted that the matter should be left to arbitration; and she was only induced to come into that measure by the threats of the complainants, that she would be ruined at law; that when her counsel attempted to state the law to the arbitrators, he was interrupted by one of the arbitrators, who told him he made false statements, and he immediately sat down; that such an award ought not to have been made, because the whole of the legatees of

the said Thomas Smith were not present, and did not know *any thing of the business, and that Claudius Buster had no legal power to enter into any contract in behalf of his son John, &c.

Thomas Smith answered, that immediately after the death of his mother, the said John Smith made a demand of the slave Robin, as heir at law, in order to sell him and divide the money among the different legatees, which demand, the defendant refused, believing the slave to be his own property, as there was a clause in his father's will, that his estate should not be appraised, and he being the residuary legatee: that he submitted to the arbitration, in consequence of the threats of the complainant John. He charges that the award is not binding, because the submission was improperly made, the whole of the legatees not being present and consenting thereto; and it also embraces parties, who are entirely out of the submission.

The bond of submission is signed by Thomas Smith, Susanna Smith, John Smith, William Grayson, William Wood, and Claudius Buster, for himself and son.

The will of John Smith was proved in the year 1783.

The arbitrators awarded, that the three negroes in dispute should be equally divided among the "heirs of Thomas Smith deceased."

The Chancellor decreed that the bill of the plaintiffs be dismissed, without prejudice to any remedy they may have at law; and the plaintiffs appealed to this Court.

Wickham, for the appellants, contended that the award was right in principle. The bequest of the woman Winifred to Susanna Smith, could not convey her increase born after the date of the will, and before the death of the testator. No case justifies such a construction. The law, at the time of the death of the testator, gave the slaves of an intestate to his eldest son, and he was accountable to the other distributees for their proportionable value. The testator died intestate as to the slaves in question.

98 *It is said, however, that Chancery has no jurisdiction in this case. But it is an established principle, that Chancery has jurisdiction, wherever a specific execution is demanded. *Smallwood v. Mercer & Hansborough*, 1 Wash. 290. As to the award being void, because it extends to persons not parties to it, the case of *Richards v. Brockenbrough*, 1 Rand. 449, proves that such an objection will not vitiate an award, but that it will stand good as to the real parties, and all the rest be rejected as surpiusage.

Johnson, for the appellees.

The bill is imperfect, as it does not pray for any relief. But there are serious objections to the award itself.

1. There are not proper parties. All the distributees interested ought to be before the Court, that the whole case might be decided.

2. The award is void, because it does not follow the submission. That only required the arbitrators to decide the question between the parties to the submission; but they have gone on to settle the rights of

to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. This amendment may be made by common order, before answer or demurrer, and afterwards by leave of the court. *Holland v. Trotter*, 22 Gratt. 139, citing principal case.

See further, monographic note on "Amended Bills" appended to *Belton v. Apperson*, 26 Gratt. 207.

the "heirs of Thomas Smith," many of whom are no parties to the bond.

3. It is void for uncertainty. The award decides that the estate shall be divided among the heirs of the testator, when there was but one heir, under the law as it then was. The law of that day did not apply to such a case as this. It only applied to a case of intestacy; here, there was a partial testacy. Grand children are not included in the provisions of that law. The award does not say whether there shall be a distribution per capita or per stirpes.

As to jurisdiction, a Court of Equity ought not to have it, because there was a most appropriate remedy at law. A jury would give damages in a suit on the arbitration bond, to the amount of the aliquot part withheld from the party aggrieved.

It was competent for some of the parties to refer their own interests to arbitration; but if they meant to refer the whole subject, all parties must unite in the submission. *Britton v. Williams*, 6 Munf. 453.

Wickham, in reply, referred to *Wood v. Griffith*, 1 Swanst. Rep. 54, to prove that equity may decree the specific execution of an award; and he contended that where parties refer a doubtful point of law to arbitration, a Court will never set aside the award, though it may be contrary to law. On the degree of uncertainty which will be tolerated in an award, he referred to *Macon v. Crump*, 1 Call, 500. By "heirs," the arbitrators meant, persons entitled to distribution. Words must be construed secundum subjectam materiam. The bill may be amended, even after a hearing, by making new parties.

February 11. The PRESIDENT delivered opinion of the Court.*

The first objection in order, to a decree in behalf of the appellants, is, to the jurisdiction of the Court. The bill makes out a case for a specific execution of an award, but prays for neither special nor general relief; as to which, no objection is taken by the appellees. They answer generally the allegations of the bill, and submit themselves to the decree of the Court, on the merits of the complaint. Whether, upon a demurrer to the bill, it would have been sustained, it is not necessary to decide. A submission to an award, is an agreement between the parties to it, to abide by and perform it in every particular; and the mutual submission of the matter in controversy, is a valid consideration for such agreement. If either party refuses to comply with the terms of it, and there is adequate remedy at law, a Court of Equity will not interfere; but as in the case of other agreements, if that remedy be inadequate, neither upon reason nor authority

100 *to a specific execution in a Court of Equity. Though there was no award in the case of *Smallwood v. Hansborough*, 1 Wash. 290, the Court went on this principle; and though in some of the English Cases, it was intimated, that where there was no acquiescence in the award by the parties to the submission, nor agreement

by them afterwards to have it executed, a bill for specific execution would not lie, (see the cases of *Thompson v. Noel & al.* 1 Atk. 60, and *Hall v. Hardy*, 3 P. Wms. 187;) yet, in the case of *Wood v. Griffith*, *Swanston's Rep.* 54, that distinction is overruled.

The next objection is, to the validity of the award; first, because it comprehends the interests of persons not parties to the submission; and, secondly, because the arbitrators have mistaken the law of the case submitted to them. I pass over the objection to the conduct of the arbitrators, as regards the counsel of one of the defendants; because, upon the evidence, there is nothing in it affecting the merits of the award. Nor does it appear that the defendant, *Susanna Smith*, was misled or deceived, when she signed the submission. She may have signed it with reluctance, but with a full knowledge of its object.

As to the validity of the award, the parties to the submission claimed their equal share in the property in controversy, with other distributees of *Thomas Smith*, the testator. They were competent to submit their claim to arbitration. Those who signed the submission, were alone to be bound by it; and in deciding on their interests, the rights of others were not to be affected. If the decision of the arbitrators was against them, they were bound by it; if against the defendants, who claimed the property, they were also bound.

That an award as to the title to personal estate, settles the rights of the parties controverting it, the cases abundantly shew. 2 *Levinz*, 104. 2 *Esp. Rep.* 25, and the cases cited in 2 *Vin. Abr.* "L." pl. 40, note 4.

101 *As to the objection that the arbitrators mistook the law of the case submitted, the question submitted was purely a question of law. *Susanna Smith*, one of the defendants, claimed the property under the will of her father *Thomas Smith*, and under a deed from *Thomas Smith* the residuary legatee. The plaintiffs claimed it as undisposed of by the will, and as distributees under the law. The nature of the controversy is stated by both of the defendants in their answers. *John Smith* had claimed it as heir at law of his father *Thomas Smith*, admitting that if he was entitled to it, he was accountable to the other children for their portions of its value. *Thomas Smith*, one of the children, claimed it as residuary legatee; and whether the property passed by the will or not, was the question submitted to the arbitrators. When parties submit to arbitration their rights involved in law and fact, they are understood to submit the facts to the arbitrators, to be decided on according to law; and if it appears upon the face of the award, that they grossly mistook the law, the award will be set aside. But, where it appears, as in the case before us, that the parties intended to submit the question of law alone, the decision of the arbitrators is binding, though contrary to law. If not, it would not be competent to parties to make a valid submission of a point of law; for, however the arbitrators might decide, no litigation would be

*JUDGE COALTER absent.

avoided. The proper Court would still have to consider and decide the point of law, as if no award had been made. See 13 East. 357, *Chace & al. v. Westmore*. *Young v. Walton*, 9 Ves. 364, and *Medcalfe v. Ives*, 1 Atk. 64. The arbitrators having, in effect, decided that the property did not pass by the will, it followed of course, in point of law, that it belonged (as the law was, at the death of the testator,) to the eldest son, as heir at law, charged with the payment of due proportions of its value, to the other children. This liability of the heir at law, was, in equity, equivalent to an equal interest in the property; and it must be understood, that

the arbitrators meant by "heirs at law" of "Thomas Smith, all his children living, and the child or children of any of them who died in the life-time of Thomas Smith, and the representatives of those who have died since his death; such children representing their parents per stirpes. Awards are to be construed liberally, to give them effect; and this seems to be a fair construction of the award in this case. It accords with the purpose of the parties submitting to it; nor is it necessary that the arbitrators point out the particular mode in which it is to be carried into effect. *Lingood v. Eade*, 2 Atk. 501, 505. That in this aspect of the case, it is one proper for specific execution in a Court of Equity, seems very clear. The parties to the submission, together with the other representatives of Thomas Smith, claimed an interest in common, in the property in question. Supposing it to be a legal, and not an equitable interest, no partition between tenants in common of personal estate, could be made at law. A partition in kind could not be made there; each party having an equal right to the possession of the whole. Whether the title to the property was legal or equitable, therefore, in this case, a Court of Equity was the proper tribunal for a partition of it.

We are of opinion, therefore, that the Court of Chancery erred in dismissing the bill, and not affording to the plaintiffs an opportunity to amend it, to ascertain the extent of their rights, by shewing how many of the representatives of Thomas Smith, would have been entitled, under the award, had they signed the submission, and thereby establish the extent of their own interest in the subject, under the award.

The decree is therefore reversed, and the following decree is to be entered:

The Court is of opinion, that the award in the proceedings mentioned, is valid and sufficiently certain, and that a Court of Equity hath jurisdiction to carry it into effect, by decreeing a portion of the 103 slaves in question, in kind, *according to the rights of the parties ascertained by the award, and the other matters in the record, if that can be done; and if not, by directing a sale thereof, and the proceeds to be divided according to the rights of the parties: that the effect of the said award, was to determine that all the children of Thomas Smith, alive at his death, and those now representing such of

them as are dead, together with the child or children of such of his children as died in his life-time, were entitled to an equal proportion of the slaves mentioned in the award, such children taking the part which their deceased parent would have taken, if alive: that as regards those who did not sign the submission, neither they nor their representatives can claim any thing under it; and the portions which they would have been entitled to, had they been parties to the submission, remain to Thomas Smith and Susanna Smith, claiming under him, as if the award had not been made, since, by the will of Thomas Smith deceased, the said Thomas Smith was, before the award, entitled to the slaves in question as residuary legatee, and that the said decree, in dismissing the bill, is erroneous, &c.

104 *Hunter's Adm'rs &c. v. Jett.

February, 1826.

Principal and Surety—Discharge of Surety—Indulgence to Principal.—A surety will not be discharged by an indulgence granted by the creditor to the principal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law. Nor will the surety be discharged even then, where the indulgence was granted with his knowledge and assent.

Same—Same—Bill—What It Must State.—A surety will not be discharged from his responsibility, unless he demands such discharge in his bill, and states such a case as would entitle him to it.

This was an appeal from the Chancery Court of Fredericksburg.

The bill was filed by William S. Jett against the administrators of Moses Hunter, deceased, Henry St. George Tucker, Henry Lee, and Peter R. Beverley. The following opinion gives a complete view of the history of the case, and of the different topics of argument.

Leigh and Johnson, for the appellants.

Stanard, for the appellee.

February 22. JUDGE CABELL.

This is a bill filed by Jett, to enjoin proceedings on a delivery bond, executed by him, as surety for General Henry Lee to Hunter's administrators. There are various matters in the bill, to which it will not be necessary to advert; as it is admitted that the only proper subjects of controversy now remaining to the parties, are those which grow out of the arrangement made between Lee and Hunter's administrators, subsequently to the delivery bond.

The bill states, that immediately after the service of the execution, and the pro-

***Principal and Surety—Discharge of Surety—Indulgence to Principal.**—On this subject many notes have been written in this series of Virginia reports. See citing the principal case, *foot-note* to *Croughton v. Duval*, 8 Call 69: *foot-note* to *M'Kenny v. Waller*, 1 Leigh 484; *Chichester v. Mason*, 7 Leigh 253, 263; *foot-note* to *Humphrey v. Hitt*, 6 Gratt. 510: *foot-note* to *Walker v. Com.*, 18 Gratt. 18: *foot-note* to *Shannon v. McMullin*, 25 Gratt. 211: *Ambler v. Leach*, 15 W. Va. 697; *Knight v. Charter*, 22 W. Va. 427, 429.

+Same—Same—Bill—What It Must State.—A surety who seeks to discharge himself from liability on the ground of time given to the principal must state every fact essential to make it a discharge. He must state that the arrangement was made, without the knowledge, or against his consent. *Knight v. Charter*, 22 W. Va. 429, citing the principal case as its authority.

To the point that in a court of equity as well as in a court of law, the allegations and proofs must agree, the principal case is cited in *Wren v. Moncure*, 95 Va. 375, 28 S. E. Rep. 588.

ceedings thereon, Lee waited upon Henry St. George Tucker, the agent of Hunter's administrators, and obtained a letter from him to their attorney, stating that as the agent of Hunter's administrators, he had made an arrangement which would suspend for the

105 present, all proceedings on the judgment and delivery *bond; and directing him to proceed no farther, until farther advised; which would probably not be the case. A copy of the letter is exhibited, bearing date the 29th of March, 1806. The bill then goes on to state the arrangement alluded to in the letter, viz: "that a certain P. R. Beverley undertook to settle the debt of Lee, provided Hunter's administrators would receive bonds to the amount:" that the complainant had seen a copy of an account between Beverley and Lee, in which the former charged the latter with 2500l. paid to Hunter's administrators, on account of this debt, and credited him with 1600l. received on the same account; and that he has been informed that Hunter's administrators acknowledged to have received 1600l. from Beverley. He complains that Hunter's administrators have procured an award of execution on the delivery bond, overlooking the arrangement between Tucker, Lee and Beverley. He calls on them to state, what were the arrangements alluded to in the letter aforesaid; whether it was not agreed that P. R. Beverley should pay the debt aforesaid, or how much thereof, and how much he did pay; whether any and what securities, either in lands or bonds or otherwise, had been received from Lee, or from others for him; and that such securities shall be delivered up to the complainant for his indemnification; and that the money due thereon may be decreed to be paid to him: that the administrators of Hunter may be enjoined from proceeding on the said execution; and concludes with a prayer for general relief.

The answer of Tucker refers to the arrangement aforesaid, and exhibits a copy thereof. It appears from the arrangement, as I understand it, that Tucker did propose to receive from Lee, good Augusta bonds, taken to P. R. Beverley, to the full amount of General Lee's debt; or, if such bonds could not then be procured, that he would receive P. R. Beverley's note to deliver such bonds to the full amount of the debt, by some certain day. These bonds were to be payable in one, two, three

106 and four years. *They were to be received on the part of the administrators, as a collateral security only, and not as a discharge of the judgment theretofore obtained by the administrators against General Lee, or as a payment of the delivery bond; and it is declared to be distinctly understood, that the transaction is not to operate as a release of the debt due from Lee, or as altering its nature in any wise; and that the administrators agree, on their part, in consideration of a punctual compliance by General Lee, in delivering the bonds, &c. not to proceed on the judgment at law, and forthcoming bond, until there should be a failure in the payment of the Augusta bonds to be delivered. Tucker's

answer farther states, that Lee did not fully comply with his engagement for the delivery of the bonds: that he only gave Beverley's note for the delivery of bonds to the amount of 2500l. which was between \$500 and \$1000 less than the note should have been for: that Beverley did not fully comply even with that note, as he delivered bonds to the amount of 1694l. 10 8; and that a small part of them had been lost by insolvencies. He, however, expresses a willingness that a credit may be given, for the present, for 1694l. 10 8, with interest at the rate of 5 per cent. per annum, from March 29th, 1806, on 798l. 8, and with like interest from March 31st, 1807, on 896l. 2 8. He insists, however, on a reference to a commissioner, for the purpose of ascertaining more accurately, what should be the final decree; believing that he has allowed more interest than is proper, and reserving the right to correct the amount of principal also, for which he had agreed to give credit, provided it should be found too large.

P. R. Beverley's note is filed, bearing date the 29th of March, 1806, and binding himself to deliver bonds to the amount of 2500l. on or before the succeeding Chancery Court.

A copy of the judgment on the delivery bond, also filed, shews that the bond, after deducting an error, amounts to more than 2700l.

107 *The Chancellor perpetuated the injunction, on the ground, it is said, that the arrangement between Hunter's administrators and General Lee, operated a discharge of Jett, the surety; and the counsel for the appellee, in this Court, has relied on that ground only, for sustaining the decree.

But a previous question presents itself: Is it competent to the appellee to insist on that ground, under the pleadings in this case?

I entirely concur with Judge Green as to the law in relation to the discharge of sureties, as laid down by him in the case of *Norris v. Crummey*, 2 Rand. 328, that if a creditor, by agreement or any other act, precludes himself at law from proceeding against the principal, after the debt is due, even for a moment; or if the agreement be such as would induce a Court of Equity to prohibit the creditor from proceeding at law, the surety is discharged, and I also entirely concur with him, that the true ground or principle on which a surety is relieved in such cases, is, that the creditor, by his act or agreement, has injured the surety, by impairing his rights and remedies.

But this principle does not apply to a case, where the arrangement was made with the knowledge and assent of the surety; for, in such case, it cannot be said that the surety is injured. *Volenti non fit injuria*. It is not the mere circumstance of the creditor's binding himself to give time to the principal, that will discharge the surety. It is the binding himself to give such time, without the knowledge or assent of the surety; for, it is then only, that it is injurious to the surety. The surety, therefore, who seeks to discharge himself on the ground of time given to the

principal, must state that which is essential to make it a discharge. He must state that the arrangement was made without his knowledge, or against his assent. This is the clear result of general principles, and is proved by the following, among other cases. *Nesbit v. Smith*, 2 Bro. Ch. Cas. 579. *Rees v. Barrington*, 2 Ves. jun. 540. *Ex parte Smith*, 3 Bro. Ch. Cas. 1. *Samuel v. Hawarth*, 3 Meriv. 272.

108 *Even where an arrangement has been made, tying up the hands of the creditor, without the knowledge, or against the assent of the surety, it will not, of necessity, operate the discharge of the surety, unless he choose to avail himself of it. The law will not force him to be discharged from his engagements against his will; and in a case where collateral security has been given, in consideration of the time extended, the surety who asks not to be discharged, but insists on the benefit of the collateral security, must be held to have assented to the arrangement originally, or to waive the discharge which he might have demanded.

Let us apply these principles to the case before us.

It does not appear from the case as stated in the bill, nor from any exhibit filed with the bill, that Hunter's administrators had bound themselves not to proceed on the judgment. The bill states, that Lee brought a letter from Tucker to the attorney, stating, that as the agent of Hunter's administrators, he had made an arrangement which would suspend, for the present, all proceedings on the judgment and delivery bond; and directing him to proceed no farther, until farther advised. But there is nothing in the letter, to shew that this suspension was obligatory. From any thing that appears in the letter, it may have been mere indulgence granted as a favor, and revocable at pleasure. Nor is that part of the bill which professes to state the arrangement, more satisfactory on this point. It says nothing about the suspension of the proceedings. All that it says about the arrangement, is, that P. R. Beverley undertook to settle the debt, provided Hunter's administrators would receive bonds to the amount; without alleging that bonds to the amount had been given. There is no allegation in the bill, that the arrangement (even admitting it tied up the hands of Hunter's administrators) was without the knowledge or against the consent of Jett, nor is there even a general allegation, that the arrangement was of a character to discharge Jett.

109 *So far from stating the facts necessary to constitute a discharge; so far from stating the arrangement to be of a character calculated to produce that effect; so far from asking to be discharged; Jett comes into Court, for the purpose (as appears from his bill) of insisting on the benefit of the counter-security under the arrangement, to enable him to pay the debt; thus clearly admitting, as I conceive, his liability to pay it.

Whether the arrangement was or was not of such a character as to discharge Jett, was not, therefore, a matter to which the administrators of Hunter were bound to

answer; nor could it, under this bill, be a matter in issue between them. There was nothing in the bill to apprise them, that Jett sought to be discharged. They could not, therefore, be required either to deny, or disprove those facts, which might constitute a discharge. If he had chosen to put that matter in issue, Hunter's administrators might have been prepared with full proof, to shew that he was not entitled to a discharge. To permit him to take them by surprise, and to rely upon it at the trial, would be contrary to justice and the established practice of Courts of Equity.

If it be said, that Jett's calling upon Hunter's administrators, by his bill, to disclose the arrangement alluded to in the letter, and to set forth the securities and money received, or to be received under it, is tantamount to an allegation on his part, that the arrangement was made without his knowledge or against his assent, I reply, that a man may be well supposed to be ignorant of the details of an arrangement, and yet be perfectly acquainted with its general character. Considering Jett's situation, exposed to all the inconveniences of an execution on a delivery bond for so large an amount, he may be presumed to have anxiously desired some arrangement for time and counter-security; and it is evident, from his bill, that he knew that time had been given, although it is not stated whether it was given as mere indulgence, or otherwise. When, under these circumstances, he files his bill, asking information as to the details of the arrangement, and praying the benefit of the payment and securities, which were the fruit of the arrangement, the bill, surely, contains in itself, no ground for his discharge. Nor will the answer of Hunter's administrators aid him in this respect; for, the answer does not, any more than the bill, state facts which would entitle him to a discharge. In the first place, it denies that Lee complied with the terms of the arrangement; and the arrangement itself shews, that Hunter's administrators were not to be bound, (as will be more fully seen hereafter,) until the terms were complied with. The answer also is silent as to the important fact, whether the arrangement was made, with or without the knowledge or assent of Jett. And as Hunter's administrators had no reason to expect that Jett was seeking a discharge, their silence on this point cannot be the foundation of any inference unfavorable to them.

Even if Jett had been ignorant of the precise character of the arrangement, until he saw the answer, surely, if he then intended to shift his ground and go for a discharge, he should have insisted on it, and put it in issue, by an amended or supplemental bill.

I am therefore of opinion, on this ground, that the decree perpetuating the injunction is erroneous.

Even admitting the arrangement to have been made without the knowledge or against the consent of Jett, I do not consider it such as to discharge him, be case, in fact, the hands of Hunter's administrators never were tied up. The prop-

osition was, that Lee should deposit, as collateral security, good Augusta bonds, taken to P. R. Beverley; or Peter R. Beverley's note, binding himself to make such deposit, to the amount of the debt. The only stipulation as to time was, that in case Beverley's note should be given, he should bind himself to deliver the bonds by a day certain thereafter. As to the deposit to be made by Lee, viz: of bonds taken to P. R. Beverley, or of Beverley's own note to deliver such bonds, no time is mentioned.

Lee enters into no obligation what-
111 ever to make such deposit. *It was a mere "proposition" on the part of Hunter's administrators, with which Lee might or might not comply, as he should think proper. It would be preposterous to contend, that such a "proposition" imposed any obligation whatever on Hunter's administrators, until it was complied with by Lee. It is true that Lee might have delivered the bonds the next moment, and then they would have become bound to forbear. But, until such delivery, to the full amount of the debt, they were under no obligation whatever. The terms of the arrangement are express and positive on this point; the administrators agree, on their part, "in consideration of a punctual compliance by Gen. Lee, in delivering the bonds, &c. not to proceed, &c." A compliance on the part of General Lee, with the terms of the proposition made by Hunter's administrators, was a condition precedent to any obligation on their part.

Did General Lee comply with the terms of the arrangement, according to the evidence in this cause? He did not. Availing himself of the alternative afforded by the proposition of Hunter's administrators, instead of disposing "Augusta bonds taken to Peter R. Beverley," he chose to deposit Beverley's note to make a deposit of such bonds. But the note of Beverley was for bonds to the amount of 2500l. only; which was considerably less than the amount of the debt. As there was not, then, a compliance on the part of General Lee with the terms of the arrangement, the arrangement did not bind Hunter's administrators to suspend farther proceedings.

If the arrangement did not bind them, did the letter bind them? The letter was no contract; and if it were, Lee was no party to it. It contained a mere direction to the counsel, for a temporary suspension of proceedings; but whether that suspension was granted as a favor, and liable to be revoked at pleasure, or not, does not appear from the letter. Regarding the letter only, we cannot say that the suspension was the result of obligation incurred by Hunter's administrators. Nor will the
112 reference, in the "letter, to the 'arrangement,'" go any farther to prove obligation on their part. I have already shewn that the arrangement, not having been complied with by Lee, was never binding on them.

If it be said, that although Lee did not fully comply with the terms of the arrangement, yet Hunter's administrators accepted what he did, as full compliance; I answer that such acceptance is neither alleged in

the bill, admitted by the answer, nor established by the proofs.

It is true that Lee went far towards complying with the arrangement; and that thereupon, Hunter's administrators suspended the proceedings. But, although this partial compliance was regarded by Hunter's administrators, as a motive sufficient to induce indulgence, it cannot be regarded by us as a legal consideration, sufficient to impose obligation. I therefore think the decree is erroneous on this ground also.

I am of opinion that the decree should be reversed, and the injunction dissolved, except for 1694l. 10 8, with interest at the rate of 5 per cent. per annum, from March 29th, 1806, on 798l. 8, and with the like interest from March 31st, 1807, on 896l. 2 8; but that, as to the said sum of 1641. 10 8, with the interest as aforesaid, there should be a reference to a commissioner, in order that Hunter's administrators may have the opportunity to shew, if they can, that that credit should be reduced, either as to principal or interest; and that the cause be remanded to be proceeded in, accordingly, to a final decree.

JUDGE CARR and the PRESIDENT concurred, and a decree was entered according to the foregoing principles.*

113

Dickinson v. Sizer, &c.

February, 1826.

Bail—Office Judgment—Equitable Relief—Case at Bar.—Appearance bail enters into a recognizance of special bail, before a Judge, in the country. He commits it to his son, to be delivered to the Clerk of the Court where the suit was depending. The son delivers it to a lawyer, who practised in that Court, and who promised to deliver it in time. The lawyer forgets his commission, and the office judgment is confirmed against the principal and his appearance bail. A Court of Equity will not grant relief in such a case. Decided by two Judges, one dissenting.

Same—Equitable Relief.†—The principles on which relief will be granted to bail.

This was an appeal from the Chancery Court of Fredericksburg, where a bill was filed by William Dickinson against Reuben M. Sizer and George Sizer, administrators with the will annexed of John Sizer, deceased. The following opinions explain the case so fully, that any other report is unnecessary.

Stanard, for the appellant.

Bacchus, for appellee.

February 23. The Judges delivered their opinions.‡

JUDGE CARR.

Reuben and George Sizer, administrators of John Sizer, sued out a writ against John Walden, on a bond or bill penal. (we do not know which) for \$1916, to be discharged by \$958. Bail was required. William Dickinson became bail. An office judgment was taken against the defendant and bail, and not being set aside at the proper Term, was confirmed, and an execution issued. Dickinson filed a bill to injoin this judgment and execution, on the
114 *ground that he entered himself

special bail, with a Judge of the

*Absent JUDGES GREEN and COALTER; the former having decided the cause as Chancellor.

†See principal case cited in Gilliam v. Allen, 4 Rand. 504; Mann v. Drewry, 5 Leigh 301.

‡Absent, the PRESIDENT, and JUDGES GREEN who had acted on the case as Chancellor.

General Court; and being obliged to go to Richmond, about the time of the office judgment Court, handed the recognizance to his son, who, he expected, would attend the Court, and requested him to deliver it to the Clerk, and have the proper entry made on the record: that his son not attending Court, gave the paper to counsel practising in the Court, who promised to deliver the same to the clerk, to have the proper entry made, and the defendant delivered: that this was forgotten by the counsel, and the office judgment confirmed, by the rising of the Court.

The defendant answers, that he resides afar off, and knows nothing of the circumstances stated in the bill. He calls for strict proof; but contends, that if the whole case stated were proved, it could not affect him, or take from him the advantage which the law, without his co-operation, has given him.

The only evidence in the cause is the affidavit of the plaintiff's son, of Mr. Lomax, of Woolfolk and Waller. The two former verify the statement in the bill, with respect to the recognizance; the two latter state that they have known the principal debtor, Walden, many years, and never knew him to conceal himself or his property. We gather, both from the bill and answer, that he is now insolvent; and the answer adds, that since the judgment, which is the subject of the injunction, was obtained, he has taken the benefit of the insolvent law. There is also in the record, evidence of a motion made before a subsequent Term of the Superior Court of Spottsylvania, for leave to the bail, to file the recognizance, *nunc pro tunc*. The Chancellor dissolved the injunction, and the plaintiff appealed.

I have entertained but one opinion on this case, since I heard it argued; but as it involves principles of importance, and more especially, as some of my brethren seemed, in conference, to take a different view of it, I have examined it with my best attention.

115 *The idea of one man's paying money for another, strikes us at once as unjust, and the surety who is prosecuted for the debt of his principal, has always our sympathies enlisted in his favor. To check these, and prevent their influence on our judgments, it is not amiss to recollect, that the creditor, in suing, is only seeking a just debt, in the mode given by the laws of the land: that those laws, by enabling him to demand bail, intended at the same time, to save the debtor from imprisonment, and to give the creditor additional security to his debt: that when he makes this demand, he evinces his determination not to trust to the debtor alone, while the bail, by his undertaking, proves that he does mean to trust him; and we know that "he who trusts most shall lose most." What may be the considerations which influence the bail to incur the obligation, we know not. It may be friendship, or value received. He may owe the debtor, or may be secured by that very property, which, without his interference, the debtor might have given up for the release of his body. However this may be, the bail enters fairly

into a solemn obligation, which by regular operation of law will subject him to the payment of the debt unless he takes those steps which are prescribed, in order to protect himself. If he takes them, he is safe. If not, the creditor has the law, and their equities are equal. Thus, in *Croughton v. Duval*, 3 Call, 74, the President says, that "though sureties are favoured in equity, and will not be charged further than the law charges them, fair creditors are also favoured in that Court, and will not be deprived of their legal rights, without some fraud or neglect in doing what they are bound to do." The same doctrine is held in *Anderson v. Anderson*, 2 Call, 163, where a marriage settlement, made to protect the property of the wife, was held void against the husband's creditors, because not recorded in due time; and it was declared by the Court, that equity would not interpose in such a case, though the recording were prevented by accident, or unavoidable necessity; yea, even though it

116 *were prevented by fraud, if the creditors were neither parties nor privies to the fraud. That the creditor, then, will be permitted to enjoy every legal advantage fairly gained, I hold to be the general rule.

Whether the case before us has any circumstances, which will take it out of the rule, remains to be enquired. The plaintiff relies on two: 1. That the Statute authorising a recognizance of special bail to be taken, before any Judge of the General Court, &c. requires that the person taking the recognizance, shall transmit it to the clerk; thus, that in this case, it was the duty of the Judge who took it, to send the recognizance to the clerk: that any failure in this point, was the failure of the Judge, and ought not to injure the bail. 2. That even though the bill, by receiving the recognizance from the Judge, took upon himself the duty of delivering it to the clerk, he has employed, in the discharge of that duty, ordinary care and diligence, and ought not to suffer, if, by accident, the means used have failed.

As to the first. The Statute certainly did not mean to impose on the Judge taking the recognizance, the duty of delivering it personally to the clerk; nor yet, of being answerable for its safe and timely delivery. It was not his duty to hire a messenger to carry it. The law says, he shall transmit it to the clerk. When special bail is taken in the country, it will either be the appearance bail who becomes special bail, and then he being the person most interested in the return of the recognizance, will of course take possession of it, and return it; or the defendant will procure some other person to enter himself bail, and then, such person, or the defendant himself, will take charge of the recognizance for the purpose of delivery. In either case, it is a matter with which the plaintiff has nothing to do. The law gives him a judgment against the defendant and appearance bail, of course. If the recognizance is never returned to the clerk, it can raise no equity against him, unless he were instrumental in preventing its return. Suppose, instead of the appearance bail, 117 some other had *entered himself

special bail, before the Judge; and this recognizance, failing to reach the clerk in time, the office judgment had stood confirmed by the rise of the Court. Would this have given the appearance bail an equity to injoin the judgment? Surely not; and it does not seem to me to change the case, that the appearance bail himself had entered into the recognizance. But in truth, I am considering a case not before the Court. The appearance bail did take possession of the recognizance, and thereby wholly exonerated the Judge, and took upon himself the risque and responsibility of delivering it. We know that he never did deliver it: that it never was tendered to the clerk: that there never was any special bail given in the suit.

But it is contended, that notwithstanding this, such a case is made out as will compel a Court of Equity to interpose, and take from the creditor the judgment, which he has gotten against the appearance bail, for want of special bail. The case stated in the bill is, that the plaintiff, having important business at Richmond, about the time that the Superior Court of Spottsylvania would sit, gave the recognizance to his son, and requested him to give it to the clerk, and have the entry made: that his son having business at Caroline Court, which sat at the same time with that of Spottsylvania, did not attend the latter, but gave the bond to a lawyer, with a request to attend to it, and that lawyer forgot it. This, I say, is the case stated; but even this case, feeble as it is, is not made out. The plaintiff is put, by the answer, to the proof of him his whole equity; yet we have no evidence of the slightest business rendering a journey to Richmond necessary that time.

It was said in the argument, that this Court had decided cases like the present, in favor of the equity set up against the judgment. I have looked through the Reports, and can find none but the case of *Smith & Morton v. Wallace*, 1 Wash. Rep. 254. In that case, the Sheriff, having become appearance bail, offered to the clerk a bail piece, (as it is called in that case,) which he not considering good, took

118 *a judgment at the Rules against the defendant and Sheriff. At the office judgment Term, the bail piece was again offered to the clerk in Court, and he again objecting to it, it was offered to the plaintiff's attorney, who, thinking it sufficient, said he should not object to it. It was then given by the defendant's counsel to the clerk, and he was directed to file it; but he not having heard what the plaintiff's counsel had said, and still considering the bail piece bad, took no notice of it, but entered a plea for the Sheriff. Judgment was afterwards gotten against the Sheriff, and he filed a bill for relief. The Court sustain the bill, on the grounds, that the bail piece was a good one: that the plaintiff's counsel had acknowledged its sufficiency; and that this excused the Sheriff of the negligence imputed to him. When the counsel assented, there was no necessity of moving the Court on the subject. Now surely, the case before us cannot be compared with this, in any of its

strong points. The recognizance was never tendered to the clerk at Rules; was never in Court; never the slightest effort made to enter special bail, and set aside the office judgment. The bail had gone one way, without the least cause proved for his absence, his son another, and the lawyer had business enough of his own to attend to. Suppose the bail had been present himself, with the bail piece in his pocket; and had been so much engaged about other matters, as to have forgotten it. Could this have raised an equity against the judgment? And is not the case the same? He appointed an agent, who made another agent, who forgot it.

Finding no ground of support for this bill in any decisions of this Court, I have looked to the English books, and to the various heads of equitable jurisdiction. The Courts of Law in England, exercise equitable jurisdiction of the most liberal kind, in every thing respecting bail. With them, the bail to the Sheriff or bail below (our appearance bail,) is not liable to a judgment at once, or to a joint judgment against him and the principal. But 119 if bail *above is not put in, the plaintiff may take an assignment of the bail bond, and sue on it; and then, the bail has eight days after the return of the latitat, to surrender the principal. The books are full of applications to the Court, sometimes to enlarge the time of delivery; sometimes to enter an exoneretur. There is no Statutory provision on these subjects, but they are governed by the rules of the Court; and these rules are formed and administered in the spirit of equity; indeed, it is called their equitable jurisdiction. I have examined these cases, and will quote a few to shew their application to the present.

Grant v. Fagan, 4 East. 189. Motion to enlarge the time for bail to render their principal, upon an affidavit, that the principal, who was in France and about to return, had been made a prisoner of war under the late edict of the French government, under which, contrary to the former usage of nations, they had arrested all British subjects, who happened to be in France at the breaking out of the war; and the case was compared to those, where the bail of defendants sent out of the kingdom under the alien act, had been relieved, (*Merricks v. Vaucher*, 6 Term Rep. 50. *Coles v. Dehayne*, Ib. 52,) as also, where the principals, after their arrest and giving bail, had become Peers, (*Trinder v. Shirley*, Doug. 45.) or members of the House of Commons, (*Landridge v. Flood*, Tidd. 152,) in which, and similar cases, bail were considered to be under no imputation of laches; it becoming out of their power, without any fault of theirs, to comply with their undertaking to render their principals. Lord Ellenborough: "In all those cases, the render becomes impossible by the act or law of our own State, which excuses the performance of the condition; but there is no case where this indemnity has been induced by the act of a foreign power; and as to the incapacity of the bail to render their principal without any default of their own, the same ex-

cuse might as truly be made in the case of the sickness of the principal, so as to make him incapable of removal
120 *without endangering his life, where, nevertheless, the bail are answerable."

Wynne v. Petty, 4 East's Rep. 102. Motion by bail to enlarge the time of delivery of their principal, on affidavit of a surgeon, that he was so sick that a removal would endanger his life. The Court at first doubted, whether it could be granted. They thought that the inconvenience ought rather to be borne by the bail, who must be fined for not complying with their undertaking, that by the plaintiff, who otherwise would be deprived of his right. Afterwards they referred to a case furnished by the master, where, in proceedings against the bail by Scire Facias, on the return day, application was made for further time, to render the defendant, on affidavit of a physician, that it would most probably kill the defendant to remove him. But the Court said, that it could not be granted, and they must adhere to their rule of Court: that the hardship of a particular case would not justify them in departing from the established practice of the Court; and where one party must suffer by the act of God, they could not interfere.

Clarke v. Hopper, &c. 3 Taunt. 46. Best, Sergeant, obtained a rule to set aside proceedings against bail, under these circumstances. The defendants became bail for Wilson, in a suit brought before his bankruptcy. He was declared a bankrupt, and obtained his certificate, before the time of pleading. He failed to plead. The plaintiff took an interlocutory judgment, executed a writ of enquiry, signed final judgment, sued out execution, and proceeded regularly against the bail. It was contended, that the bail, not being fixed when the certificate was obtained, ought to be relieved: that if the principal had pleaded his bankruptcy, it would have been a complete defence; and that the bail ought not to suffer by his negligence, especially as this was an application to the equitable jurisdiction of the Court. But the Court said, that in every case the bail put themselves in hazard of suffering by the folly and negligence of their principal: that it is their business to watch the proceedings:

121 *that if they had searched the files of the Court, they would have found a Ca. Sa. returned nihil, which was notice that the plaintiff meant to proceed against them. They, therefore, refused to permit them to avail themselves of the bankruptcy; but as the original judgment had gone by default, they suffered them to make up an issue to try the right; the bail piece, in the mean time, to stand as a security.

Thus, we see, that the Courts in England, though exercising equitable powers, hold the bail to a strict and diligent attention to their own interest and safety: that they shall watch the proceedings; and even though prevented from rendering their principal, by the visitation of sickness, they will not relieve, because they must do it at the expense of another; and because, in questions de damno evitando, they will

not remove the burthen from the shoulders of one man, to those of another equally innocent; and this is the true equitable doctrine, to be traced through the whole system.

Unless you can attach some equity upon the conscience of a party, you never can take from him a legal advantage. This is the ground of purchaser without notice. A. sells a tract of land to B. for \$10,000, and the whole sum is paid down. A Court of Equity would compel A. to convey. But if he sell and convey this land to C. and C. pay the money for it before notice of B's equity, C. will hold the land. Why? Because he has done nothing unfair, and has the legal advantage. So in accident. It must be such an accident, as renders it unconscientious in the other party to use his legal advantage, and the accident must be wholly unmingled with any fault or negligence of the party seeking relief. Thus in the Marine Insurance Company v. Hodgson, 7 Cranch. 332. C. J. Marshall says, "without attempting to draw any precise line, to which Courts of Equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law; it may safely be said, that any fact
122 which *clearly proves it to be against conscience, to execute a judgment, and of which the injured party could not have availed himself in a Court of Law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Equity."

Can any man say, that the accident here has been unmixed with any fault or negligence in the plaintiff or his agents? Or, that it is against conscience for the defendant to avail himself of the judgment, which the regular operation of law has given him? Try the question another way. It is a general head of equity to relieve against forfeitures and penalties. Take it, that this is a forfeiture which the bail has incurred, by failing to enter special bail, and set aside the office judgment. This is surely as high ground, as he can possibly assume. Does the case, in this aspect, authorise the relief asked? I say no; unless it furnishes clear evidence, that the accident was unavoidable, and that the case lies completely in compensation. To shew this, I will cite a few authorities.

In Eaton v. Lyon, 3 Ves. 690, Lord Alvanley, M. R. says: "At law, a covenant must be strictly and literally performed; in equity, it must be really and substantially performed, according to the true intent and meaning of the parties, so far as circumstances will admit. But if by unavoidable accident, if by fraud, surprise or ignorance not wilful, parties may have been prevented from executing it literally, a Court of Equity will interfere; and upon compensation being made (the party having done every thing in his power, and being prevented by the means I have alluded to) will give relief."

In 14 Ves. 289, Saunders v. Pope, Lord Erskine says: "Undoubtedly, unless it is plain that full compensation can be given,

so as to put the other party in the same situation, a Court of Equity ought not to act; for such a jurisdiction would be arbitrary."

123 **Sparks v. Proprietors of Liverpool Water Works*, 13 Ves. 428, a by-law of the corporation provided that calls should be made from time to time, on the stockholders, for such sums as were assessed, and that members making default shall receive notices, and unless payment be made in ten days after such notice sent, shall incur the loss of their stock. Under this law, the plaintiff had incurred the loss of his stock, and applied to the Court for relief, stating, that the lapse arose from ignorance of the call, from accidental circumstances, and absence from home when the notice was left. The relief was refused on two grounds: 1st, that it was a case in which compensation could not with certainty be made, because the operations of the company depended entirely on the punctuality of the stockholders in paying the calls, and the injury of failure could not be estimated. 2d. The accident was not unavoidable. The Master of the Rolls said on this point, "accident here is only the want of precaution. The plaintiff did not inform himself of the orders and rules of the company. It was easy for the plaintiff to direct the clerk to send the notices as he pleased. The Court cannot relieve against such accidents. The plaintiff ought to have taken all due pains to inform himself."

In *Rolfe v. Harris*, 2 Price's Exch. Rep. 206, Sir Thomas Plumer confines the cases of relief to inevitable accident, if the injury be capable of compensation; but if the acts of transgression be wilful, or compensation impracticable, the Court will not interfere. See also *Hill v. Barclay*, 18 Ves. 56. *White v. Warner*, 2 Meriv. 459; in both which cases it was decided, that where a tenant had covenanted to insure the premises from fire, with a clause of re-entry for failure, the Court would not join an ejectment, brought by the landlord for the forfeiture, although no loss had happened, (the premises not being touched by fire;) for, in the first place, the failure was caused by no accident, but wilful; and secondly, there was no computing the risque, which the landlord ran, of losing the tenements by fire, while uninsured, for which the tenant might have been

124 *wholly unable to pay. See also *Skinner v. Dayton*, 2 Johns. Ch. Rep. 526. 1 Ball & Beat. 47, 373. *Madd. Ch. 27*. From all these cases, it clearly appears, that to authorise the relief asked for, the failure must have been the result of inevitable accident, and the case must lie completely in compensation. I have already shewn, that here, the accident, (if it can be so called,) resulted from gross negligence. Let us see whether the case admits of compensation. Can you place the plaintiff at law precisely where he would have stood, if the bail bond had been filed? What would have been his situation then? He would have had an office judgment against the defendant and bail, subject to be set aside by plea. If set aside, he would have gotten a judgment against the de-

fendant, then not insolvent that we know of, and might have made the money. He had the chance of fixing the the bail for the debt. He had the chance, if the bail delivered up the principal, of praying him in execution, and thus of getting the benefit of what he might give up, if he swore out. Can you replace him now on this ground? Not unless you can call back time, and erase from his records the events that have since happened. But *tugit irrevocabile tempus*; and it is impossible to place the creditor where he would have stood. His debtor has since sworn out, and given up his property to other executions; and the other chances of making his debt are past, and cannot be recalled. On no principle, then, that my judgment can apprehend, can you relieve the plaintiff.

JUDGE COALTER.

The case, as I understand it, is this:

Sizer sued Walden in debt, in the Superior Court of Law for Spottsylvania county, and Dickinson became his appearance bail. Before the office judgment Court, he entered a recognizance of special bail before the Judge of the Court, and received the recognizance from him, in order to 125 *transmit it to the Clerk's Office, according to law. He gave it to his son, a practising lawyer in the Court, with directions to file it, and have him discharged. He being obliged to go to another Court, which sat at the same time, delivered it to another attorney practising in the Superior Court of Spottsylvania, who promised to file it, and have the appellant discharged from his responsibility, as appearance bail. The attorney was also particularly solicited by a letter from the son of the appellant, which he received during the Term of the Court, to file the recognizance, and set aside the office judgment, in his behalf, as to Walden; and soliciting his attention to some other business for him in the Court, as he could not attend. This, however, by accident and the pressure of other business, the attorney failed to do; so that the office judgment stood confirmed, as well against the appellant as appearance bail, as against Walden. At the next Term of that Court, an effort was made to have the recognizance entered *nunc pro tunc*, but no relief could be had there. Walden, it is proved, has ever since been amendable to, and ready to answer, the process of Ca. Sa. had one been issued. None, however, has been taken out, in this case; but in some other case, he has been taken and discharged, under the act, as an insolvent debtor. In short, it would seem, that unless the bail is to pay this debt, the creditor must have lost it, by the insolvency of his debtor, there being no proof that he could have made it out of him. On the contrary, he obtained his judgment as early as possible, and at least one Term earlier than he would have obtained it, had the recognizance been filed; as the office judgment would have been set aside as to both, and a plea put in for the defendant Walden. No Ca. Sa. was taken, either because it was considered that it would be unavailing, or that not doing so, would more effectually fix the bail, by depriving him of the proof that

would have resulted therefrom, that the plaintiff at law was in as good, and in indeed a better, situation, than he could have been in, had the recognizance been filed.

126 *I throw out of the case the reason assigned in the bill, that the appellant had important business which drew him to Richmond, about the time of the office judgment Court; so that he did not attend in person to the business, (there being no proof of that fact,) and rest the case simply on his confiding the recognizance to a regular attorney in the Court, with the directions above stated, and his agreeing to attend to it, &c.

Is it beyond the power of a Court of Equity to relieve against the accident which has occurred?

It seems to me, that much of the reasoning to shew that the Court has not this power, goes to prove that the bail must, at all events, and under all circumstances, see that the recognizance is filed, and the office judgment against him set aside. We cannot, however, go this far, without overruling the case of *Smith & Moreton v. Wallace*, 1 Wash. 254. In this, as in that case, the party had duly entered into a recognizance of special bail, and thereby became entitled, instantaneously, to surrender his principal. This new state of things, and these new rights, became vested in him under the law. 1 Rev. Code, 502. The question is, whether he has been deprived of these rights, in a way which it is beyond the power of a Court of Equity to relieve him against? Suppose he had taken his cepi corpus, and delivered his principal, and given notice that by accident, not proceeding from his culpable neglect, the recognizance had not been returned.

It seems to me, that the case above cited ought to be supported. The policy of the law in admitting bail is founded in humanity. No man can say to his debtor "I will hand you over to the Judge, and you shall remain in prison, until you pay the uttermost farthing." To prevent this, he is permitted to give appearance bail, who is entitled to enter himself special bail, and deliver his principal in his exoneration. Such bail has never been considered, whether appearance or special, as improperly interfering with the rights of the creditor. On the contrary, by the

127 *practice of the British Courts, and by our Statutes pursuing that policy, many and important favors, contrary to the letter of his undertaking, are extended to the bail. This was in furtherance of the humanity of the law, and to encourage men to prevent oppressive imprisonments. Thus the recognizance requires that the body shall be rendered to prison in execution; so that when a Ca. Sa. is issued, the officer may levy it. If this is not done, the recognizance is forfeited; yet the Courts, in favour of the bail, permitted him to surrender the body afterwards. This equitable favor was not denied him, because, peradventure, the debtor may have been able to pay the debt, had he been taken or rendered in execution on the Ca. Sa. and therefore no compensation can be made; nor would the actual proof of such

fact deprive the bail of this equitable favor, on his receiving notice by Scire Facias that the body had not been taken in execution. But, in the case under consideration, as well as in our case, the debtor could have been had in execution; but it was more important to the creditor, if possible, to fix the bail, that being his only chance to get his debt. For these and other reasons, which I forbear at present to mention, I think that case ought not now to be over-ruled. Was that a stronger case, or one in which there was so much more diligence and precaution in the Sheriff, who stood as bail, than in the appellant in this case, as materially to vary this case from that? There a recognizance was entered into, but in a form, concerning which at least there were doubts. The clerk had refused to receive it at the Rules, and also in Court. This was known to the attorney of the Sheriff, and most probably, to the Sheriff himself, who being an officer of the Court, and whose business called him thither, would be likely to hear the orders read, and could more readily attend in person to the filing his recognizance, which he had been obliged to enter into in consequence of his default in not taking a bail bond. But, his attorney shewed the recognizance to the plaintiff's attorney, who

agreeing to make no objections to 128 the form, *it was handed to the clerk; but instead of moving to set aside the office judgment, nothing was said; and the clerk, not having heard that the objection was waived by the plaintiff's attorney, and having twice before refused to receive it, of course took no notice of it. In that case too, there was a plea put in on behalf of the Sheriff, and of course the cause continued on the docket, and a further opportunity to give bail afforded, even down to the time when this plea was ultimately disposed of, and which could not have been disposed of, without the knowledge of the Sheriff or his attorney; unless indeed, it was neglected by both. Yet this neglect of the attorney in not explaining the matter to the clerk, in the first instance or moving the Court on the subject, at that or a subsequent Term, was not visited on the bail, who had entered into a legal recognizance; but which had thus failed of its legal effect. The Court say, "they are fully satisfied on the equity of this case. A more complete surprise can hardly be conceived. It would be strange, if an accident so mischievous as this in its effects, were beyond the reach of that Court, whose peculiar province it is, to grant relief in such cases. The negligence, with which the appellee is charged, is fully excused by the agreement of the counsel, and the mistake which followed." The party had entered into a recognizance, not in the accustomed form, though in reality a good one. This was remedied by the agreement of the counsel, that it was in sufficient form. His negligence in not seeing it entered of record, was excused, though the mistake arose from the failure of the attorney to make this agreement known to the clerk, in consequence of which, he, instead of setting aside the office judgment, put in a plea for the

Sheriff, against whom the creditor finally obtained his judgment at law; and having done so, insisted that he had the law on his side, and equal equity. But, this argument did not prevail. In both cases, then, there was a legal recognizance entered into by the appearance bail, which, from mistake or accident, was not so acted upon as to produce its legal effect.

129 If there *is any material difference in these cases, as to who was guilty of the most neglect, it seems to me that it was in that case. Suppose Dickinson had attended in Court, had given the recognizance to his attorney, had seen him go to the clerk's table even, to have it filed; but the clerk being busy, or he interrupted by other business, had not done it at that moment, and then forgotten it; ought he to suffer? But this was substantially his case; nor was any plea put in for him, so as to delay the suit, and give him further time to file the recognizance.

But it is said, that in this case, as the recognizance was placed in the hands of the appearance bail, it was his duty to see that it was so dealt by as to have its legal effect; but that also was done in the above case. In that case, it is true, it was handed to the clerk; but by him it was considered as waste paper, and not noticed in the record, so as to avail the plaintiff on a Scire Facias, any more than in this case. He, therefore, had not the chance, in that case, any more than in this, of fixing the party as special bail.

The recognizance being entered into before the Judge, it is made his duty, by the law, to transmit it to the clerk. Suppose he had kept it in his pocket, intending to return it in person, when he went to the Court, but had mislaid or forgotten it; would the bail have been refused relief, because he did not attend at Court and see that it was filed and entered of record? There is nothing in the law imposing this duty on him. This was not held to be the law in the above case. Suppose the bail had informed the Judge, that his son was his attorney, who had promised to attend to the business for him, and desired him to deliver the recognizance to him, either before or at Court; and the Judge had taken this method of transmitting it to the clerk, but that by some mistake or accident, it had not been filed or entered of record, so as to give both parties the rights and remedies to which, by law, they would have been entitled? Could this case have been distinguished, injuriously to the relief sought, from that above cited? I

130 *think not. On the contrary, it seems to me, that if relief is refused in such case, it must be on the ground that the bail, at all events, must attend Court, and see that the recognizance is filed and legally proceeded in, or be ready to enter into another recognizance in Court. But, would not such a decision repeal the Act which enables bail who may not be able, or may not find it convenient to attend Court, to enter bail in the country? Why is this privilege allowed him, if he must attend Court in person, (whether the recognizance is entrusted to him or not,) and see that special bail is given? If he is to

do this, he may as well enter bail in Court. How, too, could he take the body on the bail piece, and surrender it in his discharge before the office judgment Court, if that is not to avail, unless he, at all events, attends Court and sees the recognizance entered? He may be going out of the State, and unable to attend in person. If a transmission of a recognizance by a Judge, in the way above mentioned, or by any other safe messenger, would be a sufficient and legal discharge of his duty, whether it should fail or not, and would avail the bail, why shall not equal or greater precaution by the bail excuse him? It seems to me, if it does not, it must be, as above said, because he must, at all events, and in every case, see to its return and entry upon record.

It seems to me also, that this case cannot properly be likened to cases of contract, so as to make the decisions in the latter, applicable to it. There is no contract with the creditor, in consequence of which he parted with his property. The bail bond in its terms, is a contract with the Sheriff, who, on taking sufficient caution, is authorized to permit the debtor to go at large, instead of committing him to jail; indeed he is bound to receive such surety. If, on objection, the bail is adjudged insufficient, the Sheriff is liable at once, as if no bond had been taken. If the bail is not objected to, or is adjudged sufficient, instead of an assignment of this bond, and a suit on it, judgment is at once entered up against the bail, subject to be set aside

131 *on his entering, or some one else, entering himself as special bail. He does so, and is instantanly entitled to deliver the principal. This is the nature of his undertaking; and many cases, as before stated, shew the indulgence and favor of the Courts to the bail, which no Court could extend to ordinary sureties on contracts. The bail is considered as the jailor of the debtor, and these favors were extended, in order to promote the humane intentions of the law. Thus we see, if the defendant dies before Ca. Sa. the bail is exonerated. So, if he is guilty of felony and to be transported, he may be brought up by habeas corpus, so as to discharge the bail, although he is sent instantly to Newgate, so that the plaintiff cannot have him in execution. 2 Stra. 1207. If he is sent out under the alien act, the bail is entitled to an exoneretur, because no neglect is imputable, and the bail ought not to suffer in consequence of a law passed for the benefit of the public. Merrick v. Vaucher, 6 Term. Rep. 50. All these instances of favor to the bail, and a great variety of others which need not be noticed, surely go on the ground, that this undertaking is not to be considered in the nature of a contract between the bail and the creditor; but an undertaking sanctioned and encouraged by the law, for reasons of sound policy and humanity; and they equally go to prove, that it is no unjust or improper interference between the debtor and creditor. The cases in which Courts will not interfere, although an accident has occurred, unless compensation can be made, are cases of contracts. Here too, it is said, no compen-

sation can be made, because we cannot say what chance the creditor would have had to get his debt, had special bail been entered. He might have got it on a Ca. Sa. or he had a chance to fix the bail, and we can make no calculation of what loss he may have sustained; and so the payment of the debt is the only safe standard, as we cannot place him in the same situation. It is true an accident has occurred without the fault of either, by which neither party can be placed in the situation they

132 were entitled, "but for it, to occupy.

In one respect, however, the creditor has occupied, and does occupy, all the rights he would have had, if the recognizance had been duly filed. He had it in his power, at the earliest possible time, to take his Ca. Sa. Suppose he had done so, and had taken the body. Of what could he, in justice, complain? He could not say, "I have lost my chance of fixing the bail, which I might have had, if the recognizance had been filed." He could only allege that injury, in case his Ca. Sa. had been returned "not found."

But from the allegations in the bill, and the proofs in this case, we are justified in considering it as one in which he had taken the body, as it is averred and appears, that he might at any time have done so. His debtor then was insolvent, and he could not get his debt out of him. He could not have fixed the bail, as special bail, because his Ca. Sa. would have been executed. His only chance to fix the bail, arises from the accident, which has prevented his standing as special bail. This cannot be called a chance. The thing has occurred; and it depends on this Court, whether this accident is to avail him.

But by this accident, the bail is deprived of his remedy of surrendering the body, which he would have had; and it is equally clear, that he could and would have done; whilst the appellee would only have had the remote possibility of fixing him on his failure to do so. The injury, therefore, to the bail, is much greater and more apparent, than to the creditor. Shall we oppose to this the mere possibility that he might have been fixed, and a debt, which he never contracted or contributed to contract, extorted from him, and which the appellee must have lost by an imprudent extension of a credit to an insolvent man, because of this accident? If we do, it must be, I think, because the decision of this Court, in the case above referred to, is wrong, and because accident is no ground for relief, in such a case. The appellee can only complain, that he has, by our decision, been deprived of a benefit,

133 which otherwise *would have resulted to him from this accident. He has no claim which touches the conscience of the appellant, and by the admonitions of which, he ought to pay this debt. It is at most, a case of strict summum jus. Can he, in good conscience, avail himself of a mere accident, by which the bail has been deprived of his remedy to surrender the body, and which, in justice, was all he could be asked to do, and which has always been ready, so that, in substance, the undertaking has been complied with? And shall he

expect a Court of Equity, which looks to substance, to uphold his mere legal advantage, bottomed on nothing but pure accident? It seems to me, that he cannot be supported in such pretensions.

I think, therefore, that the decree ought to be reversed.

JUDGE CABELL concurred in opinion with Judge Carr, that the decree should be affirmed; which was accordingly done.

134 *M'Michen v. Amos and Others.*

March, 1826.

Action for Freedom.—Strictness of Form.—The same strictness, as to form, is not required in actions for freedom, as in other cases.

Same.—Issue Irregular.—Effect of Verdict.—Where the defendant, in such an action, by his plea, protests that the plaintiff is his slave, and that he is not guilty of the assault, &c. the plaintiff replies that "by reason of any thing by the defendant in protesting alleged he ought not to be barred, &c." because he is a free person, and issue is joined on this replication: this issue, although irregular, will be sustained after verdict.

Same.—Judgment.—Surplusage.—Where the judgment directs that the plaintiff shall recover his freedom, "and that he be discharged from the imprisonment in the declaration complained of," the latter clause will be regarded as mere surplusage, as the first part of the judgment had the effect to discharge the plaintiff from the custody of the defendant.

Same.—Declaration.—Where such an action is brought by one person, for himself and others who are infants, the declaration, though informal, is substantially good.

Verdicts.—Finding Dependent on Point of Law.—A verdict may find generally for either party, dependent upon a single point of law presented to the Court, although such a verdict is not strictly a special verdict.

Statute.—Slaves.—Oath Required under.—Who Competent to Take.—The wife of a man removing to Virginia with his slaves, is not competent to take the oath required by the Act of 1792. Rev. Code, c. 103.

Same.—Release of Forfeitures.—Application.—The Act of 1819, which releases all forfeitures and penalties incurred under former laws, and not already recovered or enforced, does not apply to the case of slaves illegally imported, who acquired a vested right to freedom, as soon as the violation of the law was complete.

This was a suit for freedom, in the Superior Court of Law for the county of Ohio, brought by Amos for the benefit of himself, and that of his infant brother, sisters and niece. The declaration is in the usual form of trespass, assault and battery, and false imprisonment.

The defendant, M'Michen, pleaded, "protesting that the plaintiffs are his slaves for life, says he is not guilty of the trespass, assault and imprisonment in the

*For monographic note on Verdict, see end of case.

†**Action for Freedom.—Strictness of Form.**—The same strictness, as to form will not be required in actions for freedom as in other cases, for the master is deeply interested in not prolonging the litigation by mere technicalities. *Betty v. Horton*, 5 Leigh 625, citing principal case as so holding.

‡**Verdicts.—Finding Dependent on Point of Law.**—A verdict finding all the facts supposed to belong to the case, and referring to the court the decision of the law arising upon these facts, is not a special verdict in the usual acceptation of the term. *Hall v. Ratliff*, 98 Va. 329, 24 S. E. Rep. 1011, citing the principal case as so holding.

See principal case also cited in *Callis v. Kemp*, 11 Gratt. 88.

Upon a special verdict, the court can presume nothing. *Betty v. Horton*, 5 Leigh 621, citing principal case as so holding.

§**Statute.—Slaves.—Oath Required under.—Who Competent to Take.**—On this subject, the principal case was cited in *Montgomery v. Fletcher*, 6 Rand. 616. See principal case also cited in *Betty v. Horton*, 5 Leigh 626.

declaration supposed, and of this he puts himself upon the country."

The plaintiffs replied, "that by reason of any thing by the defendant in protesting alleged, they ought not to be barred from having and maintaining their action against him, because they say they are free persons."

Upon this replication issue was joined.

The jury found the following verdict: "That they find for the plaintiffs their freedom, and one cent damages, sub-
135 ject *to the opinion of the Court, whether the removal of Richard Wetherhead, with his family, from the State of Maryland, to the county of Rockingham in this State, in the month of November, 1800, and the bringing with him the plaintiffs, and the taking of the oath prescribed by law, within 60 days from his arrival in the said county of Rockingham, by Elizabeth the wife of the said Richard, was a compliance of the law regulating the importation of slaves. If, in the opinion of the Court, the law be for the defendant, then they find for the defendant."

The Court gave judgment for the plaintiffs, and added, "It is therefore considered by the Court, that the plaintiffs recover of the defendant one cent, the damages assessed by the said jury, together with their freedom, and that they be discharged from the imprisonment in the declaration complained of." From this judgment the defendant appealed.

Johnson, for the appellant.

Leigh, for the appellees.

March 1. JUDGE CABELL delivered his opinion, in which the other Judges concurred.*

Several objections were made by the counsel for the appellant, to the form of the proceedings in this case. Before I examine them, I will remark that this Court has often declared, that the same strictness as to form will not be required in actions for freedom, as in other cases; and that these actions, like actions of ejectment, will be moulded into such form, as is best calculated to try the real question in controversy.

The first objection is, that the issue was not joined on the plea of not guilty, but on the protestation in that plea
136 *that the plaintiffs were the slaves of the defendant. It is very true that that was an irregularity; but as the issue was joined upon the fact whether the plaintiffs were free or not, the merits of the controversy between the parties were fairly brought in issue; and it is too late, after verdict, to take advantage of the informality in joining the issue.

The next objection is, that the judgment directs the plaintiffs to be discharged from the imprisonment in the declaration complained of. The judgment that the plaintiffs recover their freedom, and the damages assessed by the jury, had the full effect to discharge them from the custody of the defendant; the additional direction complained of, was, therefore, mere surplusage, which cannot vitiate the judg-

ment. Nor would any useful purpose be answered by the correction of this irregularity, since no question of costs is involved.

It was next objected, that judgment should have been rendered for Amos only; because he alone declared as plaintiff, suing for himself and the other petitioners, who were infants; and it was contended, that if the verdict had been for the defendant, a judgment thereon would have been no bar to a new suit by the others. Although the declaration was, in this respect, informal; yet I think that all the petitioners were substantially plaintiffs; and as their case was fairly tried, had it been against them, it would have been so far a bar, as that no Court would have given them permission to bring another suit. The declaration in the case of Maria v. Surbaugh, 2 Rand. 228, was in the same form; yet it did not preclude the Court from deciding the merits of the case, as to the children of Maria.

I come now to the more important questions made in this case.

The verdict of the jury is as follows: "We find for the plaintiffs their freedom and one cent damages; subject to the opinion of the Court, whether the removal of Richard Wetherhead, with his family, from the State of Maryland to the county of Rockingham, in this State, in the
137 month *of November, 1800, and the bringing with him the plaintiffs, and the taking the oath prescribed by law, within 60 days after his arrival, in the county of Rockingham, by Elizabeth, the wife of the said Richard, was a compliance with the law regulating the importation of slaves. If, in the opinion of the Court, the law be for the defendant, then we find for the defendant."

It is contended by the counsel for the appellant, that this verdict is too imperfect, on account of its uncertainty, to enable the Court or render judgment.

This is not a special verdict, in the usual acceptation of the term; a verdict, finding all the facts supposed to belong to the case, and referring to the Court the decision of the law arising on those facts. The jury do not profess to find all the facts which constitute the case. On the contrary, the finding is a general one, that the plaintiffs are free, unless, upon a single point of law reserved, the Court shall be of opinion that the law is for the defendant. There can be no difficulty in comprehending the true nature of a verdict like this, although writers, in attempting to name it, may not have been fortunate in using terms of great precision. In 2 Tidd's Prac. 809, it is said, "another method of finding a species of special verdict is, when the jury find a verdict generally for either party, but subject nevertheless, to the opinion of the Court above, on a special case, stated by the counsel on both sides, with regard to a matter of law." In 1 Archbold, 192, it is said, "also where a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict, for the plaintiff, subject to the opinion of the Judge, or the Court above, on a special case stated by the counsel on both sides,

*The PRESIDENT absent.

with regard to the matter of law." It is not material, whether, with one of these writers, we call this proceeding "a species of special verdict," or with the other, "a general verdict," with "a special case." They both mean the same thing; a general conclusion drawn by the jury, from the facts, in favor of one or the other party; subject, however, to the opinion of
 138 the *Court as to the law arising on a case specially stated by the jury. Such a general conclusion for one party, necessarily carries with it the idea that that party must prevail, unless the law upon the special case referred to the Court, shall be against him. All facts, not found in the special case, are excluded from the consideration of the Court, or are negative by the general finding in his favor. The "special case" would be nugatory, if the Court were to go out of it.

The case specially stated by the jury, is, that Richard Wetherhead removed with his family from Maryland to Rockingham county in Virginia, in November, 1800, and brought with him the plaintiffs; and that Elizabeth, the wife of the said Richard, within 60 days after his arrival in Rockingham, took the oath prescribed by law; and the question submitted by the jury is, whether the taking of the oath by the wife, was a compliance with the law regulating the importation of slaves.

The Act of 1792, Rev. Code, ch. 103, prohibited the importation of slaves, but contained an exception in favor of persons removing from any other State, and becoming citizens of this, and bringing slaves with them, provided that within 60 days after such removal, they take, before some Justice of the Peace, a certain oath therein prescribed: the substance of which was, that the slaves, brought in by them were not brought in with intention to sell them, nor were they imported from Africa, or the West Indies, &c.

Whether the wife of a person removing to his State, and bringing slaves with him, can take the oath to any legal purpose, merely because she is wife, was admitted to be too plain for argument; for she cannot swear as to the intention of the husband, nor is she the person bringing the slaves; and yet this is the only question submitted by the jury. The language of the jury is plain and unequivocal, and will not bear any other rational construction.

But it is said, that this question is so plain that we cannot presume the parties intended to submit it: that no
 139 *lawyer would have made it, nor would the Judge have suffered it to be put upon the record. This is, indeed, a novel argument. If the records of this Court be searched, it would be found that questions as plain (plainer there could not be) have been often made, and in some instances, incorrectly decided, in the Inferior Courts. It would be strange indeed, if the very plainness of the case were to be made the only foundation of doubts and difficulties.

It is however contended, that there may be cases in which the wife may be the proper person to take the oath, as where the

slaves are her separate property, or where they are held by her as a trustee, or as executrix or administratrix, &c. But, I think it very clear, from the positive finding of the jury, that the jury did not mean to submit a question on any such case. I think it very manifest, that the Act of Assembly intended the oath to be taken by the proprietor of the slaves; although the proprietor is not otherwise described than as the person removing and bringing the slaves with him. When, therefore, the jury speak of Richard Wetherhead, and apply to him the very words found in the Act of Assembly, removing and bringing the slaves with him, they intended to speak of him as the proprietor; and when they speak of the wife, they speak of her merely as wife. Besides, if the wife had been the proprietor, it cannot for a moment be believed, that the jury would have been permitted to be silent as to a fact, which must have been known to the counsel and the Court, to be so important to the correct decision of the cause. But be this as it may, it is sufficient to say, that it does not appear by the verdict, that any of the supposed cases existed, or were alleged by the parties to exist; or if alleged to exist, the jury have negatived it, by not finding it to exist. No verdict of this kind could ever stand, if the party or the Court were allowed to suppose facts, not found in the special case. It is not necessary that the jury shall expressly find, that certain facts do not exist. The mere silence of the jury

140 *that no facts exist, repugnant to the general conclusion they have drawn in favor of the party. In the case of Hook v. Nanny, 2 Munf. 379, (which, like this, was a case for freedom,) the jury find certain facts, and then conclude, "we therefore find the plaintiffs free." Judgment was rendered for the plaintiffs, and was affirmed by the unanimous opinion of this Court. Judge Coalter remarked, "The jury, in this case, find two facts: 1. That Nanny was brought into this Commonwealth by Jones, from North Carolina, subsequent to the 5th of October, 1778. 2. They also find from inspection, that the plaintiff is a white woman. I say nothing," (adds the Judge,) "of the other finding, viz: 'that if the plaintiff was a slave, it doth not appear that Jones did comply with the provisions of the Act to prevent the farther importation of slaves,' because, (says the Judge,) the jury need not find the negative of a fact, which the defendant must shew, in order to support his plea of justification. That part of the verdict, therefore, must be clearly rejected as surplusage. The case will stand upon the other two facts, accompanied by the general finding that the plaintiffs are free. The facts aforesaid are entirely distinct in their nature, and not depending at all on the same testimony; and either of them, if found upon proper legal testimony, will entitle the party, ipso facto, to freedom, unless the defendant can shew something to take his case out of their influence." In the case of Garnet v. Sam, 5 Munf. 542, the same principle is advanced by this Court. Suppose, in the case before us, the jury had found the plaintiffs free,

subject to the opinion of the Court, on the following fact; that Wetherhead removed from Maryland to this State, in the year 1800, bringing the plaintiffs with him as slaves. Most unquestionably, this Court would adjudge them to be free. But, as it was proved to the jury, that the wife took the oath, they submit the single question, whether this taking of the oath was a compliance with the law; and as it is admitted that it was not, I cannot see how it can make the case of the defendant better than if it had not been stated at all.

141 *The objection, therefore, as to the uncertainty of the verdict, is without foundation.

It is said, that according to the principles established in *Garnet v. Sam & Co.*, 5 Munf. 542, and *Abram & Co. v. Matthews*, 6 Munf. 159, it might have been left to the jury, to presume from the facts found, that the wife, in this case, was the proper person to take the oath. In both of these cases, more than 20 years had elapsed, between the importation of the slaves and the commencement of the action; and it was decided, that such a lapse of time should be left to the jury as the foundation of a presumption, that the oath required by law had been rightly taken. And considering the great difficulty which would generally attend the proving such a fact, after such a lapse of time, nothing could be more reasonable than such a presumption. But such presumption, however well founded, was liable to be repelled by proofs. In the present case, the time was short of 20 years. It is not pretended that the husband took the oath. That fact is negatived by the express finding, that the oath was taken by the wife. The facts, which alone could justify the oath by the wife, do not depend upon such fugitive testimony, as did the fact presumed in the cases referred to. If the wife had the separate property in the slaves, or if she were trustee, executrix or administratrix, such fact might have been proved by testimony in writing or on record; or, if that evidence had been lost, its former existence might have been established by parol testimony; or, if the husband had died within the 60 days, that fact, (admitting it to be sufficient to justify the oath by the wife,) was very different from the fact presumed in the cases referred to. It did not depend upon the testimony of a single witness who may have died. It must have been a fact of notoriety, and susceptible of easy proof. I therefore think it ought not to have been left to the jury, to presume such facts as would justify the wife in taking the oath, until at least 20 years had elapsed. But be this as it may, we do not know that any such question

142 *was made at the trial; and it is now too late to make it. If such presumption was pressed on the jury, it might have been, and probably was, repelled by opposing testimony. The jury have not, in fact, made any such presumption; and it is not competent to the Court to make it for them.

But it is contended, that the right of the appellees to freedom, under the Act of 1792, was taken away by the Act of 1819, which releases all forfeitures and penalties in-

curred under former laws, and not already recovered or enforced. 1 Rev. Code, 422, sec. 4. It may be admitted, that the right of a slave to be free, in consequence of being imported contrary to the Act of 1792, was a forfeiture imposed upon the owner, by way of penalty. But at the very moment that this forfeiture was incurred by the owner, under that Act, a perfect right to freedom vested in the slave, by the same Act. I call it a perfect right, because its enjoyment might be enforced by due course of law, the moment it vested; and it vested as soon as the violation of the law was complete; viz: as soon as 12 months elapsed from the importation. He was from that moment a free man "illegally held in slavery." If it were not so, he could never recover freedom; for, it is the business of Courts, not to create, but only to enforce existing rights. Again, our laws declare, "that all children shall be bond or free, according to the condition of the mother." *Maria v. Surbaugh*, 2 Rand. 228. If a female slave had been brought into this State, under the Act of 1792, had remained here 12 months, (the requisites of the law not being complied with,) and then had had a child, and died; it is perfectly clear, that such child would be entitled to, and would receive his freedom; and this decisively proves, that the mother was in fact, free, although she had not been declared so by the judgment of a Court of Law. The Act of 1819 contemplated cases, in which rights might be absolutely vested under former laws, which were not intended to be disturbed; and also cases in which forfeitures had been incurred, where no right had vested in any particular persons. The Act of 1806

143 afforded instances of this latter description. That Act declares, that an illegal importer of slaves shall forfeit all right to the slaves, and that such right shall vest in the overseers of the poor of any county, who should apprehend, or attempt to apprehend them. The right forfeited by the owner, did not vest, however, in any one, until the slaves were apprehended, or until an attempt was made to apprehend them. These were the forfeitures, and such as these, that the Act of 1819 intended to remit; and such remission violated the rights of no one. But under the Act of 1792, a right to freedom was actually vested in the imported slaves; and it was the intention of the Act of 1819, to preserve that right.

The judgment must be affirmed.

VERDICT.

- I. General Verdict.
- II. Form of General Verdict.
 - A. Duty of Court.
 - B. In Civil Cases.
 1. Proper Form on Demurrer to Evidence.
 - C. In Criminal Cases.
- III. Requisites of General Verdict.
 - A. Deliberation.
 - B. Unanimity.
 - C. Conformity to Instructions.
 - D. Responsiveness to Issue.
 1. Generally.
 - a. In Particular Instances.

- E. Certainty of Finding.
 - 1. In Civil Cases.
 - a. Sufficient.
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 - 2. In Criminal Cases.
 - a. Sufficient.
 - (1) Rule.
 - b. Insufficient.
- F. Referring to Indictment.
- G. Signing.
- H. Perfecting.
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- IV. Amount Found by Verdict.
 - A. Excessive.
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- V. Rendition and Reception of Verdict.
 - A. In Criminal Cases.
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- VI. Effect of the General Verdict.
 - A. General Rule.
 - 1. Illustration of Rule
 - a. In Civil Cases.
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 - (1) Curing Errors.
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 - (aa) When Cured.
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 - VII. Construction of Verdict.
 - A. General Rule.
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 - VIII. Amendment of Verdict.
 - A. General Rule.
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 - 1. Amendment by Court.
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 - A. Rules Governing.
 - 1. Question Submitted Must Be Material.
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 - (1) In Actions of Ejectment.
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 - (5) Fixing Liability for Assault.
 - (6) On Question of Fraud.
 - (7) In Action for Rent.
 - (8) In Action of Detinue.
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 - X. Subject to Court's Opinion.
 - XI. Discretion as to Nature of Verdict.
 - Cross References to Monographic Notes.
 - Amendments, appended to *Snead v. Coleman*, 7 Gratt. 300.
 - Appeal and Error, appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.
 - Autrefois, Acquit and Convict (Jeopardy), appended to *Page v. Com.*, 26 Gratt. 943.
 - Damages, appended to *Norfolk*, etc., *R. Co. v. Ormsby*, 27 Gratt. 455.
 - Demurrers, appended to *Com. v. Jackson*, 2 Va. Cas. 501.
 - Detinue and Replevin, appended to *Hunt v. Martin*, 8 Gratt. 573.
 - Ejectment, appended to *Tapscott v. Cobbs*, 11 Gratt. 173.
 - Evidence, appended to *Lee v. Tapscott*, 2 Wash. 276.

- Homicide, appended to *Souther v. Com.*, 7 Gratt. 673.
- Indictments, Informations and Presentments, appended to *Boyle v. Com.*, 14 Gratt. 674.
- Instructions, appended to *Womack v. Circle*, 29 Gratt. 192.
- Interest, appended to *Fred v. Dixon*, 27 Gratt. 541.
- Issue out of Chancery, appended to *Lavell v. Gold*, 25 Gratt. 473.
- Judgments, appended to *Smith v. Charlton*, 7 Gratt. 425.
- Juries, appended to *Chahoon v. Com.*, 20 Gratt. 735.
- Larceny, appended to *Johnson v. Com.*, 24 Gratt. 555.
- New Trials, appended to *Boswell v. Jones*, 1 Wash. 323.
- Unlawful Detainer, appended to *Dobson v. Culpepper*, 23 Gratt. 353.
- Variance, appended to *Harris v. Harris*, 2 Rand. 431.
- I. GENERAL VERDICT.

Separate Verdict, Where Two Persons Tried Jointly.—Where two persons are indicted and tried jointly for the same offense the same jury may, by separate verdicts, acquit the one and convict the other. *State v. Lilly*, 47 W. Va. 496, 35 S. E. Rep. 837.

Exceeding Authority in Fixing Penalty, Surplusage.—And, it is held in *State v. Greer*, 22 W. Va. 829, that, though a jury have no authority to fix the term of imprisonment, yet, if they do, it is mere surplusage, and the verdict of guilty is good.

On Single Count Alleging Burglary and Larceny.—Upon a count properly alleging both burglary and larceny, there may be a general verdict of guilty. *State v. McClung*, 35 W. Va. 380, 13 S. E. Rep. 664. See *State v. Williams*, 40 W. Va. 263, 21 S. E. Rep. 721; *Speers v. Com.*, 17 Gratt. 570; *Moody v. State*, 1 W. Va. 337.

When Grand, and Petit, Larceny Charged.—And, upon an indictment for grand larceny a verdict convicting of petit larceny is good, as the major includes the minor offense. *State v. McClung*, 35 W. Va. 280, 13 S. E. Rep. 655. See *Howe's Case*, 26 W. Va. 110; *Hardy v. Com.*, 17 Gratt. 593; *Canada v. Com.*, 23 Gratt. 899; *Ex parte Garrison*, 35 W. Va. 686, 15 S. E. Rep. 418; *State v. Meadows*, 18 W. Va. 660.

Where More than One Count.—Although an indictment may contain more than one count, a verdict of "guilty as charged in the indictment," is good. *Moody v. State*, 1 W. Va. 340.

One Good, and Other Bad, Counts.—But, a good count in the indictment, where there are others which are bad, will not support a general verdict of guilty, when the offenses are punishable by confinement in the penitentiary. *Clere v. Com.*, 3 Gratt. 615; *Mowbray v. Com.*, 11 Leigh 643; *Shiffet v. Com.*, 14 Gratt. 673; *Jones v. Com.*, 36 Va. 951, 12 S. E. Rep. 950. See *Kirk v. Com.*, 9 Leigh 637 (overruled).

II. FORM OF GENERAL VERDICT.

A. DUTY OF COURT.—Trial courts should see that verdicts are put in proper form before juries are discharged, but if any change is made in the substance of the verdict, the jury should be sent back to their room, where they can, untrammelled by the presence and influence of others, find such verdict as they think proper. *Porterfield v. Com.*, 91 Va. 807, 23 S. E. Rep. 352.

B. IN CIVIL CASES.

In Ejectment.—In ejectment, the verdict read, "we, the jury, find for the plaintiff the land in the declaration mentioned, and one cent damages," which, it seems, was sufficient in form. *M'Murray v. Oneals*, 1 Call 249.

And on a plea of not guilty to a declaration in ejectment, that defendant unlawfully withhold possession of land, the verdict was, "we, the jury find that the defendant does not withhold possession of the land in the declaration mentioned, as alleged, and therefore find for the defendant on the issue joined," which was good in form. *Andrews v. Roseland Iron & Coal Co.*, 89 Va. 395, 16 S. E. Rep. 255.

On Writ of Unlawful Detainer.—A verdict in a writ of unlawful detainer, reading, "we, the jury, find that the defendants are unlawfully in possession and withhold from the plaintiffs the premises in the summons mentioned," is sufficient to enter judgment upon. *Mann v. Bryant*, 12 W. Va. 519. See *Paul v. Smiley*, 4 Munf. 468; *M'Murray v. Oneal*, 1 Call 246.

In Action of Trespass.—A verdict in an action of trespass on the case, reading, "we, the jury, find for the defendants," is good, the plea being "not guilty." *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. Rep. 190; *Lewis v. Childers*, 13 W. Va. 1.

1. PROPER FORM ON DEMURRER TO EVIDENCE.—In an action on notes, the only defense set up is for damages by way of special set-off and plaintiff demurs to defendant's evidence, it seems, the proper form of verdict would be, "we, the jury, upon the issue joined, find for the defendant and assess his damages at a stated sum, subject to the opinion of the court upon the plaintiff's demurrer to the evidence; but if, upon the demurrer to the evidence, the law be with the plaintiff, then we find for the plaintiff the sum ascertained to be due him." *Southern Roanoke L. Co. v. Roberts*, 99 Va. 490, 39 S. E. Rep. 138.

C. IN CRIMINAL CASES.—When the record shows that a verdict was delivered in open court, it is immaterial that it does not show the verdict was assigned. *Hall v. Com.*, 89 Va. 180, 15 S. E. Rep. 517; *Woods v. Com.*, 86 Va. 934, 11 S. E. Rep. 799; *Crump v. Com.*, 98 Va. 835, 23 S. E. Rep. 760. See also, *State v. Morgan*, 35 W. Va. 260, 13 S. E. Rep. 385.

And so, the verdict is sufficient in form if signed by J. S. Pierpont, though the record shows Jeremiah S. Pierpont was the juryman sworn. *State v. Morgan*, 35 W. Va. 260, 13 S. E. Rep. 385.

On Charge of Murder.—"We, the jury, agree and find the defendant, Virgil Staley, not guilty of murder in the first or second degree, as charged in the within indictment, but do agree and find the defendant, Virgil Staley, guilty of voluntary manslaughter," is sufficient in form. *State v. Staley*, 45 W. Va. 792, 32 S. E. Rep. 198.

And, on an indictment charging one as principal in the second degree to a murder, a verdict which finds the accused "guilty, as charged in the indictment," and fixes his punishment, is sufficient. *Horton v. Com.*, 99 Va. 848, 38 S. E. Rep. 184.

On Charge of Breaking and Entering.—A verdict finding defendant guilty of breaking and entering the store of a certain firm is sufficient, although it does not set out the individual names of the partners as alleged in the indictment. *Henderson v. Com.*, 98 Va. 794, 34 S. E. Rep. 881.

On Charge of Malicious Stabbing.—On a trial for "maliciously stabbing with intent to maim, disfigure, disable and kill," a verdict finding "the defendant not guilty as charged," but finding him "guilty of unlawful cutting," is not good in form. *State v. Davis*, 31 W. Va. 390, 7 S. E. Rep. 24.

III. REQUISITES OF GENERAL VERDICT.

A. DELIBERATION.

Jury in Charge of Witness.—The verdict of a jury in a criminal case will not be set aside merely

because the jury was put in custody of a deputy sheriff who had testified for the commonwealth. *Reed's Case*, 98 Va. 817, 830, 36 S. E. Rep. 399.

Compromise.—And when the jury agree as to the guilt of the prisoner, but disagree as to term of imprisonment, it does not affect the verdict that the term of imprisonment is arrived at by average. *Thompson v. Com.*, 8 Gratt. 637.

B. UNANIMITY.

Presence of Juror.—The verdict of the jury must be unanimous; and, therefore, if the twelfth juror retires from the court before the verdict is written and received, such verdict is a nullity. *Com. v. Gibson*, 2 Va. Cas. 73.

And so, on trial for grand larceny the jury find prisoner guilty but fail to fix term of imprisonment, and are discharged, but instantly called back, all but one, and then fix the punishment. The verdict was bad. *Mills v. Com.*, 7 Leigh 751.

C. CONFORMITY TO INSTRUCTIONS.—Though a verdict be contrary to the instructions, yet, if there was no evidence to prove the case supposed by them, it will not be set aside. *Smith v. Tate*, 82 Va. 667.

D. RESPONSIVENESS TO ISSUE.

1. GENERALLY.—The verdict of a jury which necessarily disposes of all the issues in the case, is sufficient, although it may not respond separately to each several issue presented by the pleadings. *Black v. Thomas*, 21 W. Va. 711. See *Lewis v. Childers*, 18 W. Va. 1; *Lanier v. Harwell*, 6 Munf. 79.

But where a verdict contains matter of fact which is immaterial, and not responsive to the issue, such matter may be rejected as surplusage, and the verdict shall stand if the remaining portion is responsive to the issue, and not open to any further objection. *Martin v. Ohio River R. Co.*, 37 W. Va. 349, 16 S. E. Rep. 569.

a. In Particular Instances.

Actions of Assumpsit.—Where, in an action of assumpsit, the pleas upon which issue is joined are nonassumpsit, payment and set-off, and the verdict found for the plaintiff assess the amount of his damages, and, also, fixes the amount allowed the defendant on his set-off, it is all that is necessary. *Smith v. Packard*, 94 Va. 730, 27 S. E. Rep. 586.

So, too, in an action of assumpsit, where the pleas are nonassumpsit, and the statute of limitations, a general verdict for the plaintiff, fixing the amount of his damages, is responsive to all the issues made by the pleadings. *Hansbrough v. Neal*, 94 Va. 729, 27 S. E. Rep. 593.

Where Title Only Issue in Ejectment.—In ejectment, where issue is the title only, a verdict may be found and judgment rendered for a tract of land, "according to a survey filed in the cause." *Paul v. Smiley*, 4 Munf. 468. Compare *Gregory v. Jackson*, 6 Munf. 26.

In Ejectment, Must Find Estate in Plaintiff.—But the verdict in an ejectment case is fatally defective, if it finds the plaintiff is entitled to recover the lands mentioned in the declaration, but fails to find the estate found in the plaintiff. *Low v. Settle*, 23 W. Va. 388. Compare *M'Murray v. Oneal*, 1 Call 246; *Elliott v. Sutor*, 3 W. Va. 37; *Tapscott v. Cobbs*, 11 Gratt. 172.

In Detinue.—In detinue, defendant pleaded non-detinue and special plea in bar, to which pleas there was general replication, denying the truth of them, and issue joined. A general verdict for plaintiff was sufficiently responsive to both issues. *Garland v. Bugg*, 1 Hen. & M. 375.

In Trespass.—And, where, in an action of trespass on the case, the verdict reads, "we, the jury, find for the defendants," it is sufficient, as responsive to

the issue. *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. Rep. 190.

Suits on Administrator's Bond.—In suit on administrator's bond the verdict must find that, at the institution of the action there were in the hands of the representative assets, not bound by superior claims, sufficient to discharge plaintiff's debt. *Sturdivant v. Raines*, 1 Leigh 482. See *Eppes v. Smith*, 4 Munf. 466; *Rogers v. Chandler*, 3 Munf. 66; *Gardner v. Vidal*, 6 Rand. 106; *Booth v. Armstrong*, 2 Wash. 301.

Two Issues in Fact.—But where there are two issues in fact, and the verdict of the jury answers to only one, there ought to be a *venire facias de novo*. *Hite v. Wilson*, 2 Hen. & M. 268; *Brown v. Henderson*, 4 Munf. 492. See *Nicholas v. Kershner*, 20 W. Va. 262; *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. Rep. 861.

E. CERTAINTY OF FINDING.

1. IN CIVIL CASES.

a. Sufficient.

In Action for Waste.—If the verdict finds defendant guilty of waste, as charged, and then proceeds to assess the damages for the particular parts of the waste charged, but does not set out the *locus in quo*, nor find any part of the issue for defendant, it is sufficient. *Dejarnette v. Allen*, 5 Gratt. 499.

On Promissory Note.—And a verdict for the debt claimed in the declaration, with interest, etc., subject to a credit for a specified sum, paid at a specified date, is sufficiently certain. *Barrett v. Wills*, 4 Leigh 114. See *Grays v. Hines*, 4 Munf. 437.

Action for Damages.—When a verdict assess "damages for the loss of one-half of a spring at \$600, and of fourteen acres of land at \$540, and directs these sums to be applied to bonds as they fall due," it will not be set aside as vague and uncertain. *Grayson v. Buchanan*, 88 Va. 257, 18 S. E. Rep. 457.

In Ejectment.—And so, where the jury find land was devised to "James instead of Jacobus," it is a mistake that may be corrected by the other part of the finding that "he is the lessor." *Pendleton v. Vandevier*, 1 Wash. 388.

b. Insufficient.

If for a Part, What Must Find.—But, in an action of ejectment, if the verdict is for only a part of the land sued for, the boundaries of the part recovered should be designated. The verdict must be certain in itself, or must refer to some certain standard by which to ascertain the land so found, otherwise it will be too uncertain to warrant a judgment upon it. *Slocum v. Compton*, 98 Va. 375, 25 S. E. Rep. 3.

Libel, in Admiralty.—Certainty being one of the elements of a verdict, it is held that, a verdict for "the vessel, tackle, apparel and cargo, except that part of the cargo upon which the duties had been paid," was too uncertain. *Richards v. Tabb*, 4 Call 522.

On Bond.—And where suit is brought against two persons on a bond, and it abates as to one by his death, a verdict finding only, that the surviving defendant hath not paid the debt, is bad. *Triplett v. Micou*, 1 Rand. 269. See also *Green v. Dulany*, 2 Munf. 518; *Buckner v. Blair*, 2 Munf. 336.

2. IN CRIMINAL CASES.

a. Sufficient.

(1) Rule.—The verdict in a criminal case is always to be read in connection with the indictment, and if, upon reading them together, the meaning of the verdict is certain, it is sufficient. It need not give the name of the prisoner, nor the person assaulted. *Hairston v. Com.*, 97 Va. 754, 32 S. E. Rep. 797. See *Hoback v. Com.*, 28 Gratt. 922; *Rogers v. Com.*, 1 Va. Dec. 798; *Henderson v. Com.*, 98 Va. 794, 34 S. E. Rep. 861.

Malicious Shooting.—In *Hoback v. Com.*, 28 Gratt.

922, the accused was indicted for malicious shooting, and the jury found him "not guilty of malicious shooting, as charged, but guilty of unlawful shooting with intent to maim," etc., it was held the verdict was to be read in connection with the indictment, and sufficiently indicated the person. See *Hairston v. Com.*, 97 Va. 754, 32 S. E. Rep. 797.

b. Insufficient.

Forgery.—Indictment charges forgery of a note in first count, and, in the second, the forgery of an indorsement on the note, jury finds prisoner not guilty on the first count, and then say, "on the second count, viz., that of uttering a negotiable note knowing it to be forged, we find prisoner guilty, and fix the term of his imprisonment," etc. The verdict upon the second count is too uncertain. *Cocke v. Com.*, 13 Gratt. 750.

Breaking and Entering.—And where accused was indicted for breaking into a storehouse and stealing more than four dollars, the verdict found him guilty of grand larceny and fixed his imprisonment at seven years. It was held too uncertain to render judgment upon. *Com. v. Smith*, 3 Va. Cas. 327.

Fixing Shorter Term than Law Allows.—Also, the verdict of a jury, finding a prisoner guilty, and fixing his imprisonment at a shorter term than the law allows is illegal. *Nemo v. Com.*, 2 Gratt. 559. See *Jones v. Com.*, 20 Gratt. 848; *Richards v. Com.*, 81 Va. 116; *Ex parte Marx*, 86 Va. 46, 9 S. E. Rep. 475; *Com. v. Smith*, 3 Va. Cas. 327; *Com. v. Percavill*, 4 Leigh 687; *Mills v. Com.*, 7 Leigh 751; *Marshall v. Com.*, 5 Gratt. 663; *Com. v. Scott*, 5 Gratt. 607.

And, if one be indicted as accessory to murder, a verdict which finds him guilty thereof, but does not say whether he is guilty as accessory in the first or second degree is bad. *Com. v. Williamson*, 2 Va. Cas. 211.

F. REFERRING TO INDICTMENT.—Where, on a sufficient indictment, the jury "find the prisoner guilty, and fix his punishment at eighteen years in the penitentiary," the verdict is not bad because it fails to refer explicitly to the indictment. *Rogers v. Com.*, 1 Va. Dec. 798.

G. SIGNING.—Where a verdict is duly delivered in court and recorded, though unsigned, it is sufficient. *Woods v. Com.*, 86 Va. 934, 11 S. E. Rep. 799. See *Hall v. Com.*, 89 Va. 180, 15 S. E. Rep. 517; *Crump v. Com.*, 98 Va. 833, 23 S. E. Rep. 760; *Gilligan's Case*, 99 Va. 816, 37 S. E. Rep. 962.

H. PERFECTING.—After a verdict for felony has been received and read, it is the duty of the clerk, to duly perfect it, to read it over to the jury, and to poll them, and say, "So say you all," or words to that effect. Until this is done any one has a right to retract. *Com. v. Gibson*, 2 Va. Cas. 70.

I. IMPEACHING.—As a general rule, a verdict cannot be impeached by testimony of jurors of their own misconduct. *Bull v. Com.*, 14 Gratt. 613. See sustaining this view, *Shobe v. Bell*, 1 Rand. 39; *Harnsbarger v. Kinney*, 6 Gratt. 287; *Carr v. Magruder*, 2 Pat. & H. 107; *Koerner v. Rankin*, 11 Gratt. 420; *Price v. Warren*, 1 Hen. & M. 385; *Read's Case*, 22 Gratt. 924; *State v. Cartright*, 20 W. Va. 32; *Stephoe v. Flood*, 31 Gratt. 323; *Danville Bank v. Waddill*, 31 Gratt. 469; *Moses v. Cromwell*, 78 Va. 671; *Probst v. Braeunlich*, 24 W. Va. 358; *Bartlett v. Patton*, 38 W. Va. 71, 10 S. E. Rep. 21; *Graham v. Cit. Nat. Bank*, 45 W. Va. 701, 32 S. E. Rep. 245; *Elam v. Com. Bank*, 86 Va. 92, 9 S. E. Rep. 498; *State v. Robinson*, 20 W. Va. 713. But see *contra*, *Cochran v. Street*, 1 Wash. 79; *Moffett v. Bowman*, 6 Gratt. 219; *State v. Robinson*, 20 W. Va. 713; *Wormley's Case*, 8 Gratt. 712.

In the following cases, however, the affidavits of jurors were read in support of their verdict, though no rule, it seems, is laid down as to when such aff-

daivts will be admitted. See generally, McCaul's Case, 1 Va. Cas. 371; Kennedy's Case, 2 Va. Cas. 510; Overbee's Case, 1 Rob. 756; McCarter's Case, 11 Leigh 633; Thompson's Case, 8 Gratt. 637; Read's Case, 22 Gratt. 924; State v. Cartright, 20 W. Va. 32; State v. Robinson, 20 W. Va. 713.

IV. AMOUNT FOUND BY VERDICT.

A. EXCESSIVE.—A verdict for \$2,500, as compensation for a broken leg and much consequent suffering, will not be set aside as excessive, in the absence of evidence that the jury were actuated by improper motives, gross error, or misconception of the subject. Newport News, etc., R. Co. v. Bradford, 100 Va. 232, 40 S. E. Rep. 900. See N. & W. R. Co. v. Shott, 92 Va. 47, 22 S. E. Rep. 811; Young v. W. Va. & P. R. Co., 44 W. Va. 218, 28 S. E. Rep. 932; Trice v. C. & O. Ry. Co., 40 W. Va. 271, 21 S. E. Rep. 1022; Pegram v. Stortz, 81 W. Va. 220, 6 S. E. Rep. 486; Battrell v. Ohio River R. Co., 34 W. Va. 232, 12 S. E. Rep. 699; N. & W. R. Co. v. Nighbert, 46 W. Va. 202, 32 S. E. Rep. 1032; Moses v. Cromwell, 78 Va. 676.

Finding Less than Amount Claimed.—And a verdict is not excessive which is not only supported by evidence in the case, but is for a less sum than that fixed by some of the witnesses. Barnes v. Morrison, 97 Va. 372, 34 S. E. Rep. 93.

B. CERTAINTY.

In Action of Debt.—In an action of debt on a bond, with credits indorsed thereon, a verdict "for the debt in the declaration mentioned," is erroneous, though the plaintiff in court offer to release so much thereof as is equal to the credits endorsed on the bond. Grays v. Hines, 4 Munf. 437. And see Early v. Moore, 4 Munf. 262.

But, where there is a verdict for the debt claimed in the declaration, with interest, subject to a credit, specifying the sum, it is certain enough as to amount. Barrett v. Wills, 4 Leigh 114, distinguishing Grays v. Hines, 4 Munf. 437.

In Action of Assumpsit.—In an action of assumpsit the declaration consisted of the common counts and three special counts, to which was demurrer overruled, genera lissue, plea of payments, with account, plea of set-off, with account and special plea in the nature of set-off. The verdict found for the plaintiff and assessed the amount of his damages, and also fixed the amount allowed the defendant on his set-offs, which was held free from confusion, so that proper judgment could be entered thereon. Smith v. Packard, 94 Va. 730, 27 S. E. Rep. 586.

In Action for Recovery of Personal Property.—A verdict in an action for the recovery of personal property must find the value of the property, and of each article sued for, as in the action of detainee. White v. Emblem, 43 W. Va. 819, 28 S. E. Rep. 761.

V. RENDITION AND RECEPTION OF VERDICT.

A. IN CRIMINAL CASES.—It has been uniformly held that it is absolutely necessary to a valid conviction that the prisoner shall be present in court when anything is done in his case in any way affecting his interests. State v. Greer, 22 W. Va. 811. See Sperry's Case, 9 Leigh 623; Hooker's Case, 13 Gratt. 763; Jackson v. Com., 19 Gratt. 666.

B. IN CIVIL CASES.—Parties cannot, by their consent, authorize a jury to render their verdict to the clerk, in the absence of the judge, and be discharged. If a verdict is so rendered, and the jury discharged, it is no verdict. B. & O. R. Co. v. Polly, 14 Gratt. 449. But in McMurray v. Oneal, 1 Call 246, it was held, if the agreement of parties that the jury may render privy verdict be substantially performed, it is sufficient.

VI. EFFECT OF THE GENERAL VERDICT.

A. GENERAL RULE.—The verdict of a jury is entitled to great respect, and should not be set aside even by the trial court, unless plainly against the weight of the evidence. Humphreys v. Valley R. Co., 100 Va. 749, 42 S. E. Rep. 893; Miller v. Ins. Co., 13 W. Va. 116; State v. Bowyer, 43 W. Va. 180, 27 S. E. Rep. 301; Miller v. White, 46 W. Va. 67, 33 S. E. Rep. 332; Whitehurst v. Com., 79 Va. 562; Jones v. C. & O. R. R. Co., 14 W. Va. 514.

And though the verdict be contrary to the instructions, yet, if there was no evidence to prove the case supposed by them, it will not be set aside. Smith v. Tate, 83 Va. 667.

1. ILLUSTRATION OF RULE.

a. In Civil Cases.

Determining Negligence of Parties.—Where a case involving the determination of the negligence of defendant, and the contributory negligence of the plaintiff has been fairly submitted to the jury, under proper instructions, their verdict cannot be disturbed unless it is plainly in violation of the law, or is without evidence to support it. Newport News, etc., R. Co. v. Bradford, 100 Va. 241, 40 S. E. Rep. 900.

Recovery of Money on Rescinded Contract.—And, in an action to recover back money paid on a contract which the plaintiff has treated as rescinded, the court will not set aside a verdict in favor of plaintiff, where the evidence shows that the conduct of defendant has been such as to amount to a rescission on his part, or to justify one on the part of plaintiff. Buena Vista Co. v. McCandlish, 92 Va. 297, 23 S. E. Rep. 781.

Where Instructions Are Inconsistent.—Where two instructions are inconsistent with each other, the verdict will be set aside, as it is impossible to tell whether the jury was controlled by the one or the other. Va. & N. C. Wheel Co. v. Chalkley, 98 Va. 66, 34 S. E. Rep. 976. See Richmond Traction Co. v. Hilderbrand, 98 Va. 22, 34 S. E. Rep. 888.

Where Evidence Inconsistent.—But, where the evidence is conflicting it cannot be said that, upon the whole case, no other verdict could have been found than that which was found. Va. & N. C. Wheel Co. v. Chalkley, 98 Va. 66, 34 S. E. Rep. 976.

b. In Criminal Cases.

Recommendation to Mercy.—Where a verdict finds accused guilty of a crime, the added recommendation of the accused to the mercy of the court has no legal effect. State v. Newman, 49 W. Va. 724, 39 S. E. Rep. 655.

Conviction on One Count, Acquittal on Others.—If there be three counts in an indictment, and the jury find a conviction on the second, saying nothing as to the other two, the accused stands acquitted on those two. Com. v. Bennet, 2 Va. Cas. 235. See Hawley v. Com., 75 Va. 847.

(i) Curing Errors.

(a) In Civil Cases.

(aa) When Cured.

Want of Similitur.—The want of a *similitur* shall not, after trial, vitiate the verdict. Brewer v. Tarpley, 1 Wash. 363.

Uncertainty in Allegations.—Action on covenant, in which the plaintiff agreed to serve defendant for a year, in consideration of a certain part of the grain made on the plantation, oats excepted, a declaration charging "defendant did not, at the close of the year, pay plaintiff such part of the grain made on the plantation," if bad for not setting out what crop was made, the defect was cured by verdict. Laughlin v. Flood, 3 Munf. 255.

Failure to Allege Performance of Conditions.—And a failure to allege the performance of a precedent

condition will be cured by verdict. *Bailey v. Clay*, 4 Rand. 346.

Omission to Lay Damages.—And so, the verdict cures the omission to lay damages in the declaration. *Stephens v. White*, 2 Wash. 208.

Misjoinder of Issues.—Where there is a misjoinder of issues, the defect will be cured by verdict. *Moore v. Mauro*, 4 Rand. 400, overruling, it seems, *Wilkinson v. Bennett*, 3 Munf. 314. See also, *Southside R. R. Co. v. Daniel*, 20 Gratt. 800; *White v. Clay*, 7 Leigh 68; *Mackey v. Fuqua*, 3 Call 19; *Boatright v. Meggs*, 4 Munf. 145; *Ray v. Clemens*, 6 Leigh 600; *Baylor v. B. & O. R. R. Co.*, 9 W. Va. 283; *Sweeney v. Baker*, 13 W. Va. 216; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 572; *Walden v. Payne*, 3 Wash. 1.

(bb) When Not Cured.

Failure to Allege Consideration.—Where the declaration does not allege a consideration, it is not such defect as may be cured by verdict. *Moseley v. Jones*, 5 Munf. 23.

Failure to Show Right of Action.—And, where in an action of debt the declaration not only shows the plaintiffs have no right of action, but that such right is in another and there is a verdict for plaintiffs. Such verdict is unavailing to cure the error. *Ross v. Milne*, 12 Leigh 204.

Averring Gist of the Action.—Nor will anything be presumed after verdict but what must have been necessarily proved from the matter stated in the declaration; therefore, total want of averment of a fact which constitutes the gist of the action will not be cured by the verdict. *Chichester v. Vass*, 1 Call 88.

Lack of Plea and Issue.—And if there be no plea entered nor issue made up, the defect is fatal, and any verdict rendered in such case will be set aside. *McMillion v. Dobbins*, 9 Leigh 422. See *Sydnor v. Burke*, 4 Rand. 161.

If All the Pleadings Faulty.—So, too, if all the pleadings, including the declaration, be faulty, the verdict will not cure the defects. *Link v. Walker*, 1 Wash. 135; *Stevens v. Tallaferrero*, 1 Wash. 155; *Totty v. Donald*, 4 Munf. 430.

Action on Assigned Bond.—And, if in debt on an assigned bond the declarations do not allege a failure to pay the money to the obligee and to each of the assignees, as well as to plaintiff, only charging a failure to pay to plaintiff, the defect will not be cured by verdict. *Braxton v. Lipescomb*, 2 Munf. 282. See *Buckner v. Blair*, 2 Munf. 336; *Green v. Dulany*, 2 Munf. 518.

Action against Administrator for Fraud of Decedent.—It is error to bring an action against the personal representative of a deceased vendor for the fraud and deceit of such vendor in a sale of a chattel to plaintiff, the cause of action having abated with the death of the vendor, and is not cured by verdict. *Boyles v. Overby*, 11 Gratt. 208.

Suing Contrary to Directions of Statute.—And where it is required that suit must be brought against the principal bank by its corporate name, it is error to sue the president and directors of a branch bank, and such error is not cured by verdict, founded on the general issue pleaded. *Mason v. Farmers Bank*, 12 Leigh 84; *Tompkins v. Branch Bank*, 11 Leigh 372.

(b) in Criminal Cases.

(aa) When Cured.

Verdict of Eleven Jurors, by Consent.—See monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

Objection to Juror.—An objection to a juror for incompetency is cured by verdict. *Poindexter v. Com.*, 33 Gratt. 766.

Irregularity in Charge of Clerk.—And, if there be

irregularity in the charge of the clerk to the jury, it is cured by verdict. *Rogers v. Com.*, 1 Va. Dec. 798.

Indictment for Rape.—So, too, if indictment for rape charges carnal knowledge of a female, instead of a woman child, the omission is cured by verdict. *Com. v. Bennett*, 2 Va. Cas. 335. See *Trimble v. Com.*, 2 Va. Cas. 148; *Com. v. Ervin*, 2 Va. Cas. 337; *Aldridge v. Com.*, 2 Va. Cas. 447.

Indictment of Insurance Agent.—And, if accused is indicted for keeping an office and doing business as agent for a named insurance company, and the indictment does not allege that the company is an insurance company, and for this the indictment is defective, such defect is cured by verdict. *Slaughter v. Com.*, 13 Gratt. 707.

VII. CONSTRUCTION OF VERDICT.

A. GENERAL RULE.—Verdicts of juries are to be favorably construed, and if the point in issue is substantially decided by the verdict, it is the duty of the court to mould it into form. *Lewis v. Childers*, 13 W. Va. 9. See *McMurray v. Oneal*, 1 Call 246; *Moody v. State*, 1 W. Va. 340; *Mann v. Bryant*, 12 W. Va. 519; *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. Rep. 190.

B. IN CIVIL CASES.

Pleas, Payment and Set-Off, Verdict for Gross Sum.—In an action of assumpsit the defendant pleads payment and files set-offs exceeding the amount demanded by the plaintiff, whereupon the verdict finds for defendant simply a gross sum. Such verdict must be interpreted as a finding that the set-offs of the defendant exceeded the amount of plaintiff's claim by the sum found. *Black v. Thomas*, 21 W. Va. 711.

C. CRIMINAL CASES.

Malicious Shooting.—On an indictment for malicious shooting one S., the verdict of the jury was, "we, the jury, find defendant not guilty of malicious shooting, as charged, but guilty of unlawful shooting, with intent, etc., and fix his term of confinement," etc. The verdict is to be read in connection with the indictment, and, therefore, sufficiently indicates the person shot. *Hoback v. Com.*, 28 Gratt. 922. See *Price v. Com.*, 77 Va. 394; *Wolverton v. Com.*, 75 Va. 911; *Canada v. Com.*, 22 Gratt. 899.

Taking No Notice of Some Charges.—Where a verdict finds the accused guilty upon some of the counts in an indictment, saying nothing of others, judgment of acquittal should be entered on those counts of which the verdict takes no notice. *Kirk v. Com.*, 9 Leigh 627. See *Page v. Com.*, 9 Leigh 688.

Meaning of "Twelve Months."—Where one is found guilty of a felony, and the jury fix his punishment at twelve months imprisonment, the term "twelve months" means one year. *Vandewall v. Com.*, 2 Va. Cas. 375.

VIII. AMENDMENT OF VERDICT.

A. GENERAL RULE.—Where the verdict returned is not in form, it is proper that it be amended, in open court, but only as to matters of not substance. *Porterfield's Case*, 91 Va. 806, 22 S. E. Rep. 352; *State v. Davis*, 31 W. Va. 390, 7 S. E. Rep. 24; *Com. v. Gibson*, 2 Va. Cas. 70; *Mills v. Com.*, 7 Leigh 751.

B. TIME OF AMENDMENT.—And, so, the court may, for good reason, return a jury to its room to further consider and amend, or alter, its verdict, at any time before it is received by the court and the jury discharged. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 310. See *Mills v. Com.*, 7 Leigh 751; *Com. v. Gibson*, 2 Va. Cas. 70; *B. & O. R. Co. v. Polly*, 14 Gratt. 449.

And it is held in *Sledd v. Com.*, 19 Gratt. 813, that the jury may amend their verdict at any time before they are discharged.

C. RULE ILLUSTRATED.

1. AMENDMENT BY COURT.

In Ejectment.—In an action of ejectment the jury found "for the plaintiff one cent damages," which it was proper for the court to amend, so that it read, "we, the jury, find for the plaintiff the lands in the declaration mentioned, and one cent damages." *McMurry v. Oneal*, 1 Call 246. See *Elliott v. Sutor*, 3 W. Va. 87. Compare *Low v. Settle*, 23 W. Va. 287; *Mann v. Bryant*, 13 W. Va. 519; *Paul v. Smiley*, 4 Munf. 468.

In Writ of Right.—And in a writ of right brought by several demandants the mise is joined on the mere right, and the jury find "for demandants," with the additional finding that "one of the demandants was dead before the institution of the suit, leaving children," which latter clause was held to be mere surplusage. *Garrard v. Henry*, 6 Rand. 110. See *Wells v. Garland*, 2 Va. Cas. 471; *Martin v. Ohio River R. Co.*, 37 W. Va. 349, 16 S. E. Rep. 589.

2. AMENDMENT BY THE JURY.

In Trial for Felony.—On a trial of an indictment for a felony, it is proper to allow the jury to retire and amend their verdict. *Fry v. Com.*, 82 Va. 334.

IX. SPECIAL VERDICT.

A. RULES GOVERNING.—In a special verdict the jury ought not to find the evidence and submit to the court to say whether certain facts are to be inferred from it; but should find the facts explicitly, and submit to the court the questions of law arising thereupon. *Henderson v. Allens*, 1 Hen. & M. 235; *Brown v. Ralston*, 4 Rand. 504; *McLean v. Copper*, 3 Call 367; *Blanks v. Foushee*, 4 Munf. 61.

And in *Hall v. Ratliff*, 93 Va. 331, 24 S. E. Rep. 1011, it is held, that, in a special verdict all the facts necessary to enable the court to determine whether or not the plaintiff is entitled to recover must be found with certainty. No facts can be inferred from those found. Where a verdict falls short of this it should be set aside. See *Henderson v. Allens*, 1 Hen. & M. 235.

1. QUESTION SUBMITTED MUST BE MATERIAL.—Also, in *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. Rep. 584, the court says, that a special question, unless material, should not be submitted to a jury. See *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155, 11 S. E. Rep. 1009.

Nor, as was held in *Vieth v. Hope Salt & Coal Co.*, 51 W. Va. 96, 41 S. E. Rep. 187, should two special questions covering the same enquiry be put to the jury, yet if one covering same matter of another be so drawn as to more definitely and pointedly inquire as to a particular matter controlling the case it should be given. See *Pen. L. T. & M. Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. Rep. 237; *Bess v. C. & O. Ry. Co.*, 35 W. Va. 492, 14 S. E. Rep. 234.

And no material fact, not found expressly, or by very evident implication, in a special verdict, can be supplied by intendment. *Tunnell v. Watson*, 2 Munf. 283.

Therefore, it is held to be an inflexible rule that the court, upon a special verdict, cannot infer other facts from those found. *Stribbling v. Bank of the Valley*, 5 Rand. 159.

a. Exception.—But in criminal and civil cases, when the intent is important to the decision of the case, the court may infer it from the facts found in a special verdict, though the intent be not found. *Stribbling v. Bank of the Valley*, 5 Rand. 159.

2. CERTAINTY OF FINDING.

a. The Rule.—If a special verdict be so uncertain as that the court cannot say for whom judgment

should be given, there ought to be a *verdict de novo*, otherwise if the verdict be not uncertain, but it merely shows plaintiff's case, or his title, to be defective. *Brown v. Ferguson*, 4 Leigh 37.

And so in a special verdict, if the facts formed make a case upon which the court may render a judgment upon the merits, the verdict is not defective because other facts exist which might have been found, and which would have made a different case requiring a different judgment. *Hunter v. Humphreys*, 14 Gratt. 287. See *Bolling v. Mayor*, 3 Rand. 563.

b. Rule Applied in Particular Instances.

(1) In Actions of Ejectment.

Verdict Aided by Clerk's Certificate.—Where a special verdict finds that a person having an estate in land conveyed the same by deed of trust of a particular date, which deed it finds was duly recorded, and sets forth the same in *hac verba* which verdict, aided by the clerk's certificate as to the time of recordation, was sufficient. *Pownall v. Taylor*, 10 Leigh 172.

Statute of Limitations and Time Excluded.—If a certain time has been by statute, excluded from the statutory period of twenty years, the special verdict must find that the defendant has had possession for the twenty years, exclusive of this time. *Clay v. Ransome*, 1 Munf. 454.

Ascertaining Time of Possession.—And in an action of ejectment the verdict should find whether the defendant, or those under whom he claimed, had or had not such possession of the land as would be sufficient for his defense in that action, whatever might be the state of the title. *Cropper v. Carlton*, 6 Munf. 277.

Ascertaining Time of Death.—So, too, in ejectment, the verdict should find the time of death of the person under whom the lessors of plaintiff might or might not have been entitled to the land in controversy, their title depending on the time of his death. *Cropper v. Carlton*, 6 Munf. 277.

Finding Livery of Seisin.—In ejectment for a lot of land, the verdict should find, precisely, whether there was livery of seisin; barely finding the memorandum endorsed upon the deed is but evidence of the fact, and insufficient. *McLean v. Copper*, 3 Call 367. See *Brown v. Ralston*, 4 Rand. 504; *Henderson v. Allens*, 1 Hen. & M. 235.

Recovery of Less than Sued for.—A plaintiff in ejectment may recover less land than the quantity stated in his declaration; but if the jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for, and do not specify the boundaries of such part, with such precision as that possession thereof may be delivered, such verdict is not sufficient. *Clay v. White*, 1 Munf. 162.

(2) In Writ of Right.—A special verdict may be found in a writ of right. *Shaw v. Clements*, 1 Call 429. See *Jones v. Jones*, 1 Call 466; *Bolling v. Mayor*, 3 Rand. 563.

What Verdict Must Find.—But, a special verdict in writ of right, where the defense is the statute of limitations, must find either an actual disseisin or ouster of the demandants, or those under whom they claim, or facts which, in law, constitute such actual disseisin or ouster. *Purcell v. Wilson*, 4 Gratt. 16.

(3) Action on Protested Bill of Exchange.—Where, in an action on a protested bill of exchange, the jury found "that the bill with three endorsements thereon, two of which were erased, was duly protested, and that notice thereof was given to defendants at a named date. If this be a reasonable notice, then the verdict is for plaintiff, others wise for defendant." The court held that it was

"no objection to a verdict that enough is not found to answer the purpose of one of the parties, provided what is found be clearly stated," which was the case here. *Stott v. Alexander*, 1 Wash. 331.

(4) *In Action on Bond.*—And, in an action on bond and plea of usury, it is sufficient if the special verdict find facts amounting to usury, though not directly finding the agreement was usurious. *Gibson v. Fristoe*, 1 Call 62.

(5) *Fixing Liability for Assault.*—Also, finding in a special verdict that L and B were concerned in the same affray for which a judgment was rendered against B is a sufficient finding that L and B were jointly guilty of the same assault and battery. *Wilkes v. Jackson*, 2 Hen. & M. 355.

(6) *On Question of Fraud.*—And it is not necessary in a special verdict, that fraud be found expressly, *eo nomine*, if facts amounting to fraud, in legal construction, be found. *Robertson v. Ewell*, 3 Munf. 1.

(7) *In Action for Rent.*—But, where in a proceeding to recover rent due upon a perpetual lease granted out of land, with right of distress and entry if the rent is not paid, a special verdict finding the entry of the grantee of the rent upon the land, and the holding by him and those claiming under him for forty-three years; but not finding that the original entry was under the right of entry given by the deed, or that the parties held adversely, nor any facts from which such an entry or such a possession results as a conclusion of law, is insufficient. *Turner v. Smith*, 18 Gratt. 880.

(8) *In Action of Detinue.*—And, in an action of detinue for slaves, if the jury find a special verdict, and, as to some of the slaves, omit to state a circumstance which is necessary to ascertain whether the plaintiff is entitled to them or not, it is insufficient. *Robinson v. Brock*, 1 Hen. & M. 212; *Tunnell v. Watson*, 2 Munf. 283.

(9) *In Action on Note.*—So, too, a verdict submitting to the court, for its judgment as to the law, certain documents and other evidence oral and written, without finding the facts established thereby, is too uncertain to found judgment upon. *Blanks v. Foushee*, 4 Munf. 61. See *Henderson v. Allens*, 1 Hen. & M. 235.

X. SUBJECT TO COURT'S OPINION.

A verdict may find generally for either party, dependent upon a single point of law presented to the court, although such verdict is not, strictly, a special verdict. *McMichen v. Amos*, 4 Rand. 137. See *James River & Kanawha Co. v. Adams*, 17 Gratt. 427.

So, if in an action of waste, the verdict finds for the plaintiff and assess damages, but subject to the opinion of the court, whether, on the facts stated, the plaintiff can maintain the action, it is a general verdict. *Dejarnette v. Allen*, 5 Gratt. 500. See *McMichen v. Amos*, 4 Rand. 136.

And, on motion for a new trial on the ground that the verdict is contrary to law and evidence and the damages excessive, if the plaintiff release such part thereof as, in the court's opinion ought to be released, and thereupon judgment is entered for the residue, such judgment not appearing unreasonable, should be sustained. *Preston v. Bowen*, 6 Munf. 271. See *James River & Kanawha Co. v. Adams*, 17 Gratt. 427; *Vinal v. Core*, 18 W. Va. 63.

XI. DISCRETION AS TO NATURE OF VERDICT.

The jury has the discretion to say, when it finds a prisoner guilty of murder in the first degree, he shall be punished by imprisonment in the penitentiary. *State v. Greer*, 23 W. Va. 809.

The Commonwealth v. Scott and Thompson.

March, 1826.

*Court of Appeals—Jurisdiction.**—The Court of Appeals has no jurisdiction in the case of an information against the members of an unchartered bank, for a violation of the law of 1816, 2 Rev. Code, 111, because that Act is a penal law.

The Attorney General filed an information in the Richmond Chancery Court, against John C. Scott and William M. Thompson, under the Act of 1816, 2 Rev. Code, 111, the one as president, and the other, as treasurer of an unchartered banking company, in Culpeper county.

The information charges, that there exists, at this time, at Culpeper Court-house, or elsewhere in the said county of Culpeper, an association entitled, or styling themselves, the Culpeper manufacturing and agricultural association, or some such name, &c. and that the said association, although they have no charter or law, incorporating the said 144 company *with authority to trade as a bank, are in the constant habit, and have been for a considerable time, of discounting notes, bills, or other securities, for the payment of money or other valuable thing, and issuing notes, drafts or bills, payable to order or bearer, or payable to the order of some agent of the said association, &c. and for the purpose of dealing, trading, and carrying on business as a bank, &c.: that the said association is conducted under the direction of John C. Scott, who acts as president, and William M. Thompson, who acts as treasurer thereof, and who sign the notes issued by the said association, under those designations; but that the Attorney General does not know who are the other members of the said association. The information calls on the defendants to disclose, on oath, whether the said association does not discount bills, notes or bonds, or other securities, and upon what terms? Who are the members of the said association? What is the amount of its capital, and of what does it consist, &c? It prays that the defendants may be compelled to exhibit the original articles of association, and the journal of their proceedings, and all their books and papers: that they be decreed to pay up the capital stock of the association, for the benefit of the Commonwealth, &c.

The defendants pleaded, that on the 7th day of January, 1809, an Act of Assembly was passed to incorporate the Culpeper Agricultural and Manufacturing Society: that in pursuance of the said Act, the said company was duly constituted, and still continues in being, and is a body corporate duly constituted and appointed, by virtue of the said Act; and, not confessing or admitting that they have done any act or deed, in violation of the Act of Assembly aforesaid, they say that all their actings and doings, in relation to the issuing of notes, or any of the matters set forth in the bill, have been done and performed as officers of the said institution, duly char-

*The principal case was cited in *White v. King* & *McCall*, 5 Leigh 788.

See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 233.

tered and constituted by the Act of Assembly aforesaid.

The Attorney General replied generally, and the plea was set down for argument.

145 *The Chancellor, thinking that this case did not come within the Act of Assembly relating to unchartered associations, which did not apply to acts of misconduct in a chartered company, dismissed the information. From this decision, the Attorney General appealed.

The case was argued in this Court, by the Attorney General, for the appellant, and Leigh, for the appellee.

It was said, on behalf of the appellant, that this case came within the first section of the Act against unchartered banking companies; 2 Rev. Code, 111; for although this company had a charter, it was for a different purpose, and a charter for one purpose cannot protect acts not contemplated by the charter. The association was, as to the powers of banking, an unchartered institution. This case comes within the spirit, as well as the letter of the law. It is true, that penal laws are to be construed strictly; but laws which concern the public good, are to be liberally interpreted. 6 Bac. Abr. 388, 391, Tit. "Statute."

The second section gives the Chancery Court jurisdiction: and the only question is, whether the law itself is constitutional. That Court exercises powers, as penal in their nature as this, in numerous instances; as in the case of sequestration, &c. 2 Com. Dig. 4, W. 25. Charitable Corporation, &c. v. Sutton, 2 Atk. 400, which proves that Chancery has jurisdiction of a trust, whether public or private; and here the appellees held their capital stock, in trust for the Commonwealth. 2 Bac. Abr. 139, Tit. "Courts of Chancery." Sparks v. Liverpool Water Works, 13 Ves. 428. Tomkies v. Downman, 6 Munf. 557. Wilson v. Spencer, &c. 1 Rand. 76.

The cases of *Bedinger v. The Commonwealth*, 3 Call, 461, and *The Commonwealth v. Broadbuss*, 6 Munf. 116, may be urged on the other side, to prove that the Chancery Court has not jurisdiction. But, those cases were decided on the ground, that the law had not given that Court jurisdiction. 146 diction, "not that the Legislature could not give it. They were so decided, because amotion from office, and a sentence of separation, did not come under the idea of "debt or damages."

On the part of the appellee, it was not contended that it was not competent to the Legislature, to give to this Court criminal jurisdiction; but it was contended, that in this case, they have not conferred it. The proceeding in this case is clearly criminal. The offence is called a misdemeanor. If the construction put on the law is correct, it would be a violation of the Bill of Rights; because it compels the party accused to make a discovery of his offence, and deprives him of all the other safe-guards provided by that fundamental law. The real meaning of the law is, (and the only one which would make it constitutional,) that the corporations are

first to be convicted by a regular proceeding at common law, and then the Chancery Court is to exercise its powers. 2 Bac. Abr. 31, Tit. "Corporations," G. Wherever this Court enforces a fine, it is only incidental to private redress; but where it is only a public offence, as in this case, it is not within its jurisdiction.

As to the argument that this is a trust, the substance of a thing cannot be changed by the terms in which it is expressed. It is certainly, in all its features, a forfeiture and a punishment.

The doctrine contended for, would punish the innocent as well as the guilty. The Commonwealth would seize on the property of those members who resisted this perversion of the lawful purposes of the corporation, as well as of those who promoted it. Even the property of infants and widows, who were wholly innocent of any evil intent, would be confiscated. But, the law applies expressly only to those companies which are formed for the purpose of dealing as a bank. The Act of 1808-9, ch. 56, confirms this idea; the fifth section of which, applies to corporate bodies chartered for other purposes.

147 *But, the cases of *Bedinger v. The Commonwealth*, and *The Attorney General v. Broadbuss*, are conclusive as to the jurisdiction of this Court. In those cases, this Court refused to entertain the Appeals, on the express ground that they were criminal prosecutions.

March 3. JUDGE COALTER.

This is an information filed in the Chancery Court at Richmond, by the Attorney General, against Scott and Thompson, (the one as president, and the other as treasurer, of an unchartered banking company,) under the Act of 1816, made to prevent the circulation of notes emitted by unchartered banks.

The information was dismissed by the Chancellor, on a plea in bar filed by the defendants; and the Attorney General appealed from that decree to this Court.

The first question is, whether this is a criminal prosecution, and therefore not within the jurisdiction of this Court, according to the cases of *Bedinger v. The Commonwealth*, 3 Call, 461, and *The Attorney General v. Broadbuss and wife*, 6 Munf. 116.

The first section of the Act above referred to, declares, "that it shall not be lawful for any association or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed, within the limits of this Commonwealth, for the purpose of discounting notes, bills, &c. and issuing notes, bills, &c. for the purpose of dealing, trading or carrying on business as a bank, to commence or continue the discounting of any notes or bills, &c. or the issuing of any notes, drafts or bills, &c. and every member, officer or agent, of any such company or association, that may so commence or continue such discounting or issuing, &c. shall be held and taken to be guilty of a misdemeanor, and upon conviction thereof, on in-

dictment, information or presentment, shall be liable *to be fined at the discretion of a jury, in a sum not less than \$100, nor more than \$500; and if any such company or association, or any president, manager, cashier or other officer, or agent, &c. shall pay out, deliver, put in circulation, or issue, any note, draft, bill, &c. each member, officer, or agent thereof, shall be, in like manner, liable to the same penalty."

The second section declares, "that all the capital stock of any association or company, trading or discounting paper, or issuing notes, in violation of this Act, and all the capital stock subscribed to such association or company, shall be held in trust for the benefit of the Commonwealth, and it shall be the duty of the Attorney General, whenever he shall be informed of the existence of any such company or association, to institute a suit in the Superior Court of Chancery, in the Richmond district, in behalf of the Commonwealth, for the purpose of recovering the capital stock aforesaid. In such suit, it shall be lawful to make all or any of the members of such company or association, or any officer, agent or manager thereof, parties defendant, and to call upon and compel them, or either of them, to exhibit all their books and papers, and an account of all such matters and things as may be necessary to enable the Court to make a decree, in pursuance of this Act. The members of any such association or company, made defendants in such suit, shall be held severally liable to the Commonwealth for their respective proportions of the capital stock, &c. at the institution of the suit, or at the time of the decree, &c. and the Court shall decree against the defendants, respectively and severally, the amount, &c. to be levied of the respective goods, chattels, lands and tenements of such defendants: Provided, that no disclosure, made by any party defendant to such suit, and no books or papers exhibited by him in answer to the bill, &c. shall be used as evidence against him in any motion or prosecution against any such defendant to such suit, for the recovery of any penalty or the infliction of any punishment prescribed by this Act."

149 "The third section avoids all notes, &c. discounted contrary to the provisions of the Act, and provides, that any person who may pay money in virtue of such note, &c. may recover it back, &c. and executors, administrators, &c. are not to be allowed for any payment made on such illegal contract.

By the fourth section, any person who may sign, countersign, or endorse, as president, manager, or cashier, or by any other name or designation, &c. any note, &c. shall be liable, on motion, &c. before any Court of Record, &c. to a judgment in favor of the Commonwealth, for threefold the amount of any such note, &c.

The information filed in this case, sets out the first section of the Act aforesaid, and also the second section. It then goes on to charge the existence of an association, styling themselves the Culpeper Manufacturing and Agricultural Associa-

tion, not having a charter, with authority to deal as a bank, and who are, and have been in the habit of discounting, &c. contrary to the said Act, &c. managed by Scott, as president, and Thompson, as treasurer, &c. but that the attorney does not know who the other members are. He makes them defendants, calls on them to answer, on oath, whether they do not act as president and treasurer of said association, and interrogates them specially as to all their actings and doings, in discounting bills, issuing notes, &c. and also, to discover who the other members are: that they exhibit the original articles of association, the journal of their proceedings, and all their books and papers, which will give the Court full information, &c. and that they be decreed to pay the capital stock, &c. and such other decree, &c.

The defendants plead, in substance, that on the 7th of January, 1809, an Act of Assembly was passed, (to a copy of which they refer, but which is not in the record,) to incorporate the Culpeper Agricultural and Manufacturing Society, in pursuance of which the said company was duly constituted, and still continues, &c.: that the said corporate body is one and the same with the company and association
150 *named in the bill, and no other; and by protestation, not confessing or admitting that they have done any act or deed, in violation of the Act of Assembly set forth in the information, say, that all their actings and doings, in relation to the issuing of notes, or any of the matters set forth in the bill, have been done and performed as officers of the said institution, duly chartered and constituted, by force of the Act of Assembly first referred to; and they plead these matters in bar of the information, &c.

This plea seems to admit the issuing of the notes, &c. as charged, but alleges that it was done by a corporate body, then in existence, under the Act referred to in the plea, and so not by an association formed for the purpose of discounting notes.

What may be the merits of this defence, it is not now proper to decide; because, if this is a criminal prosecution, of which we have no jurisdiction, then I hold we ought to give no opinion on the subject, according to the decision of this Court, in Dance's Case, 5 Munf. 349; all such cases belonging exclusively to other tribunals.

Every section of the Act seems to me to be highly penal; and the Attorney General cannot proceed, until, either by the disclosure of the parties, or other evidence, or both combined, he convicts them of these acts, which are declared by that section to be a misdemeanor, punishable by a heavy fine. His information would contain no ground of claim to the capital stock of the association, nor could he get a decree therefor, except by a charge and proof of that misdemeanor; and though the disclosure made by the parties defendant, or any books or papers exhibited, are not to be used as evidence against them, in any motion or prosecution under the Act, yet a recovery in this suit is no bar to any such motion or prosecution, if it can be supported on other proofs; and such dis-

closures, books, &c. may lead to the disclosure of other evidence, which would convict them of some of the offences punishable by the Act.

But, it is not the first section only, as it appears to me, that is penal; almost every one is so. It is true, that many
151 *of them are penalties, which, like those of the Act to prevent usury, may be enforced in civil suits; as avoiding the notes, and the recovery back of the money, under the third section; the annuement of the contract of association itself, between the parties; the recovery of debts against them, in a summary way, though they cannot recover, and though they are incapacitated even to sue, as provided in the 5th, 6th and 7th sections.

But, the 4th section is highly penal as to the parties defendant, in this case; and their conviction under it may be produced, in consequence of a knowledge of parties, &c. obtained by the proceedings in this suit.

It is said that the second section is not penal, within the meaning of the cases, in which we have refused to take jurisdiction, because it merely creates a trust for the Commonwealth, of the capital stock, &c. But, is not this a declaration of a forfeiture of that stock to the State, for a crime against the State, and which crime must be proved, and that on the disclosure of the party defendant, and by a proceeding in Chancery? It seems to me to be a heavy penalty; and though it is not called a fine or forfeiture, it is as much so, as if it had been said, "he shall forfeit and pay to the Commonwealth, the amount of his stock." It is as much a fine or forfeiture, as it would have been, had no other sanction or penalty been declared for the commission of this misdemeanor. Surely an accumulation of penalties, which shews rather the enormity of the offence, than that this was not intended as a punishment of it, cannot change the nature of this penalty or forfeiture.

It seems to me, therefore, to be a case clearly within the principles laid down by this Court, in the case of the Attorney General v. Broadus and wife, above mentioned, and that the appeal must be, consequently, dismissed.

JUDGES CABELL and GREEN concurred, and the appeal was dismissed.*

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*Hatcher v. Lewis.

March, 1826.

Negotiable Paper—Joint Action against Drawer and Endorsers—Office Judgment—Writ of Enquiry.—Where a joint action is brought against drawer and endorsers of a negotiable note, an office judgment cannot be confirmed against all or either of the defendants, without a writ of enquiry.

*The PRESIDENT and JUDGE CARR, absent.

+**Negotiable Paper—Joint Action against Drawer and Indorser—Office Judgment—Writ of Enquiry.**—In *The James River, etc. Co. v. Lee*, 16 Gratt 428, it is said: "In *Hatcher v. Lewis*, 4 Rand. 152, a joint action of debt was brought against drawer and indorsers of a negotiable note, and it was held that an office judgment could not be confirmed against all or either of the defendants without a writ of inquiry." See principal case also cited in *Hollingsworth v. Milton*, 8 Leigh 52.

See further, monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 623.

Same—Same—Bail—Demand as of Right.—In such an action, bail cannot be demanded as of right, but can only be obtained from a Judge or Justice of the Peace, on proper affidavit.

Judgment by Default—Statute of Jeoffails.—The Statute of Jeoffails, has no effect upon a judgment by default, for want of appearance.

Declaration—Writ—Demands in One and Not Other.—A demand of interest in the declaration, which is not claimed by the writ, is not erroneous; but it is error to claim in the declaration, costs of protest, when those costs are not demanded in the writ. This error may be taken advantage of, where the judgment is by default.

Notes—Transfer—Averment.—Quære, what averments of the transfer of a note, and of demand and notice, are sufficient?

Charles Lewis, brought an action of debt upon a protested negotiable note, in the Superior Court of Campbell county, against Benjamin Perkins, John Moore, Archibald Hatcher, James W. Dibrell and David Saunders, Jr. The writ demands \$1395 59, and \$500 damages; but does not demand interest, nor the costs of protest.

The declaration charges, that Perkins executed his promissory note to Moore, for \$1395 59, negotiable and payable &c. that Moore, Hatcher, Dibrell and Saunders, successively endorsed the note; of which the plaintiff became legally possessed, for a fair and valuable consideration: that the several endorsers had notice of these assignments as they occurred: that the note was duly protested as to the drawer and endorsers thereof, at the Office of Discount and Deposit of the Farmers' Bank at Lynchburg, of which protest the drawer and endorsers had notice; by reason whereof, the defendants became jointly and severally bound to pay to the plaintiff, the said sum of \$1395 59, with interest &c. and \$4 03, as charges of protest.

The endorsement on the writ was in these words: "an action of debt upon a protested negotiable note. No bail required."

The writ having been served on Perkins, Hatcher, Dibrell and Saunders, (Moore being returned, "no inhabitant,")

153 *and they not appearing, a conditional order was entered against them for \$1395 59, with legal interest thereon, and \$4 03, which judgment was afterwards confirmed, "unless they do appear at the next Superior Court of Law to be holden for this county, find special bail, and plead to issue." The defendants failing to appear according to the terms of the judgment, it was confirmed.

At the succeeding term of the Superior Court, the defendants Dibrell, Saunders and Hatcher, moved the Court to set aside the office judgment, so far as it affected them, and for permission to file a plea of nil debet, and one of usury, which the Court refused, unless they would give

+**Bail—Right to Demand.**—See principal case cited in *Hawthorn v. Hunter*, 8 Leigh 414.

***Judgment by Default—Statute of Jeoffails.**—When a judgment is obtained by default, the statute of Jeoffails has no effect on such judgment, and the appellate court will look into the writs and all other proceedings. *Laidley v. Bright*, 17 W. Va. 791, citing principal case. To the same effect, the principal case is cited in *Long v. Campbell*, 37 W. Va. 609, 17 S. E. Rep. 198.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Interest.—To the point that interest follows the principal as the shadow the substance, the principal case is cited in *McVeigh v. Howard*, 87 Va. 604, 13 S. E. Rep. 81.

special bail; the plaintiff asking, as of right, that such bail should be required; the Court being of opinion, that the plaintiff might legally require bail from the defendants, without cause shewn. To this opinion, the defendants excepted.

Hatcher, obtained a Supersedeas.

Wickham, for the appellant, referred to the case of Metcalfe v. Battaille, Gilm. 191, as decisive of the question, whether a writ of enquiry was necessary in this case. This was not a note for the payment of money, within the meaning of the law. He also referred to the case of Laporte v. Dunlops, 1 Hen. & Munf. 22. This was not a case in which bail could be required as of right. 1 Rev. Code, 499, sec. 42; 43.

The Attorney General, for the appellee, contended, that bail, may of right, be demanded of principal and endorsers, under the 1 Rev. Code, 78, which places notes negotiable at the Bank, on the footing of foreign bills of exchange; and the law merchant considers every endorser as a new drawer. The same argument proves, that a writ of enquiry is not necessary.

154 *JUDGE COALTER delivered the opinion of the Court.*

The case of Metcalfe v. Battaille, Gilm. Rep. 191, if correctly decided, is decisive of one point in this case, to wit: that a writ of enquiry was necessary, and that alone is sufficient to reverse the judgment. Although that case was decided by a bare Court, yet it was an unanimous opinion, and therefore a binding precedent, as much as any other. But it was said, that point was not made in the argument, and may have been a hasty opinion. I have looked into my notes of the argument, and find the point was made and answered nearly in the way that has now been attempted. But, surely, that case must be sound law. The Statute, giving a joint action, was neither intended, nor could it vary, the nature of the contracts of the parties. It merely gave a joint action on several contracts. Several suits may still be prosecuted, as before. In a several suit against one endorser, all the matters, posterior to the endorsement, which are in pais, and which must be performed, in order to entitle the plaintiff to his remedy against the endorser, are things of which the clerk can take no cognizance. Suppose A. gives his note to B. for \$100, payable on a given day, provided B. on or before that day, deliver him a certain horse. He avers the delivery of the horse, and produces a notarial certificate that he had done so. Would this authorise an office judgment for the \$100? In an action of debt on a note directly engaging to pay a sum of money, the note itself contains full evidence of the plaintiff's right of action. But the endorsement of a note does not shew the demand, protest and notice, which are necessary to subject the endorser. They are substantive matters dehors the endorsement, and must be averred and proved. On this ground, that case was decided; and there can be no doubt of the correctness of

that decision. In a suit against the drawer alone, a judgment might be rendered
155 against *him, without a writ of enquiry; but when he is sued with the endorser, no judgment can properly be given finally against him, until a final judgment is also given against all the defendants.

The next enquiry is, whether the Court erred in refusing to allow the defendants, the endorsers, to appear and plead without giving special bail; although no cause was shewn, on the part of the plaintiff, why bail should be required. Independent of the question, whether bail was demandable of right, the fact is, that the plaintiff did not demand it. The writ does not state whether the defendants are makers, or endorsers, or both; they may be, for aught that appears from it, all endorsers, or all makers, and the suit by the payee; or the plaintiff may be a remote endorsee, suing both maker and endorsers. The endorsement is simply in these words: "An action of debt on a protested negotiable note. No bail required."

The Act of Assembly, 1 Rev. Code, 499, requires, that "when the plaintiff may of right demand bail, he shall endorse the true species of action in such manner, that his title to bail will appear thereby, and shall also endorse that bail is required;" and the 50th section, p. 501, provides, that "in any personal action, in which bail shall not have been required, the Court may, at any time before final judgment, for good cause shewn, rule the defendant to give special bail, &c." The law makes no distinction between cases in which bail might have been required, but was not so required, and cases where it could not have been required, and therefore was not. If it was not, in fact, required, the party had an equal right to appear without giving special bail, unless required by the Court, for good cause shewn, whether it was the one case, or the other. The case, then, falls not only within the letter, but the spirit, of the law.

But it is said, that the exhibition of the note itself, endorsed by the defendants, was good cause. This argument would be more plausible, if the plaintiff could
156 have demanded *bail of them, as a matter of right, which will be considered hereafter. But, is it a sound interpretation of the law, even in a case of that kind, when no bail has in fact been required; and when the party, not expecting bail to be required, has employed counsel to appear for him, and has put into his hands full proof of payment, that the plaintiff, without further cause, and by mere caprice, shall require bail when a plea is offered? His own endorsement shews, that at one time he did not think bail necessary; but it may afterwards become necessary, and if it does, he ought to shew it. In Dunlops v. Laporte, 1 Hen. & Munf. 22, it was contended, that the defendant could only set aside the office judgment, by the very words of the law, on giving good special bail: that Laporte's not being excepted to as appearance bail, was no proof that he was good special bail. The plaintiff might elect not to be delayed by

*The PRESIDENT and JUDGE CABE, absent.

excepting to him, and he may have become insolvent since. But the Supersedeas was unanimously refused. The principles of that case fully support the position above taken.

But, could the plaintiff require bail of the endorsers as a matter of right? The 43d section of the Act above referred to, provides, that in actions of debt, founded upon any writing obligatory, bill or note in writing, for the payment of money or tobacco, &c. the plaintiff may, of right, demand bail, &c. But, an endorsement of a note is not a note in writing for the payment of money, within the meaning of the Act, as has been decided in *Metcalf v. Battaile*, above mentioned. It is a collateral undertaking, and the liability of the parties depends as much upon matter dehors that endorsement, and posterior thereto, as in the case of an assignment of a bond or ordinary note. Non constat, because the party has endorsed, that he owes any thing. The endorsement itself ascertains no demand. And so in *Ruffin v. Call*, 2 Wash. 181, it was decided, that in an action of debt on a bond with collateral condition, the judgment against the Sheriff, for not returning appearance bail, was erroneous. The party, then, could *only obtain bail of the endorsers, in this case, from a Judge or Justice of the Peace, under the 44th section of the Act, on proper affidavit, &c. and of course, ought to have shewn equal cause for ruling them to give special bail.

But there are also other errors in this case. It being a judgment by default, for want of appearance, the Statute of Jeofails has no effect upon it; and the Court must look into the writ, as well as all the other proceedings.

The demand for interest in the declaration, which is not claimed in the writ, is no objection; since, by the Statute in that case provided, the interest follows the principal as the shadow does the substance. But here, the declaration claimed, and the judgment gives, \$4 03, the costs of protest, as a part of the debt, and which is not claimed in the writ.

There might perhaps, also, be serious objections to this declaration, for want of proper averments of the transfer of the note from one defendant to another, and finally to the plaintiff, thereby shewing his right to sue, as every plaintiff must; and also, whether a sufficient demand or notice has been set out. But it has not been considered necessary to investigate these matters.

The last objection above taken, shews that the declaration, though it might have being cured by a plea and verdict, in that respect, being variant from the writ, which is part of the record in an office judgment for want of appearance, is bad; and that consequently, on that ground also, no judgment could have been entered on it.

The writ, however, is good. The judgment must therefore be reversed, and the proceedings back to the writ set aside, and the cause sent back, to be sent to the Rules for further proceedings.

158 **Dickinson, Adm'r &c. v. M'Craw*.
March, 1826.

Foreign Administrator—Right to Sue.—An administration granted in another State, does not give the administrator appointed there, a right to sue jointly with an administrator appointed in Virginia.

Attachment Bond—Action on—What Necessary to Justify.—In an action on an attachment bond, by which the obligor was bound to pay all costs and damages, which might accrue to the obligee, in consequence of suing out the attachment, it is not necessary that they should be previously assessed in some other action, to justify an action on the bond.

Executors—Attested Certificate of Probate—Evidence.—The certificate of probate or of administration granted by a Court of this State, and attested by the clerk, will enable the executor or administrator to act, and may be given in evidence in any Court of this Commonwealth.

Attachment Bond—Action on—Declaration—Allegations—Sufficiency of.—In an action on an attachment bond, it is not sufficient to allege in the declaration, that the defendant "did not pay all such costs and damages as have accrued &c." but it must be expressly averred, that costs and damages had been actually sustained.

Martin Dickinson, administrator with the will annexed of Catherine Thompson, deceased, brought an action of debt against Robert Hammock and James M'Craw, in the Superior Court of Law for Grayson county. It does not appear that Hammock was ever served with process, and the suit was prosecuted against M'Craw alone.

The action was founded on an attachment bond, which had been executed by the two defendants jointly, by which they undertook to pay to Catherine Thompson, "all such costs and damages as may accrue for wrongfully suing out a certain attachment then and there obtained," (viz: in the county of Surry in the State of North Carolina,) "by the said Robert Hammock against the said Catherine." The breach stated in the declaration is, "that the said defendants did not pay the said Catherine in her life-time, or the plaintiff since her death, all such costs and damages as have accrued for wrongfully suing out said attachment, &c." The plaintiff concludes with making profert of his letters of administration with the will annexed of the said Catherine, "whereby it fully appears, that he is the administrator, &c."

The defendant M'Craw filed a general demurrer to the declaration. He also craved oyer of the letters of administration *with the will annexed, &c.

which were only a certificate of the clerk of Grayson county, that Martin Dickinson had qualified as administrator &c. of Catherine Thompson, deceased, and given bond and security, according to law. The defendant filed a second plea, that, at the time of commencing this action, the

***Foreign Administrators—Right to Sue and Be Sued.**—In *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 650, 22 S. E. 99, it is said: "A foreign personal representative cannot sue or be sued outside the state granting him authority. *Hull v. Hull*, 26 W. Va. 15; *Vaughan v. Northup*, 15 Pet. 1; *Bart. Ch. Prac.* 162; *Dickinson v. McCraw*, 4 Rand. 158; *Story, Conf. Law*, § 513; *Dixon v. Ramsay*, 3 Cranch 319; *Fenwick v. Sears*, 1 Cranch 259; 1 Lomax 121; 1 Rob. Prac. (new) 161; *Andrews v. Avory*, 14 Gratt. 230; 1 Lomax 142; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Fugate v. Moore*, 86 Va. 1045, 11 S. E. Rep. 1063. The fact may be pleaded in abatement or in bar. *Noonan v. Bradley*, 9 Wall. 394."

See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6. The principal case is also cited in *Durkin v. Exchange Bank of Virginia*, 3 Pat. & H. 300.

plaintiff was not the sole administrator with the will annexed, of Catherine Thompson, deceased, but that one Elijah Harris, was also administrator, &c. by letters of administration granted to him, by the County Court of Surry in North Carolina; by virtue of which, the said Elijah became a joint administrator with the plaintiff, having full power to sue in the present action, together with the plaintiff; and that the latter ought not to sue alone.

The third plea alleges, that no damages had been legally assessed or ascertained by suit against the said Robert Hammock, so as to enable the defendant or the said Robert, to pay the same, according to the tenor and effect of the bond.

The fourth plea is nearly to the same effect as the second.

The fifth plea, after craving oyer of the letters of administration, objects that the certificate above mentioned, gives no authority to the plaintiff, to maintain this action.

The plaintiff demurred to the three last pleas; and the defendant joined in demurrer.

The Court gave judgment for the defendant on the demurrers; and the plaintiff appealed.

Wickham, for the appellant, contended that the declaration was good, under the authority of *Craghill v. Page, &c.* 1 Hen. & Munf. 446. *Lane v. Harrison*, 6 Munf. 573.

The second plea is not before the Court, as the demurrers did not apply to it.

The third plea is bad, because, in a suit on a bond with a collateral condition, it is not necessary to ascertain the damages by a previous suit against the principal.

160 *The fourth plea is clearly bad, because an administration in another county has no authority in this. *Dickson v. Ramsay*, 3 Cranch, 319. *Fenwick v. Sears*, 1 Cranch, 259. *Hilliard v. Cox*, 1 Salk. 37. *Burnley v. Duke*, 1 Rand. 108.

As to the fifth plea, the certificate of the clerk of letters of administration, having been granted, was sufficient under our Acts of Assembly. 12 Hen. Stat. at Large, 148.

No Counsel for the appellee.

JUDGE CABELL pronounced the opinion of the Court.*

The Court is of opinion, that the second plea is bad; for, the administration in North Carolina did not give the administrator appointed there, a right to sue jointly with the administrator appointed in Virginia.

The third plea is also bad; for, if any damages had been sustained, it was not necessary that they should be previously assessed in some other action, to justify an action on the bond.

The fourth plea is also bad. The administration in North Carolina gave no right whatever to sue in this State; much less did it destroy the right of the administrator appointed in Virginia, to sue here.

The fifth plea is not less free from objection. Since the Act of 1785, 12 Hen. Stat. at Large, 148, the certificate of pro-

bate or of administration granted by a Court of this State, and attested by the clerk, will enable the executor or administrator to act, and may be produced or given in evidence in any Court within this Commonwealth, and be as effectual as any probate or letters of administration, made out in due form.

But the Court is of opinion, that the declaration also is defective. The action was upon an attachment bond, the 161 *condition of which was, that the defendant should pay all costs and damages that might accrue from wrongfully suing out the attachment. The declaration avers, that the defendant "did not pay all such costs and damages as have accrued, &c." But, there is no averment that the attachment was wrongfully sued out, or that any costs and damages had been sustained. The mere allegation that the defendant had failed to pay the costs and damages that had accrued, is not a sufficient foundation for inferring that costs and damages had been actually sustained. A direct averment was essential.

Upon the principle, therefore, of going back to the first fault, judgment was rightly entered for the appellee, on all the demurrers, and is therefore affirmed.

Sydnor v. Burke and Wife.

March, 1826.

Record—Amendment by Court.—It is error in a Court, to amend a record, after the Term at which judgment was rendered.

Same—Same at Bar.—Therefore, if the record omits to state that a plea was entered, and issue joined, the Court cannot, after the Term at which judgment was rendered, direct a plea to be entered, nunc pro tunc upon the evidence of the clerk that a plea was filed, and issue joined.

Statute of Jeofails—Curative Effect of.—Quære, how far the Statute of Jeofails will cure a declaration which sets out no cause of action?

Appeal from the Superior Court of Richmond county.

Burke and his wife brought an action of detinue against Sydnor, for "certain goods and chattels, slaves and stocks, of the value of \$2000, to wit: Billy, a slave, of the value of \$500; Allen, a slave, of the value of \$800; 28 head of horned cattle, of the value of \$280; 5 horses, of the value of \$250; a stock of hogs, of the value of 162 \$20; one set of *blacksmiths' tools, of the value of \$30; and four beds and furniture, of the value of \$120." The declaration avers property in both the plaintiffs, and lays their damages in \$500.

There is no notice in the record of any plea, or issue joined, but it is stated that a

***Pleading and Practice—Nonjoinder of Issue—Effect of Verdict.**—It is well settled, that if a verdict has been rendered without any issue being joined, it is a mere nullity, and no judgment can properly be rendered upon it, whether it be a civil or a criminal action. *State v. Douglass*, 20 W. Va. 777, citing the principal case to the point. To the same effect, the principal case is cited in *foot-note* to *Stevens v. Tallaferrro*, 1 Wash. 155; *foot-note* to *Walden v. Payne*, 2 Wash. 1; *McMillon v. Dobbins*, 9 Leigh 422, 428, and *foot-note*; *Rowan v. Givens*, 10 Gratt. 250, 251, and *foot-note*; *Petty v. Frick Co.*, 84 Va. 508; 10 S. E. Rep. 886; *Briggs v. Cook*, 99 Va. 275, 33 S. E. Rep. 148; *Griffin v. McCoy*, 8 W. Va. 206; *High v. Pearce*, 9 W. Va. 294; *Ruffner v. Hill*, 31 W. Va. 159; *Brown v. Cunningham*, 23 W. Va. 11; *Hickman v. Baltimore, etc.*, R. Co., 30 W. Va. 305, 4 S. E. Rep. 659; *Hickman v. Baltimore, etc.*, R. Co., 30 W. Va. 315, 7 S. E. Rep. 461; *White v. Emblem*, 48 W. Va. 823, 28 S. E. Rep. 763.

*Absent, the PRESIDENT, and JUDGE CARR.

jury was sworn "to try the issue joined." The jury rendered a verdict for a portion of the articles claimed by the declaration, and the Court gave judgment accordingly.

At a subsequent Term, the Court ordered that the plea of non detinet and issue, should be entered nunc pro tunc, in the said action, it appearing by the evidence of the clerk, that the said plea was filed and issue joined, but omitted, through mistake, to be entered by the clerk. Sydnor appealed.

Leigh, for the appellant.

Stanard, for the appellee.

March 17. JUDGE COALTER.

Although the record states that the jury were sworn to try the issue joined, yet, unless we can look to the plea which was directed to be entered nunc pro tunc, at a subsequent Term after the judgment, by way of amendment of the record, there was no plea entered, nor issue made up in the cause. As to the amendment in question, it was not one justified by the Act of Assembly, (1 Rev. Code, ch. 128, sec. 108,) and could not be made at a subsequent Term, independent of that Act, as has been decided in this Court, in many cases. Without deciding, therefore, on any other point made in the cause, the judgment must be reversed for this error, and the cause remanded for a new trial to be had.

It is unnecessary to decide the question arising under the Statute of Jeofails, in this case, (if we could give any opinion ¹⁶³ on it, there being no verdict or issue joined), as, whichever way they might be decided, still the cause must go back for the reason above assigned, and the plaintiff will have an opportunity to amend, or the defendant to demur to his declaration.

It may not be impertinent, however, to remark, that if this declaration, on the face of it, shews that the plaintiffs had no cause of action, as has been contended for, and if nevertheless, such declaration, and the judgment thereon, must be supported, when the jury, on an issue joined, find for the plaintiff; it is a strong illustration of the propriety of a remark made by counsel, some days ago, on this Act, "that counsel in the country, in order to guard the interests of their clients, ought to go constantly prepared with blank demurrers, and put in one in every case where they appear for a defendant; and that if this practice should be the result of the late amendment to that Statute, it may have a very beneficial effect, by producing more care in declaring, than was necessary even under the Act as it before stood; and thus preserve in the profession some attention to legal forms."

JUDGE CABELL.

This is an appeal from a judgment of the Superior Court of Law for the county of Richmond.

Although the record states, that the jury were sworn to try the issue joined between the parties, yet it does not shew that any plea was filed by the defendant, nor that any issue was, in fact, joined.

The counsel for the appellee has exhibited the transcript of an order of the Superior Court, made at a Term subse-

quent to that at which the judgment was rendered, shewing that the Court received the evidence of the clerk, that a plea had been regularly filed, and that issue was joined thereon, and directing the plea to be entered nunc pro tunc. But, we cannot regard this transcript as any part of

¹⁶⁴ *the record. In the case of Vaughan and Field, ex'ors of Field v. Freeland, reported in a note to 2 Munf. 477, this Court decided that it was erroneous in the District Court, after the term, to amend the record, even by the written minutes of the clerk. It would be much more improper to allow such amendment, founded on the mere recollection and oral testimony of the clerk.

Without deciding any other question made in the argument, I am of opinion to reverse the judgment, on the ground that no issue was joined between the parties.

JUDGE CARR and the PRESIDENT concurred, and the judgment was reversed.*

Pate v. M'Clure, &c.

March, 1826.

Bill of Exchange—Notice of Protest—Acknowledgment of Debt as Waiver of.—When a bill of exchange returns protested, and the drawer, on payment being demanded, promises to pay, he cannot afterwards resist the payment, on the ground, that due notice was not given of the protest.

Agents—Diligence Required of.—An agent without reward will not be required to use more diligence than would be used by a prudent man in the management of his own concerns.

Deed of Trust—Injunction of Sale—Death of Trustee.—Where a debtor who has given a deed of trust, injoins a sale of the property, and pending the suit the trustee dies, the Chancellor, upon dismissing the bill, may direct the property to be sold by his marshal.

This was an appeal from the Chancery Court of Staunton, where John Pate filed his bill against William M'Clure, Alexander M'Clure, George Lynham, James Breckenridge and Andrew Hamilton. The case, so far as it is material to the present report, is briefly this. Pate became indebted to William M'Clure & Co. and executed ¹⁶⁵ *his note for the sum of \$6584, on the 7th day of June, 1798. Some payments were made; and for the balance, Pate endorsed two sterling bills of exchange in blank, and delivered them to M'Clure & Co. drawn by George Lynham, of Norfolk, on Walter Burrows of London, payable at ninety days sight. These bills were dishonoured by refusal to accept, on the 21st of October, 1799, and afterwards, at the proper time, protested for non-payment. M'Clure informed Pate by letter, dated the 2d of February, 1800, that the bills were refused acceptance, and not likely to be paid, when due: that Lynham had some property, and would pay, if able; and asks his instructions how to act. A correspondence then ensued, which is particularly de-

*JUDGE GREEN absent.

†Bill of Exchange Notice of Protest—Acknowledgment of Debt as Waiver of.—On this subject, the principal case is cited in Cardwell v. Allan, 33 Gratt. 166: Devendorf v. W. Va. etc. L. Co. 17 W. Va. 175: Peabody Ins. Co. v. Wilson, 29 W. Va. 541. 3 S. E. Rep. 895. See further, foot-note to Walker v. Laverty, 6 Munf. 487. See further, monographic note on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 623. The principal case is cited in Brown v. Armistead, 6 Rand. 601. on the subject of equitable relief.

tailed in the opinion which follows. Pate then executed a deed of trust to Andrew Hamilton as trustee, to secure the payment of the debt due to M'Clure & Co. The land so conveyed in trust, was advertised for sale by Hamilton the trustee, to satisfy this debt.

The bill prays that this sale may be enjoined, on the grounds that M'Clure had not given timely notice of the protest of the bills, and that M'Clure had acted negligently and fraudulently in his agency; by which Pate was discharged from the debt. There are other small objections, which are sufficiently noticed in the following opinion.

The injunction was awarded to restrain the trustee from selling the land.

The defendants answered, and a variety of evidence was filed, consisting of depositions and correspondence between the parties, &c.

Hamilton, the trustee, having died during the progress of the suit, the Chancellor substituted the marshal of his Court in his place, to execute the decree, which was to the following effect: that the land should be sold, or so much thereof, as might be necessary to satisfy the claim of the defendants, by the marshal, and the purchaser at the said sale to have the benefit of a bond executed by the plaintiff with

Matthew Pate and Edmund Pate, as 166 sureties to *William M'Clure & Co. for the removal of a lien upon the said land, prior to the said deed of trust. But the dissolution of the said injunction, is without prejudice to any action or actions at law, which the plaintiff may think proper to institute against the defendants Alexander and William M'Clure, or either of them, for the purpose of recovering any damages which he may have sustained by the loss of the bills of exchange drawn by George Lynham on Walter Burrows, &c.* And so much of his decree as dissolves the said injunction, and directs the said sale, is suspended, until the defendants Alexander and William M'Clure, or either of them, or some responsible person for them, shall execute to the plaintiff, or file with the clerk of this Court, bond with sufficient security, in the penalty of \$6000, conditioned for paying to the plaintiffs all such damages as he may recover in any action or actions at law aforesaid.

The plaintiff appealed.

The cause was argued by Johnson, for the appellant, and Wickham, for the appellees.

The counsel for the appellant made several objections to the decree. These were, 1. That it was erroneous to make any decree against the appellant, further than dismissing the bill, even if he had not been entitled to relief. 2. The Court should not have appointed the marshal to conduct the sale, without having the heirs of Hamilton the trustee, before the Court. 3. That the decree was wrong in requiring that the purchaser should have the benefit of the bond, executed by Matthew and Edmund

Pate, before the Court. 4. The injunction ought not to have been dissolved, before the right to damages had been ascertained. 5. That the M'Clures were responsible for these bills, whether they were committed to them as agents, or as a security for the debt. In either character, they were guilty of such negligence as would exonerate Pate. It was their duty carefully to preserve the security put into their hands. *M'Mahon v. Fawcett*, 2 Rand. 53. *Pothier on Obl. No. 427*, 520, 521. *Hays v. Ward*, 4 Johns. Ch. Cas. 130. There ought besides, to have been a protest for non-acceptance. The bill was at 90 days after sight. In such case, a protest for non-acceptance was indispensable. Proof of protest cannot be furnished from any other source than the protest itself. *Chitt. on Bills*, 278, 279. That this evidence of protest is not sufficient, is proved by *Chitt. on Bills*, 280, 281.

March 25. JUDGE CARR.

This is a bill of injunction to stay proceedings on a deed of trust executed by the plaintiff to secure a debt to the defendants. In his bill, the plaintiff claims several small credits, as omissions in the accounts presented by the defendants; but these claims are inadmissible, as the plaintiff has settled the whole account, and acknowledged its correctness, twice at least; in 1803, when he settled with M'Credie, and executed his bond, and in 1806, when he executed a deed of trust to secure the debt then under the direction of Breckenridge; and there is no evidence whatever, that either of these settlements was procured by fraud, or any kind of concealment or misunderstanding.

Passing by these small items, we will consider the important question in the cause; that is, ought the plaintiff to receive a credit on his debt to the defendants, of 5721. 4 1 sterling, the amount of two bills of exchange, drawn by George Lynham, on Walter Burrows of London, in favor of Pate; by him endorsed in blank, and delivered to Alexander M'Clure, by whom they were endorsed to Miller, Hart & Co. or order. The circumstances are briefly these. Lynham had had property taken on the high seas, by the cruisers of 168 Great Britain. He had made *Burrows his agent, to solicit compensation from that government for these spoliations; and in the hope that he might have received funds from that source, he drew the bills on him, which he passed to Pate in payment for tobacco purchased of him. The bills were delivered to Alexander M'Clure, in the early part of September, 1799. They were payable at 90 days sight. On the 21st of October, 1799, it seems from a note of the notary public, that these bills were presented for acceptance, and dishonoured by a refusal to accept. Counting the 90 days from the 21st of October, the bills would be payable the 22d of January, 1800. They were regularly presented for payment, refused and protested; as we see by a copy of them in the record. On the 2d of February, 1800, M'Clure informs Pate by letter, that the bills are refused acceptance, and are not likely to be paid when due: that they were due in January,

*This part of the decree, relates to a fact in the cause, that the bills were lost while in M'Clure's possession, by robbery.

and might be expected in March or April: that Lynham has some property, and will pay, if able; but as he is informed, there are other bills in the same predicament, he asks instructions how he shall act most for Pate's interest, and most likely to prevent loss. "For instance, (he says,) he may be unable to pay money, and willing to give West India produce, or some other equivalent, which I might, from a knowledge of his situation, be induced to accept, rather than run any further risque by delay; and you may be assured, I will do for your interest, as I would for my own." There is no answer to this letter in the record. On the 21st of March, 1800, M'Clure writes to Pate, that he has no idea the bills will be paid, and is daily expecting to receive them under protest, when he will do his best to recover them; but in the mean time, the advance is heavy and severely felt, and he therefore expects that Pate will pay up his debt, in the course of the spring. On the 21st of June, 1800, M'Clure writes Pate, that not a shilling is paid on the returned bills, and presses him for payment. On the 20th of October, he writes to him pressing payment, and says nothing

169 has been gotten of Lynham: "that two of his vessels had been taken, and one returned in ballast: that there was no species of property he could get hold of, though he had left nothing untried. On the 20th of June, 1801, Pate writes to M'Clure, stating how hardly he is pressed by the protest of Lynham's bills: that he had better have given away the tobacco; expresses a hope that something might still be gotten from him; begs indulgence, and promises the best payments he can possibly make.

I have given thus much of the correspondence, to shew, that on the protest of the bills, M'Clure immediately looked to Pate for their amount, and that Pate explicitly acknowledged himself liable, and promised payment: that in every thing M'Clure did, towards attempting to get the amount of the bills from Lynham, he considered himself acting as the friend and agent of Pate, and that Pate also considered it in the same light. Many more letters are in the record, going to prove the same points; but it is useless to notice them farther. Pate, in 1803, gave a new bond, including the amount of the bills. In 1806, he gave a deed of trust on land, to secure the same debt. By various promises of selling the land and making payment, (as Breckenridge states in his answer,) he gained time, year after year, till 1812; and it was never till after his land was advertised for sale, that the objections to payment, and the claims of credit stated in his bill, seem to have been thought of.

It is now objected, 1st, that there is no evidence in the record, that he had a regular and timely notice of the protest, and that, therefore, he is released from paying the bills: 2dly, that M'Clure has been negligent in his agency, has acted fraudulently, in concealing the loss of the bills; and that on this ground also, Pate is released.

As to the first, Alexander M'Clure says, in direct response to a particular interrogatory in the bill, that immediately on the return

of the bills, he gave due notice of the protest both to Lynham and Pate; and 170 this is strongly "corroborated by the correspondence. But in truth, the case is taken wholly off that ground, by the various subsequent promises to pay, and acts of sanction and ratification given and done by Pate; promises and acts, covering an interval of twelve years, and done in the most solemn manner, with full knowledge of the facts. After this, it is equally repugnant to reason and to law, that he should claim to be discharged for want of notice, and call on the other party to prove that he proceeded in strict conformity with all the niceties of the law merchant. If he had intended to place himself on this ground, the time for it was, when the bills came back, and he was pressed for payment of them. He should then have said, "shew that in all things, you have proceeded strictly; that the bills have been regularly protested, and due notice of protest given to me." Nor will it avail him to say, that he was ignorant of the law; every man is bound to know the law.

The cases on this subject, in the English books, are abundant; and there is also one in this Court, on the very point. It is *Walker v. Laverty, &c.*, 6 Munf. 487. Debt on a protested bill of exchange against John C. Walker of the firm of Walker & Co. The declaration states the drawing, the presentation and protest of the bill, of which defendant had notice, &c. (in the usual form of declarations in such cases.) Plea, nil debet. On the trial, the defendant required proof of notice of protest for non-payment of the bill. The plaintiff introduced a witness, who proved, that he applied to the defendant for payment of the said bill, who acknowledged that the debt was a just one, and said he would pay it. But, nothing was said as to his receiving notice or not. Defendant then moved the Court to instruct the jury, that unless the acknowledgment was made, with a knowledge of all the facts in the case, as to the laches of the holders of the bill, the evidence of acknowledgment was not to be received; which opinion the Court refused to give, and instructed the jury that such

acknowledgment was a waiver of no-
171 tice. Defendant excepted, "and a verdict being found against him, brought the case up by Supersedeas, contending that the Superior Court erred in not giving the instruction asked for by him, and referring in his petition to *Blesard v. Hurst*, 5 Burr. 2672. *Goodall &c. v. Dolly*, 1 Term. Rep. 712, and 12 East. 38. This Court, after argument, affirmed the judgment. As the Court do not state the reasons or the authorities on which they found their opinion, I will shew by a reference to some of the cases, that they have full authority for the decision.

In *Bilbie v. Lumly*, 2 East. 469, an underwriter had promised payment, with a knowledge of facts which would have released him from his contract, and afterwards attempted to avoid the promise on the ground of ignorance of the law. The Court said, "every man must be taken to be conversant of the law. Otherwise, there

is no saying to what extent the excuse of ignorance might be carried. It would be urged in almost every case."

Lundie v. Robertson, 7 East. 231. Suit against an endorser, who relied on want of notice. Lord Ellenborough said, "the case does not admit of a doubt. The defendant is charged as endorser of a bill of exchange. When applied to for payment, he says, he has no cash by him, but if the witness will call again, he will pay it. Now, when a man, against whom there is a demand, promises to pay it; for the necessary facilitating of business in transactions between man and man, every thing must be presumed against him. It was therefore to be presumed *prima facie*, from the promise, that the bill had been presented for payment in due time, and dishonoured; and that due notice of it had been given to the defendant."

Stevens v. Lynch, 12 East. 38. The drawer of the bill, knowing that time had been given, but apprehending that he was still liable, three months after it was due, said, "I know I am liable, and if the acceptor does not pay it, I will." The Court said the defendant had made the promise with full knowledge of the facts, 172 three months after *the bill had been dishonoured, and could not now defend himself upon the ground of his ignorance of the law.

Potter v. Rayworth, 13 East. 417. A note was made payable to order of defendant, who endorsed it and delivered it to Fulford. It passed through several hands, and some time elapsed after its dishonour, before the defendant heard of it. At length, one Kirton, who then held it, applied to the defendant, and he promised payment. He failed to pay, however, and Kirton had recourse to his immediate endorser, who paid him, and then sued the defendant as first endorser. He relied on want of notice. The plaintiff relied on the promise made to Kirton, either as an admission of due notice, or a waiver of notice. It was insisted on the other side, that the promise being to a third person, and not in the plaintiff's presence, the case was not within the principle of *Lundie v. Robertson*. The Court held, that whether the promise were made to the plaintiff, or any other who held the note, it was equally evidence, that the defendant was conscious of his liability to pay; and must be considered either as an acknowledgment that he had due notice, or that without such notice, he was the proper person to pay.

The cases of *Gibbon v. Coggin*, 2 Camp. 188, and *Jones v. Morgan &c.* 2 Camp. 474, are also very strong to this point. In the former, Lord Ellenborough says, "by Colbourn's promise to pay, he admits his liability; he admits the existence of every thing necessary to render him liable. When called on for payment of the bill, he should have objected that there was no protest. Instead of that, he promises to pay it. I must therefore presume, that he had due notice, and that a protest was regularly drawn up by a notary." See also *Pierson v. Hooker*, 2 Johns. Rep. 68, and the cases cited in the note. I consider it

clear from these authorities, as well as the reason of the case, that the plaintiff has no right to object on the ground of the failure of M'Clure to proceed regularly with notice of protest, &c.

173 *As little foundation is there, in my opinion, for the objection, that the negligence of M'Clure in his agency, or the loss of the bills, or his concealment of that loss, ought to release Pate from the payment of them. As to the loss of the bills, M'Clure was chargeable with no neglect on that score, for his store was broken open, and his strong box taken off, in which the bills were deposited; and where, it is in evidence, that merchants often keep valuable papers. But the loss could be of no serious injury, because notarial copies, with proof that the originals were lost, would be sufficient for every purpose. It is in full proof, that from the time of drawing the bills, or shortly thereafter, till he left Norfolk in 1802, Lynham was insolvent: that he left many creditors unsatisfied, who were so confident of his inability to pay, that they gave him a letter of license to leave the country, and promising not to molest him for five years. The only possible chance for recovering the money of him, seems to have been the claim on the French government, which was allowed and paid at the treasury in Washington. But I can see no ground for charging M'Clure with negligence on this point. There is no evidence that he ever heard of it 'till 1806, and the money was paid to Lynham's order in 1805. None of his numerous creditors in Norfolk seem to have been aware of this fact, in time to avail themselves of it; and it would be hard measure to mete out to a voluntary and gratuitous agent, to hold him to greater diligence, and more efficient exertions, than those were capable of, who were stimulated by the powerful motive of self-interest. We see too from the evidence, that Alexander M'Clure did write to his brother William, prior to his leaving France in 1808, making enquiries after Lynham &c. and that William did try to find him out, and could not. We also have it from William, in his answer, that after his return to France in 1809 or 1810, he made enquiries after Lynham; that he was told he had retired to the interior, somewhere in the vicinity of the Pyrenees, utterly insolvent: that

174 William *knew the notary in London, who had protested the bills, and could with ease have gotten notarial copies from him, which he would have done, if he had seen any prospect of benefiting Pate. From these considerations, it is perfectly clear to me, that Alexander M'Clure was guilty of no such negligence as would make him chargeable: that Lynham was utterly insolvent, so that no injury could result to the plaintiff from any negligence, from the loss of the bills, or the failure to disclose that loss to Pate; and that there is no ground for this second objection.

It was objected in the argument, that the Chancellor erred in supplying the place of the trustee, who had died pending the suit, and in committing the execution of the trust to the marshal, under the super-

intendence of the Court. I have reflected a good deal upon this point, and examined the cases. Upon the reason and the practice, I cannot think the thing wrong. The parties had submitted their case to the equity of the court. The Chancellor had arrested the proceedings in the country. This was done at the instance of Pate by bill of injunction, making such a case, as the Court of Equity thought justified its interference. The case was fully developed, and it appeared finally, that the plaintiff's injunction was wholly unsupported. The Chancellor decided all the points against him; and it was clear that he ought, in good conscience, never to have come into equity, to arrest the proceedings of the trustee. In the mean time, this trustee had died; and though the deed was to him and his heirs, the trust was a personal confidence placed in him. Who his heirs were, whether infants or adults, does not appear. The Chancellor was either to dismiss the bill and leave this matter in doubt and uncertainty, or to supply the place of the trustee, and thus place the parties as nearly as might be, in the situation they would have occupied, if the case had not been brought before the Court. The right to make such substitution by motion, and without putting the parties,

who were all before the Court, to 175 new pleadings, seems to *me fairly to belong to those powers, which Courts of Equity, in order to do complete justice, exercise in all cases before them; and more especially, in injunction cases. If the trustee had continued in life, and there had been no objection to him on the score of interest, misconduct, or any other sufficient ground, I would by no means be understood to say, that the Chancellor could, of his own mere motion, set him aside, and put the execution of the trust into the hands of the marshal. This would be to deprive the parties against their will, of a trustee, to whom they had both confided the business, as their confidential friend, and to subject them to the commissions of the marshal, when that friend could probably execute the trust without expense. The case here is wholly different. The creditor has been deprived of the services of the trustee, by the interference of the Court, at the instance of the plaintiff; and the question is, cannot the Court, at the request of the creditor, and when the plaintiff makes no objection that we see in the record, repair the mischief which its interference has produced? I think what Lord Eldon says, in *Pultney v. Warren*, 6 Ves. 92, very applicable to this case. Speaking of the injury which had resulted to a party from an injunction granted by the Court, he says, "If there be a principle, upon which Courts of Justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or oversights, done at the instance of the party against whom the relief is sought." He then cites a case from Shower, where a party came into equity to be relieved from a bond, which was sued on at law. The litigation was drawn out into such length, that before the decision, the principal and interest far exceeded the

penalty of the bond; and the Court of Equity, finding that the injunction was unfounded, and the bond justly due, decreed that the plaintiff should pay the whole principal, interest and costs. *Duval v. Terry*, Show. Parl. Cas. 15. Commenting upon this case, he says, "by the mere circumstances of filing the bill, the 176 plaintiff would *be taken to submit to every thing conscience and justice require. Upon that principal, he would be held to do that which is just; and the Court, duly acting with him, would compel him to pay the principal, interest and costs, occasioned by his delay. It may be said," he adds, "that this is a relief against a plaintiff coming for relief. I consider these persons as plaintiffs, asking an injunction, and impliedly saying, they ask it upon the terms of putting the plaintiff (at law,) in exactly the same situation, as if it had been determined they were not entitled; for otherwise, there is no colour of justice in calling upon the Court to discuss the question, whether they are entitled to equitable relief. These, it seems to me, are sound principles, and very applicable to the case before us. There are also several cases in this Court, where the Court in order to render complete justice, have gone quite as far as the Chancellor has done in this case. I will only refer to the cases by name. *Todd v. Bowyer*, 1 Munf. 447. *Fox v. Taliaferro*, 4 Munf. 243. *West v. Belches*, 5 Munf. 187. *Ball's devisees v. Ball's ex'rs and widow*, 3 Munf. 279; and *Humphreys' adm'r v. M'Clenachan's adm'r* 1 Munf. 493, a very strong case.

It was also objected, that the decree was erroneous, in giving to the person who might purchase the land at the sale by the marshal, the benefit of the bond executed by Pate and his brothers to M'Clure & Co. and conditioned to remove the lien of Galt on the land. But I think this part of the decree perfectly correct, and so clearly equitable, that I rather think it would have followed without the decree. Nor can the sureties complain; for, it does not change their situation, nor affect any defence they may have against the bond.

Thus far, I think the Chancellor correct. But there is one part of the decree, from which I feel compelled to dissent. It is that which suspends the sale, till the defendants, or some one for them, shall give bond in the sum of \$6000, conditioned to pay the plaintiff all such damages 177 *as he may recover of them, on account of the conduct of the defendant Alexander, touching the bills of exchange. I think the whole record shews, that the plaintiff has suffered no damages whatever from the conduct of Alexander; and though I would leave the plaintiff free to bring any suit he may choose, there does not seem to be the least ground for subjecting the defendants to give the bond.

I am of opinion, therefore, that this part of the decree be reversed, the residue affirmed, and that the cause be remanded to be proceeded in accordingly.

The other Judges concurred, and a decree was entered in pursuance of the foregoing principles.*

*JUDGE GREEN absent.

Harrison v. Tiernans.

Two Suits.

March, 1826.

Bail Bond—No Amount Specified—Effect.*—A bail bond which is returned to the clerk's office, but which specifies no sum to be paid by the obligor to the obligee is a mere nullity.

Deeds—Promissory Notes—Distinction between.—The difference between deeds, and bills of exchange, and promissory notes, as to the mode of their execution.

These were two actions of debt brought in the Superior Court of Law for the County of Rockingham, by the appellees against John Clarke, on two single bills. Each writ was endorsed, "Debt on single bill". Bail required." These writs were returned executed, with G. W. Harrison as appearance bail. At the same time, papers, purporting to be bail bonds, were returned to the clerk's office. These papers were in the usual form, signed and sealed by John Clarke and G. W. Harrison, but no sum is mentioned in the penalty of either bond. Declarations were filed, and office judgments obtained against the defendant and G. W. Harrison, his appearance bail.

Harrison applied for, and obtained a Supersedeas to these judgments, from a Judge of this Court.

Wickham, for the appellant, referred to the case of Shelton v. Pollock & Co. 1 Hen. & Munf. 423, as decisive of this question.

Nicholas, for the appellees, contended, that upon general principles, whenever a man signs a bond in blank, he gives authority to another to fill it up. That this is true of negotiable paper, is proved by Chitt. on Bills, 35, 113. 4 Mass. Rep. 45. The same principle exists as to bonds. 5 Mass. Rep. 538. But the case of bail bonds is still stronger. Our Act of Assembly prescribes no particular form. It is enough for the Sheriff to take the engagement of the bail, that the principal shall appear &c. This principle undoubtedly prevails in the case of forthcoming bonds. Wilson v. Beall, 4 Munf. 380. Bartley & Ferguson v. Yates, 2 Hen. & Munf. 398. The omission of a penalty is immaterial, as it is not required.

A bond may be with or without a penalty. Such an error would not be fatal in England, where the Statute is more particular than in this country. Sell. Prac. 143. Rogers v. Reeves, 1 Term. Rep. 418. The bond is not in question here. Judgment has been obtained against the principal and bail, in the original suit.

Wickham replied, that there was no analogy between the case of a bond, and a mere promissory note, or a bill of exchange. A bond is a deed and requires delivery to perfect it. As for the Massachusetts Case, it is not law. The other cases cited, are wholly inapplicable.

179 *March 28. JUDGE CABELL delivered the opinion of the Court.†

It was decided by this Court, in the case of Shelton v. Pollock & Co. 1 Hen. & Munf. 423, that if the Sheriff returns a writ executed, and the name of the appearance bail,

but does not return the bail bond, or a copy thereof to the clerk's office, together with the writ, judgment ought not to be entered against the bail, but against the Sheriff.

In the case at bar, the Sheriff returned with the writ, a writing purporting to be a bail bond, but which specifies no sum of money to be paid by the obligor to the obligee; the part of the writing, in which the sum of money intended to be paid is usually inserted, being left entirely blank. And the question is, whether such a writing can be regarded as a good bail bond?

"A bond is a deed, whereby the obligor obliges himself to pay a certain sum of money to another, at a day appointed. If this be all, the bond is called a single one, simplex obligatio; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else to remain in full force." 2 Black. Com. 340. The obligation to pay money, is then of the essence of a bond, and is, in fact, the only stipulation which the bond contains. But, in the case before us, the stipulation is to pay nothing. It is no bond; it is a nullity.

Nor can this defect be supplied by the recital in the condition. The condition forms no part of the obligation or bond. It is entirely for the benefit of the obligor; stating matter by which the obligation or bond may be discharged. He may, or he may not comply with it, at his election. If he be unwilling or unable to comply with the condition, the law intends that the bond shall charge him. But how can this be, when the bond itself is a nullity?

180 *The counsel for the appellant, endeavoured to assimilate this to those cases, which have been decided according to the principles settled in Russell v. Langstaffe, Doug. 496, and Colles v. Emmett, 1 H. Black. 313, concerning bills of exchange and promissory notes. According to those cases, a man who signs his name to a blank piece of paper, will, under certain circumstances, be considered as giving authority to fill it up with a bill of exchange or promissory note, which he will be bound to pay. But, those cases were decided on a principle totally inapplicable to this. Bills of exchange and promissory notes, are not deeds; and authority to execute them may be given by parol, or inferred from circumstances. But, a bail bond is a deed, which cannot take effect without delivery; and this delivery can only be made by the party himself, or by some attorney legally constituted by deed, for that purpose. Now, the writing in question could not take effect as a bail bond delivered by the appellant himself; because, being blank as to the sum of money intended to be paid, it was as a bail bond, a mere nullity. Nor could it take effect as a deed to the Sheriff, authorising him to execute a bail bond for the appellant, because it does not even profess to have such object in view.

This case, therefore, cannot be distinguished from that of Shelton v. Pollock & Co.

The Court is of opinion to reverse the

*See principal case cited in Rhea v. Gibson, 10 Gratt. 220; Preston v. Hull, 23 Gratt. 614; Penn v. Hamlet, 27 Gratt. 341.

†JUDGE GREEN absent.

judgment and remand the cause to the Superior Court, that it may be sent to the Rules, that it may be proceeded in according to law.

181 ***Calloway and Others v. Langhorne and Wife.**

May, 1826.

Wills—Construction—Intention—Case at Bar.—The intention is to govern in the construction of a will. Therefore, where a testator, who devised his real estate to his children, and also a sum of money to one of them, so that his estate, both real and personal, not specifically given, shall be brought into estimate, and divided in such manner as to make their portions equal: the sum of money bequeathed as aforesaid, shall be taken into the general estimate, although the terms specifically given and estimate, do not strictly apply to money, it being the plain intention, inferred from the whole will, to make all his children equal.

Legacies—Interest upon Interest.—Interest upon interest on a legacy, will not be allowed, unless the testator plainly requires it.

Appeal from the Chancery Court of Lynchburg.

The question arose under the will of James Calloway, deceased. The testator, after devising portions of his real and personal estate to his wife and children, makes the following provision for the female appellant, one of his children. "Item, I give and bequeath unto my daughter, Catharine Calloway, the mansion house of land, with the mill on Lick run, and all the personal estate, except the slaves that I have given to my wife, after the termination of her estate thereto, unto my said daughter and her heirs forever. I also give her one negro named Peggy, and the sum of 1000l. to be paid to her by my executors, as herein after to be directed, and until this is fully done and completed, they are to pay her annually the interest thereon." He then devises all the residue of his estate, both real and personal, to his executors, for the purpose of paying all his debts, his daughter Lucy's legacy, and the legacy to his daughter Catharine, at her intermarriage, or arrival at the age of twenty-one years; and for these purposes, he gives his executors unlimited power to sell, dispose of, rent, hire out, &c. the above mentioned property. After these objects are satisfied, he empowers his executors to divide the residue of his estate among his children and grand-children, with an express injunction to make his children equal in point of property.

182 *The will then proceeds, "It is my will and desire, that in the distribution of this residuary estate by my executors, it shall be so done, that the estate, whether real or personal, or both, heretofore and not specifically given to my children, or either of them, shall be brought into estimate, and each charged with what they may have so received, and this residuum to be so divided, as to make each equal to the other."

The testator added a codicil to his will, declaring, that instead of the former distribution of the residue of his estate, (which he apprehended might be too uncertain,) his children should receive their respective

portions, according to "the estimate, or true value of all the estate they have received, or may specifically receive under the will, and for which they are bound to account, in order to produce the equality contemplated by the will. He proceeds to affix a valuation on the several portions, and estimates the value of Catharine's part at 2300l. He then concludes, "These sums are to be considered by my executors as the standard value of the respective estates, and no further estimate is, to be made."

The bill was filed by Langhorne, and his wife Catharine, against the executors, alleging that the estate devised to her had not been received until the day of in the year , at which time the legacy of 1000l. with simple interest from the time of the testator's death to the time of payment, was paid: that the executors insisted, that the said legacy was not comprehended in the said sum of 2300l. the estimate made by the testator; and consequently, that in the distribution of the residuum, so as to equalize the children's portions, the complainants should be charged with the 1000l. over and above the 2300l. whereas they conceive, that the said sum of 2300l. comprehends all the property, real and personal, specifically devised to the female plaintiff: that by the will, the executors were expressly directed to pay to the female plaintiff, annually, the interest on the said 1000l. that is 60l. which

183 *was the only provision made for her maintenance, until the payment of the principal: that this annuity was withheld for many years; they therefore insist that they are entitled to receive interest on the said 60l. until the principal was paid. They pray, that the executors may be made to account for the plaintiff Catharine's proportion of the residuum, after estimating the property devised to her, including the said money legacy, at the sum of 2300l. and that they be required to pay interest on the annuity of 60l. so long as that annuity was withheld.

The executors, in their answer, admit all the facts stated in the bill, and being only anxious to discharge their duty correctly, they submit the construction of the will to the Court. The other defendants answered, resting on the objections which have been briefly stated in the bill.

Depositions were taken; but as they were not considered in the decree of this Court, they are omitted.

The Chancellor decreed, that in the distribution of the residuary estate of James Calloway, deceased, his executors ought not to pay interest on the interest of the legacy of 1000l. bequeathed to the plaintiff Catharine; that the said legacy forms a part of the 2300l. mentioned in the codicil to the will of the testator; and that for the legacy and other property devised to them, the plaintiffs are to be charged only with the sum of 2300l. in the distribution.

The defendants appealed.

Wickham, for the appellants, contended that parol evidence might be received to explain the will in this case. For this he referred to *Shelton v. Shelton*, 1 Wash. 45. *Kennon v. M^r Roberts*, Ib. 96. *Reno v.*

*See monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

*See monographic note on "Legacies and Devises" appended to *Early v. Early*, Gilman. 124.

Davis, 4 Hen. & Munf. 283. The testator did not mean that the 1000l. should be estimated; nor could he have applied the terms "specifically given," to money. Those terms apply only to property, not money. The codicil is liable to the same observation. It speaks of property estimated.

184 *As to the question of interest, it never is paid on a legacy payable in futuro. 1 Ves. jun. 451.

Leigh, for the appellees.

Parol evidence is not admissible in this case. There was nothing absurd in estimating a sum of money, where the testator had made different provisions for his children, some in property, some in money, &c. In like manner, the term "specifically," is not used technically, but means "particularly." If the money is not brought into hotchpot, the legacies will be unequal, while the testator clearly intended equality. The codicil explains the will to mean all the estate which he had given, of every kind whatsoever, to render the portions equal. The phrase "account," applies to money.

As to the interest, it was nothing more than a bequest of 60l. per annum, for the maintenance of a child. This is not the case of a debt, but it was a voluntary gift; and the donor might give compound interest if he pleased.

May 5. The PRESIDENT delivered the opinion of the Court.*

It seems to be very clear, that the testator intended that his children should take equal portions of his property. He expressly declares his design to be, to make all his children equal in point of property. That it was to be an equal portion, in relation to what he had specifically devised to them, and not in relation to his whole estate, including money, is not to be inferred from the use of the words, "estimate," and "specifically devised," in the will, as was argued. Words in a will are to be construed according to the subject matter to which they are made to apply, by the whole context of the will. Though

185 money "cannot be estimated or valued, in the strict sense of those terms; yet, as it was his purpose, more than once expressed, to make the fortunes of his children equal, to that purpose money may be estimated and valued. So also, it may be said to be specifically devised. This last expression also, may have been used to distinguish the several bequests from the residuum. In the codicil, which is to be taken as a part of the will, the expression "previously given," and the term "provision," are also used in reference to the same subject. They clearly include money, as well as specific property. Money may be given, and is also included in the term "provision."

As to the claim to interest upon interest on the 1000l. legacy, there is nothing in the will to justify it. The testator may have designed it as maintenance, until the death of his wife, when provision is made for the legatee; but he calls it interest, which does not generally carry in-

terest; and if he intended that it should, he would have said so. Such a construction would also make the portion unequal, which was intended to be equal.

The decree is therefore to be affirmed.

186 *Farmers' Bank of Virginia v. Reynolds.

May, 1856.

Banks—Mutilated Bank Notes—Rights of Holder of.*—

Where a bank note is cut in two, and one half sent by mail and lost, the holder of the remaining half has a right to demand payment at the Bank, upon presentation of the half in his possession, proving ownership, and giving bond with adequate security for the indemnification of the Bank.

Same—Same—Same.—But if these pre-requisites are not complied with, and the Bank is used in consequence of refusing payment, the holder shall not recover interest or costs, although he may perform the conditions after the suit is brought.

This was an appeal from the Chancery Court of Richmond.

John Reynolds of Ohio, sent, by mail, to his partner, Isaac Reynolds, in Baltimore, the halves of three notes of the Farmers' Bank of Virginia, amounting to \$210. John Reynolds afterwards sent, by mail, the corresponding halves of the bank notes. The first letter, enclosing the halves of the bank notes, was duly received by Isaac Reynolds; but the second letter, containing the corresponding halves, never came to hand, and have never been heard of since. The lost halves were advertised in newspapers of Washington, Cincinnati, and Baltimore.

Reynolds & Co. filed a bill against the Farmers' Bank, setting out the foregoing facts, and charging that the half notes in their possession had been presented for payment, but that the Bank had refused; although they offered good and sufficient security to indemnify the said Bank against the future appearance of the corresponding halves, so lost or stolen. They therefore pray that the Bank may be decreed to pay the amount of the said notes, &c.

The Bank, by its proper officers, answered, that the plaintiffs had never proved their ownership of the said notes, except by the affidavits of the parties themselves, which are not admissible evidence: that the Banks in Richmond had adopted a regulation, that they would not pay half notes, except under the decision of some competent tribunal; which regulation they have made public. The answer requires, that the plaintiffs shall give bond 187 with ample security to indemnify the Bank, and contends, that as the Bank has been in no default, it ought not to be subjected to costs, &c.

A deposition was taken, by which it appeared that the half notes mentioned in the bill, were enclosed, as therein stated, to Isaac Reynolds, in Baltimore: that they were either lost or stolen; and immediately advertised.

The Chancellor decreed that the Bank

*The principal case was cited in *Moses v. Trice*, 21 Gratt. 552; *Exchange Bank v. Morrill*, 16 W. Va., 551, 552.

See generally, monographic note on "Banks and Banking" appended to *Bank v. Marshall*, 25 Gratt. 378.

should pay to Reynolds & Co. the sum of \$210 with interest from the time of the presentation of the half notes at the Bank, until payment, and the costs of this suit; but the effect of the decree to be suspended, until the plaintiffs shall have entered into bond with good security, to the defendants, in the penalty of \$420, against the claims of any persons, who might thereafter come against them, in consequence of having the possession of the halves of the said notes.

The defendants appealed.

Nicholas and Leigh. for the appellants.
Bacchus, for the appellees.

May 6. JUDGE CABELL delivered the opinion of the Court.

The evidence in this cause sufficiently establishes, that the appellees are the bona fide owners of the bank notes in the bill mentioned; that the said notes were cut into two parts for the purpose of being transmitted by the mail; and that one half of each of the said notes was lost, in consequence thereof. The Chancellor, therefore, was clearly right, according to the case of *The Bank of Virginia v. Ward*, 6 Munf. 166, in giving to the appellees the amount of the said notes, on their entering into bond with adequate security, for the indemnity of the appellants.

The only questions are, as to the propriety of compelling the appellants to pay interest and costs.

188 *Interest is in the nature of damages for improperly withholding a debt, beyond the time when it ought to be paid. But the appellants were in no default whatever, in not paying the notes in this case. Banks are under no obligation to seek out their creditors; they are bound to pay only on a demand for payment made at their offices of discount and deposit. And in the case of the presentation of the moiety of a note, the demand for payment at the Bank, must be accompanied with such evidence of the ownership of the note, as ought to satisfy the Bank. *The Bank of Virginia v. Ward*, 6 Munf. 166. The demand in the case before us, was unaccompanied by any such evidence. That demand, therefore, imposed no obligation to pay the principal, and of course, could give no claim for interest. Sufficient evidence of ownership has been exhibited since the institution of this suit; but no demand of payment has been made at the Bank, since that evidence was taken. The appellees, therefore, are not yet in default, and consequently ought not to pay interest.

The question of costs is still plainer. Costs are given or withheld at the discretion of a Court of Chancery; and the sound exercise of this discretion forbids the imposition of costs on a party, in no wise in the wrong.

The decree, therefore, is affirmed, so far as it directs the payment of the amount of the notes in the bill mentioned, but is to be reversed, so far as it directs the payment of interest and of costs by the appellants. And the appellants are to recover their costs, both in this Court, and in the Court of Chancery.

189

Cunningham v. Mitchell.

Two Suits.

May, 1826.

Forthcoming Bond—Principal—Surety—Case at Bar.—A. B. & C. execute a forthcoming bond, to release the goods of A. taken in execution. C. pays the debt, and moves against B. as a principal in the bond. There is nothing in the bond to shew whether B. was principal or surety. B. contends that he was only a surety jointly with C. The Court below give judgment for C. on the motion. No evidence is in the record to shew whether B. was surety or principal. The judgment was affirmed in this Court, as it will be presumed, that the Court below had evidence before them, that B. was a principal and not a surety.

Record—Papers Inserted by Clerk.—Papers inserted in the record by the clerk, cannot be considered as part of the record, unless they are made so by the party wishing to avail himself of them.

Sheriff's Return—Contradiction of.—A Sheriff's return may be contradicted by evidence alunde; in which case the Sheriff himself would be a competent witness to prove its truth. But after judgment by default, a party cannot object in an Appellate Court, to the truth of the return.

This was an appeal from the Superior Court of Law for Spottsylvania county. The case was this:

Two motions were made upon due notice, by Reuben Mitchell, against Joshua Long and James Cunningham, for the sums of \$215 73, and \$455 91, money which he had paid as surety on two forthcoming bonds executed by Long and Cunningham, and himself as their surety. The clerk certifies, that the plaintiff, in support of his motions, introduced two executions against Long and Cunningham, his appearance bail, and forthcoming bonds in pursuance thereof. These bonds are executed by Long, Cunningham and Mitchell, reciting in the condition, that a Fi. Fa. had issued against the goods and chattels of Long and Cunningham, his appearance bail, a negro man &c. of Long's taken and released upon giving the said

*For monographic note on Records, see end of case.

Principal and Surety—Parol Evidence to Establish the Relation.—In *Williams v. Macatee*, 86 Va. 684, 10 S. E. Rep. 1061, it was said that the relation of principal and surety can be proved by parol evidence and the principal case was quoted from to sustain the point.

Record—Papers Inserted by Clerk.—It is not the province of the clerk to make anything a part of the record, his province is to copy the record as it is; and the clerk's certificate that the papers were relied on cannot make them a part of the record. To this point the principal case is cited in *Roanoke Land & Imp. Co. v. Karn*, 80 Va. 593, 593; *Davie v. Hughes*, 86 Va. 920, 11 S. E. Rep. 488.

In *Sweeney v. Baker*, 13 W. Va. 202, the clerk copied at the end of the record a certificate signed by the judge stating that a demurrer had been filed and overruled by the court but no entry of it had been made by the clerk. The record book failed to show the filing of the demurrer at any time; and this memorandum of the judge was not referred to on the record book. It was held that the memorandum of the judge could not be considered as a part of the record in the case, though the clerk did certify that it was a transcript of a paper in the cause; the court citing the principal case to sustain its holding. To the same effect, the principal case is cited in *Bowyer v. Chesnut*, 4 Leigh 4; *White v. Toncray*, 9 Leigh 852; *Phares v. Saunders*, 18 W. Va. 341.

Sheriff's Return.—See monographic note on Sheriffs and Constables* appended to *Goode v. Galt*, Gilm. 152.

Appellate Practice—Notice of Suit—Waiver.—By appearing to the action and going to trial, on the merits, the defendant dispenses with a formal service of process and waives any objection to the alleged irregularity and cannot raise the objection for the first time in the appellate court. *Pulliam v. Allen*, 15 Gratt. 62, citing principal case as authority. On the same subject, the principal case is cited in *Freeman's Bank v. Ruckman*, 16 Gratt. 126; *Watson v. Wigginton*, 28 W. Va. 545.

bond; but they do not state whether Cunningham was a principal obligor or a surety. They only state that Long "hath tendered the above bound Reuben Mitchell, as security, &c." The Sheriff states in his returns, that the forthcoming bonds were taken of the said Long and Cunningham, with Mitchell as surety. Judgments 190 were obtained on *these forthcoming bonds, executions issued, and the money paid by Mitchell, as appears by the return of the Sheriff.

On these motions, judgments were rendered by default; and Cunningham obtained a supersedeas.

Standar, for the appellee.

No Counsel, for the appellant.

The principal question made, was, whether, upon this record, Cunningham was to be considered as a surety or a principal obligor. The counsel for the appellee, relied on the case of Preston v. The Auditor, 1 Call, 471, to shew that it ought to be presumed, that the Court below had evidence that Cunningham was a principal and not a surety; and that if the appellant contested that point, he ought to have made his evidence part of the record.

May 9. JUDGE GREEN delivered the opinion of the Court.

In these cases, the defendant in supersedeas having given due notice that he should move for judgments against the plaintiff in supersedeas and Joshua Long, for money paid for them, as their surety, under execution; the defendants in the motions failed to appear, and judgments were given according to the notice. The proofs upon which the judgments were given, do not appear in the records. The plaintiff in supersedeas, having obtained copies of the records, and also, certain papers which the clerk certifies were the evidence upon which the judgments were rendered, objects that the judgments were erroneous, because it appears from the papers, certified by the clerk as the evidence, that in truth, Mitchell was not the surety for Cunningham, but for Long only; and, that Cunningham was a joint surety with Mitchell for Long, the principal debtor. From these papers it appears 191 that two suits were *brought against Long, and judgments were rendered against Long and Cunningham as his appearance bail; upon which executions issued and were levied upon Long's property, which was restored upon his tendering Mitchell as his surety in forthcoming bonds. Cunningham joined in these bonds; but it is not said upon the face of the bonds, whether he joined as principal or surety. The Sheriff's returns upon the executions state, that forthcoming bonds had been taken of Long and Cunningham, with Mitchell as his surety, and forfeited. Executions were awarded upon these bonds, and being issued, were paid to the Sheriff by Mitchell.

If the papers which disclose these facts could be considered as properly a part of the record, the judgments were right upon the merits, taking the Sheriff's returns that Long and Cunningham were the principals and Mitchell the surety, to be true. These returns did not contradict the evidence

afforded by the executions and bonds. Although Cunningham appears to have been Long's appearance bail in the first instance, and the executions issued against him in that character, yet he might have stipulated with Mitchell to execute the bonds as principal, and to save him harmless, as an inducement to Mitchell to execute them as surety; and Mitchell might have refused to execute the bonds on any other terms. The bonds themselves do not ascertain whether Cunningham executed them as principal or surety, and, as in all other cases of joint bonds, the question whether one was principal and another surety, was to be solved by evidence aliunde. Cunningham might have contradicted the Sheriff's return; and in that case, the Sheriff himself would have been a competent witness to prove its truth. He cannot now, after submitting to a judgment by default, object, in this Court, to the truth of the return; for it cannot be here supported by parol proof, as it might have been in the Court below, if it had been there objected to.

192 *But, the certificate of the clerk, that those papers were the evidence upon which the judgments were founded, cannot be received as a part of the records. His certificate to that effect can have no more effect than that of any other individual. He may certify that such records exist in his office, but not what use was made of them. That ought to have been shewn by the record; and it was the duty of the party wishing to avail himself of the fact, to have it made a part of the record. We are bound to consider the fact, that Mitchell was surety for Long and Cunningham, which was the foundation of the motions, was properly in proof before the Court, and this was the ground of the judgment in Preston v. The Auditor, 1 Call, 471.

The judgments should be affirmed.

RECORDS.

I. Public Records.

- A. Definition of Public Records.
- B. Duty to Keep Records.
- C. Authority to Make Records.
- D. Conclusiveness of Act of Recording.

II. Judicial Records.

- A. Matters That Are Part of the Record.
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 1. Quære.
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V. Lost Records.

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VII. Rejected Pleas.

Cross References to Monographic Notes.

- Appeal and Error. appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.
 Bills of Exception. appended to Stoneman v. Com., 25 Gratt. 887.
 Evidence. appended to Lee v. Tapscott, 2 Wash. 276.

Indictments, Informations and Presentments, appended to *Boyle v. Com.*, 14 Gratt. 674.
 Instructions, appended to *Womack v. Circle*, 29 Gratt. 192.
 Judgments, appended to *Smith v. Charlton*, 7 Gratt. 425.
 Jurisdiction, appended to *Phippen v. Durham*, 8 Gratt. 457.
 New Trials, appended to *Boswell v. Jones*, 1 Wash. 322.
 Removal of Causes, appended to *Brown v. Crippln*, 4 Hen. & M. 173.

I. PUBLIC RECORDS.

A. DEFINITION OF PUBLIC RECORDS.—A public record is a written memorial, intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it. *Coleman v. Com.*, 25 Gratt. 865.

B. DUTY TO KEEP RECORDS.—Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty to keep that written memorial, whether expressly required so to do or not; and, when kept, it becomes a public document, a public record, belonging to the office and not the officer. *Coleman v. Com.*, 25 Gratt. 865.

C. AUTHORITY TO MAKE RECORDS.—And it is not necessary that one who makes a public record should derive his authority from an express statutory enactment. *Coleman v. Com.*, 25 Gratt. 865.

D. CONCLUSIVENESS OF ACT OF RECORDING.—The act of a clerk admitting a paper to record is conclusive upon the question whether the paper is what it purports to be. *Tallafiero v. Pryor*, 12 Gratt. 277; *Grove v. Zumbro*, 14 Gratt. 515; *Johnston v. Slater*, 11 Gratt. 321; *Vaughn v. Com.*, 17 Gratt. 390; *Quinn v. Com.*, 20 Gratt. 144; *Herring v. Lee*, 22 W. Va. 672; *State v. Vest*, 21 W. Va. 800; *Burley v. Weller*, 14 W. Va. 272.

II. JUDICIAL RECORDS.

A. MATTERS THAT ARE PART OF THE RECORD.

Bond Given under Order of Court.—A bond given pursuant to an order of court, becomes a part of the very record. *Beery v. Homan*, 8 Gratt. 48.

Writ and Inquisition.—And, upon a motion to quash a writ and inquisition founded on a judgment at law, the writ and inquisition are a part of the record. *Wallop v. Scarborough*, 5 Gratt. 1.

Warrant of Summons.—So, too, the warrant summoning the magistrates of an examining court is a part of the record, but the warrant of commitment is not. *Com. v. McCaul*, 1 Va. Cas. 271.

Execution.—An execution of the same court, used as evidence on the trial of the cause, will be regarded by this court as part of the record, without a *certiorari*. *Preston v. Auditor*, 1 Call 471.

Papers in Another Suit.—And, a decree which refers to the record of another suit as an exhibit in the cause makes such record a part of the record of the cause under consideration, though it is not referred to in the bill or answer, nor made an exhibit by an entry on the order book. *Craig v. Sebrell*, 9 Gratt. 131.

How Far Writ Part of Record.—But the writ is a part of the record, for the purpose of amendment only, where issue has been joined upon a plea to the action. *Payne v. Grim*, 2 Munf. 297.

B. MATTERS THAT ARE NOT PART OF THE RECORD.

Advertisements of Judicial Sale.—Where advertisements to rent are not referred to in the commissioner's report, or in decree of sale subsequently ordered, they will not, though copied into the rec-

ord, be considered a part thereof on appeal. *Mustain v. Pannill*, 86 Va. 33, 9 S. E. Rep. 419.

Bill of Injunction.—And, a bill of injunction and the proceedings thereupon are not properly part of the record of the judgment at common law. *Hite v. Wilson*, 2 Hen. & M. 268.

Papers Not in Cause.—Papers upon which a cause was not heard in the trial court constitute no part of the record of the cause and cannot be considered. *Flourance v. Morien*, 98 Va. 26, 34 S. E. Rep. 890.

Caption of Orders.—Nor is the caption to the orders a necessary part of the record. *Jones v. Janes*, 6 Leigh 167.

1. QUERE.

Quere, as to Depositions and Commissioner's Report.—A cause is brought on to be heard upon the bill, answer, exhibits and award; *quere*, if the depositions and commissioner's report are a part of the record. *Nelson v. Cornwell*, 11 Gratt. 724.

C. ADDITIONS MADE BY CLERK.—The clerk can add nothing to the record, and his certificate that a deposition or other paper copied by him was the evidence whereon the judgment was founded, is no part of the record. *Roanoke L. & I. Co. v. Karn*, 80 Va. 589; *Cunningham v. Mitchell*, 4 Rand. 189; *Watson v. Com.*, 85 Va. 807, 9 S. E. Rep. 418; *Offending v. Ford*, 86 Va. 917, 12 S. E. Rep. 1; *Johnson v. N. L. & I. Co.*, 90 Va. 267, 18 S. E. Rep. 36; *Com. v. Quann*, 2 Va. Cas. 89.

D. MODE OF PROVING.—One of the usual methods of proving records is by examining copies. The method prescribed by the Code of Va., § 3343, is merely cumulative, and does not deprive parties of the right to resort to any other method allowable at common law. *So. Ry. Co. v. Wilcox*, 99 Va. 394, 39 S. E. Rep. 144.

E. CERTIFYING RECORDS IN REMOVED CAUSE.—Where a cause is removed from one court to another the clerk of the court to which it is removed is the only person who can certify the record. *Smith v. Pyrites, etc., Co.*, 100 Va. 292, 40 S. E. Rep. 918.

F. CURING DEFECTS.

Supplying Defects by Averment.—No defect in a record can be supplied by averment. *Wood v. Com.*, 4 Rand. 329.

Supplying Omissions by Intendment.—And, no intendment can supply an omission from the record in a criminal case of what is material, but all proper inferences may and must be drawn from that which does appear. *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 962.

G. CORRECTING ERRORS.—A court may, at any time, permit the correction of clerical errors in its records. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Bohn v. Zeigler*, 44 W. Va. 402, 29 S. E. Rep. 983; *Gibson v. Com.*, 2 Va. Cas. 111.

H. SIGNING COMPELLED BY MANDAMUS.—A judge who fails to sign the record may be compelled to do so by mandamus. *Weatherman v. Com.*, 91 Va. 796, 22 S. E. Rep. 349; *Quinn v. Com.*, 30 Gratt. 143.

III. AMENDMENT.

When Made.—During the term of a court at which a judicial act is done the record remains in the breast of the court, and may be altered or amended; but after the adjournment of the term amendments can only be made in cases in which there is something in the record by which they can be safely made. Amendments cannot be made after the term, upon the individual recollection of the judge, or upon proof *aliunde*. *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

So, after the term at which a judgment was rendered it is error for the court to amend the record. *Sydnor v. Burke*, 4 Rand. 161.

IV. INSPECTION.

The records and papers of every county court clerk's office are open to the inspection of any person. *State v. Long*, 37 W. Va. 266, 16 S. E. Rep. 578.

Proceedings of Electoral Boards.—And, so much of the record of the proceedings of electoral boards as relate to the appointment and removal of judges and commissioners of election and registrars, or the ordering of a new registration, is a public record, open to inspection by any citizen and voter of the county in which the record is kept, and he may take therefrom at and within a reasonable time, in the presence of the secretary of the board, memoranda or notes of the proceedings of the board as to which no secrecy is enjoined. But so much of said records as relate to the preparation and printing of the official ballots prescribed by law, certification of the same, and their distribution to the judges of election, is not a public record that is open to the inspection of any one, other than the officers of the county to whom the duties of preparing, printing, certifying and distributing the ballots are confided by law, and the secretary of the board cannot be compelled to allow memoranda or notes thereof to be taken, or that portion of the records to be inspected, by any other voter. *Gleaves v. Terry*, 93 Va. 491, 25 S. E. Rep. 552.

V. LOST RECORDS.

Where a record is lost it may be supplied by an authenticated copy or proof of its contents, but this rule does not apply to records in criminal cases. *Bradshaw v. Com.*, 16 Gratt. 507; *Hudson v. Yost*, 88 Va. 347, 13 S. E. Rep. 436.

VI. REMOVING RECORDS.

At the suit of a citizen an injunction will be granted to prevent the illegal removal of the public records of a county. *Osburn v. Staley*, 5 W. Va. 85.

But, transferring the records of a county to an extension of the clerk's office is not such a removal of them as is prohibited by law. *Board of Supervisors of Norfolk County v. Cox*, 98 Va. 270, 36 S. E. Rep. 380.

VII. REJECTED PLEAS.

See monographic note on "Bills of Exceptions" appended to *Stoneman v. Com.*, 25 Gratt. 887.

Cottom v. Cottom.

May, 1823.

Judgment—Conclusiveness of.—When the judgment of a competent Court is pronounced on any question, it is conclusive on all other tribunals, until it is reversed by a regular course of proceedings. **Same—Same—Case at Bar.**—Therefore, where two successive applications are made to a County Court for administration, and rejected; appeals taken to the Circuit Court from both decisions, and the judgments of the County Court affirmed; upon an appeal to this Court on the second case, the Court cannot reverse the first judgment, and grant administration.

Appeal from the Superior Court of Law for the town of Petersburg. The case was this:

In September, 1823, Samuel Cottom, moved the Hustings Court of Petersburg, for administration of the estate of Richard Cottom, deceased, by whose will the said Samuel had been appointed 193 executor. The Court being "equally divided, the motion was over-ruled, and an appeal taken to the Superior Court,

where the judgment of the Court of Hustings was affirmed.

In August, 1824, Samuel Cottom made a second application to the Hustings Court to be permitted to qualify as executor as aforesaid; which motion was again over-ruled, and the administration with the will annexed, was granted to Charlotte Cottom, the widow of the said Richard.

Samuel Cottom filed a bill of exceptions to the opinion of the Court, setting forth the evidence by which his motion had been supported; but, as this Court decided the case on the ground of jurisdiction, it will be unnecessary to insert that evidence here.

Samuel Cottom appealed to the Superior Court, where the judgment of the Court of Hustings was affirmed. From this second judgment, he appealed to this Court; but no appeal was taken from the first judgment.

Daniel, for the appellant.

Spooner and May, for Charlotte Cottom, the appellee.

The argument turned, principally, upon the merits of the judgment of the Hustings Court, in rejecting the application of Samuel Cottom; and it was urged, in addition, by the appellee's counsel, that the first judgment was not appealed from, and must be a bar to any future application on the same subject, until it was reversed. For this doctrine, they referred to the case of *Webb v. M'Neil*, 3 Munf. 184.

May 10. The PRESIDENT delivered the opinion of the Court.

The proceedings on the first application of the appellant to qualify as the executor of Richard Cottom, his testator, ought to have put at rest the controversy now 194 before the Court. The record of those proceedings was properly before the Circuit Court, upon the appeal from the second order of the Hustings Court, refusing to permit the appellant to qualify as executor as aforesaid. The Circuit Court had both appellate and original jurisdiction of the controversy; and the record of the proceedings on the first application to qualify, was properly presented to it as a bar to the application in the second instance. Until the judgment of a Court of competent jurisdiction, upon the same matter, is reversed in a course of regular proceedings on it, a resort to any other tribunal, or to the same tribunal, for its judgment on the same controversy, is inadmissible. Though the Hustings Court, on the first application by the appellant to qualify as executor, was divided, and only virtually refused his application, yet, an appeal lay to the Circuit Court from that refusal, and was prosecuted by the appellant here to a judgment against him; from which, he failed to appeal to this Court. The record of those proceedings is, therefore, not before this Court, for the purpose of re-viewing the judgment against him in that case; although it was properly before the Circuit Court, in the proceedings now appealed from, as a bar to any further application to qualify as executor, no pleadings being required in such case; and

*See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 435.
The principal case is cited with approval in *Schultz v. Schultz*, 10 Gratt. 383.

of consequence, is also now before this Court for the same purpose.

Without noticing, therefore, the other points made in the argument, the judgment is to be affirmed.

195 *Jackson v. Arnold.

May, 1820.

Injunction—Judgment against Principal and Surety—Parties.*—The principal and surety to a bond obtain an injunction to a judgment against them. The surety dies pending the suit in Chancery. After referring the cause to a Commissioner, exceptions to the report on account of set-offs disallowed, (some of which were claimed by the surety himself.) and the Court rejecting them, because not filed in time, the injunction is in part dissolved, and in part perpetuated, without making the representatives of the deceased plaintiff a party. This proceeding is erroneous. A rule should have been given him, at the instance of the defendant, that unless he revived the suit by an appointed time, the injunction should stand dissolved.

This case was submitted by counsel, and the following opinion gives a sufficient history of it.

May 11. JUDGE GREEN delivered the opinion of the Court.

The appellant Edward Jackson, and Jackson, filed their bill against the Arnolds, and obtained an injunction to a judgment obtained by them upon a bond in which Edward Jackson was principal, and John Jackson surety. In the progress of the cause, the accounts between the parties were referred to a commissioner, who made his report on the 12th of October, 1820. On the 16th of October, 1821, it was suggested that John Jackson had departed this life since the last Term; and the cause came on to be finally heard, as to the surviving plaintiff and the defendants. By the decree of the Court, the injunction was in part dissolved, and in part perpetuated. Exceptions to the report were filed by the plaintiffs, on the 8th day of May, 1821, which were disregarded by the Court, because they had not been filed within the time prescribed by the rules of the Court. Amongst other claims to set-offs against the bond, submitted to the commissioner, rejected by him, and insisted on by the exceptions, were two claimed by John Jackson, the surety, on a receipt alleged to have been executed by George Arnold, 196 for 45l. as paid expressly on *account of the bond, proved by the subscribing witness, but denied upon oath by George Arnold; the other, for \$6, a debt due to him by James Arnold, admitted by the latter.

The representative of John Jackson, who had been a party to the suit, was interested in the fate of this injunction; and it ought not to have been dissolved, without affording him an opportunity to be heard. This opportunity should have been given to him, by making a rule upon him, at the instance of the defendants, if they chose to make a motion to that effect; that unless he revived the suit by an appointed time, the injunction should stand dissolved. If he failed to revive accordingly, the injunction might have been dissolved in whole or

in part, as to John Jackson, if, upon a hearing as to Edward Jackson, it ought to have been dissolved, in whole or in part, as to him. The hearing of the cause, as to Edward Jackson, was therefore premature; and it would not be proper, in this Court, now to examine the merits of the cause, in the absence of the representative of John Jackson, who has had no opportunity to be heard.

On this ground, the decree should be reversed, and the cause remanded.

197 *The Trustees of the Presbyterian Church v. Manson, &c.

May, 1826.

Principal and Agent—Liability of Agent.*—Individuals who contract for the benefit of a company or society, where the credit is given to them, and not to their constituents, are personally liable. **Equity Jurisdiction—Account.**—The principles of Smith v. Marks, 2 Rand. 449, confirmed.

This was an appeal from the Richmond Chancery Court, where Manson and Sturdivant filed a bill against Parkhill and others, trustees or committee for building the First Presbyterian Church in the City of Richmond. The bill states, that the plaintiffs entered into a contract with the persons above mentioned, in their character aforesaid, to erect the First Presbyterian Church in the City of Richmond; and that after the work on the main building was completed, a new contract was made between the plaintiffs and two of the same committee or trustees, for the construction and completion of a steeple to the said church: that the said contract was made with the persons aforesaid, with the consent and authority of the other members of the said committee or trustees: that the plaintiffs did, accordingly, proceed with and fully complete a steeple for the said church: that the contract was made with the said trustees, and none other, solely on their credit and responsibility, and the individual contributors or subscribers were unknown to the plaintiffs, and still are so: that frequent application has been made for an adjustment and payment of their account, but to no purpose: that a measurement of the work performed was effected under a mutual order of the plaintiffs and three of the said committee; but the said committee have totally failed and refused to pay the same. The bill prays, that the defendants may be compelled to pay the sum of money due as aforesaid, &c.

Several of the defendants answered, alleging that the sum stipulated for had been fully paid; but it is unnecessary to go into detail, as the cause was decided on the question of jurisdiction.

198 *The Chancellor decreed in favor of the plaintiffs; and the defendants appealed to this Court.

Forbes and Wickham, for the appellants. Bacchus, for the appellees.

May 10. JUDGE CARR delivered his opinion.

In this case, the appellants made a con-

*See monographic note on "Agencies" appended to Silliman v. F., etc., R. R. Co., 27 Gratt. 119.

*See monographic note on "Jurisdiction" appended to Philpen v. Durham, 8 Gratt. 457.

The principal case is cited in Petty v. Fogle, 16 W. Va. 512; Yales v. Stuart, 39 W. Va. 120, 19 S. E. Rep. 425.

*See generally, monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425; monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

tract with the appellees, in their character of trustees for the pew-holders of the church, whereby they employed them to finish the steeple. They did so. The parties disagreed about the contract, and the appellees filed this bill. It seeks no discovery; states no difficulty in the way of proceeding at law; nor any other reason for coming into equity, except that equity could do more complete justice, by apportioning the debt among the defendants. There could have been no difficulty from the trustees being fiduciary characters; for, we know from *Willis v. M'Williams*, *Cullen v. The Duke of Queensbury*, and many other cases, that individuals who contract for the benefit of a company or society, where the credit is given to them, and not to their constituents, are personally liable; and the bill states, that his contract was made with the trustees alone, and solely on their credit and responsibility; the individual pew-holders being then and still unknown to the plaintiffs. In the argument of the cause, the counsel referred to several cases, to shew that Chancery would sometimes take jurisdiction, in cases of this kind. The authorities have been examined, and they are found to present some feature of equity, which is wanting here. Either a discovery was sought, or a multiplicity of suits must have been encountered at law. This case is, in principle, exactly like the case of *Smith v. Marks*, 2 Rand. 449. The reasons and authorities there cited, may be referred to, and need not be repeated here.

199 *I am of opinion, that the decree of the Chancellor be reversed, and the bill dismissed.

The other Judges concurred, and the decree was reversed.*

Carter, &c. v. Harris.

May, 1826.

Deed of Trust—Construction.—Where a grantor has conveyed all his estate, real and personal, to trustees, the conveyance includes equitable as well as legal rights, and the trustees are the proper persons to assert them, in a Court of Equity.

Sheriff's Levy of Execution.—A Sheriff who is interested in an execution, cannot lawfully levy it himself.

Same Execution—Purchase by Sheriff.†—Quære, can a Sheriff selling property under an execution levied by himself, become the purchaser, even if he is not interested in the debt?

Same—Sale by—Vacation of.—A sale by a Sheriff will be vacated, if he raises doubts, or makes impressions unfavourable to a fair sale, and then buys in the property at an under rate.

Same—Same—Validity of.—Such a sale will be void, if the Sheriff is the only bidder, or there is another who only bids to give a colour of fairness to the sale.

Appeal from the Lynchburg Chancery Court.

Carter and others, trustees for James Dickie, his wife Joanna, and their children, filed their bill against Benjamin D.

Harris, stating the following case. James Dickie, by deed dated the 14th of July, 1819, and duly recorded, conveyed in trust to the plaintiffs, all his real and personal estate, and all debts owing to him, for the purpose of paying all the just debts of the said Dickie, and then of maintaining him and his wife, the education and maintenance of his children, &c. Some time before the execution of this deed, Dickie became indebted to Claiborne, and gave his note for \$100, which was assigned to Benjamin D. Harris; on which the said Harris instituted a suit and recovered judgment,

in March, 1819. Execution issued, 200 *a delivery bond was taken and forfeited, and execution awarded on the delivery bond in May, 1819. The said Benjamin D. Harris, being then Deputy Sheriff of Nelson county, in order to remove the difficulty that would attend the levying an execution in his own favor, endorsed it to his father, Edward Harris, and then levied it on a female slave of the said Dickie, named Savory, whom he advertised, and purchased, at the day of sale, for about \$120. The said slave was worth at least \$400 or \$500, and would have commanded that price, if she had been fairly disposed of. The sale is charged to be illegal and void, and the plaintiffs say that they are entitled to the said slave, on payment of the execution, interest, &c. On the day of sale, there were no real bidders present, and Harris purchased the slave at the price aforesaid, having procured a by-stander to make a nominal bid, in order to give an appearance of fairness to the sale. The bill prays that the said sale may be set aside, upon the plaintiffs' paying the sum due upon the execution, &c. and that an account might be directed of hire and interest, &c.

Harris answered, denying that the plaintiffs had any right to sue for his alleged injury; that it is true, that he directed the execution to be endorsed for the benefit of Edward Harris; and this was a fair bona fide transaction, intended to secure to the said Edward Harris, the proceeds of the said execution, to re-pay money which he had advanced for the defendant, to enable him to farm the Shrievalty: that the slave in question was sold at a public place, to satisfy two executions: that she sold for about \$157, being the amount of both executions, and the defendant became the purchaser: that the sale was fair: and the girl was sold for as much, (as the defendant believes) as she would have brought, if sold at any other place in the county, under an execution, considering the great scarcity of money, &c. at that time.

Many depositions were taken, the material parts of which, are so fully stated in Judge Carr's opinion, that it is unnecessary to insert them here.

*JUDGE COALTER absent.

†**Fiduciaries Purchase of Trust Fund.**—As a general principle, it is well settled that trustees, agents, auctioneers and all persons acting in a confidential character, are disqualified from purchasing the subject committed to them. The functions of buyer and seller are incompatible, and cannot be exercised by the same person without great danger of fraud. Such transactions are constructively fraudulent, and are therefore voidable at the instance of the beneficiary, although, if he

chooses to recognize them, they are binding upon the trustee. *Feamster v. Feamster*, 35 W. Va. 13 18 S. E. Rep. 57, quoting from 2 Min. Inst. 212, and citing the principal case. To the same effect, the principal case is cited in *Hamilton v. Shrewsbury*, 4 Rand. 431; *foot-note* to *Buckles v. Lafferty*, 2 Rob. 292; *foot-note* to *Howerly v. Helms*, 20 Gratt. 2; *Tenant v. Dunlop*, 97 Va. 241, 38 S. E. Rep. 620; *Smith v. Miller*, 68 Va. 541, 37 S. E. Rep. 10; *Newcomb v. Brooks*, 16 W. Va. 59, 68; *Lewis v. Brown*, 36 W. Va. 14 S. E. Rep. 444.

201 *The Chancellor dismissed the bill of the plaintiffs, and they appealed to this Court.

Leigh for the appellants, contended, that the endorsement of the execution, did not effect a transfer of the debt from B. Harris to E. Harris. It was still the property of B. Harris; and he could not, as Sheriff, levy his own execution. Fraud is distinctly proved by Perrow, and many corroborating circumstances. A Sheriff cannot purchase at his own sale, at all, in England; and whether this rule is strictly followed in this country, or not, yet any circumstances to prove unfair dealing, will certainly invalidate the sale.

Wickham, for the appellee.

Dickie, is no party to the suit. It is brought by his trustees, and the sale took place before the deed of trust was executed. If so, Dickie alone had a right to sue, and he could not transfer that right to any person whatever. It is said, the property was sold for less than its value; but this was produced by the state of the times, want of bidders, &c. The fraud is not sufficiently proved. Perrow is the only witness to that point, and he speaks doubtfully. None of the circumstances go to establish fraud. It is not proved, that there was only one bidder; and if it was, it is not necessary to the validity of a sale, that there should be more than one.

May 12. JUDGE CARR delivered his opinion.

It was objected by the counsel for the appellee, that the trustees were not the proper parties to file this bill, nor equity the proper forum. We must settle these points first.

By the deed of trust, it seems to have been intended to divest the grantor of all property, rights and credits, of every kind. After a long and minute enumeration of the different articles of property, it adds, "with all the other estate, both real and personal, of the said James Dickie." This would convey, I presume, equitable as well as legal estate. The question raised by the bill, is, whether the sale of the slave was not so conducted, that a Court of Chancery would pronounce it invalid, and the purchaser, a trustee for Dickie, holding the property subject to redemption, by payment of the amount of the executions. In this point of view, it seems a question of property, which the trustees are the proper parties to litigate. Nor do I think the objection to the jurisdiction of the Court, well founded. Though it be true, as was contended, that the Sheriff might have been sued for the fraud, that does not seem to take from the party aggrieved, the power of waiving such suit, and coming into equity to redeem the slave. This is the every day jurisdiction of that forum. The books are full of such cases; and it is much the most favourable course for the defendant, as it ensures to him, if the sale should be set aside, the payment of the executions, with their interest and costs, without further delay or litigation.

Upon the merits, the first question seems to be, was Harris interested in the execution? If he were, there need no authori-

ties to tell us, that he was not the person to levy it; to sell and to buy under it. Sheriffs are confidential and highly responsible officers of the law. They are the trustees and agents, of both plaintiff and defendant; not selected by them, but imposed on them by the law; and therefore, for the honor of the law, and the purity of the administration of justice, it is vitally essential, that their conduct should be watched over with a vigilant and jealous eye. This is the more necessary, as their office clothes them with great power, and is constantly assailing them with strong temptations to abuse and pervert that power to sinister and selfish purposes. To permit them to wield the process of our

Courts, in their own cases; to cut and carve for themselves; to exact such measure of justice, as self-interest might dictate; would lead to oppression and abuse; would tend to subvert the foundation of private rights, and cover with deserved shame the ministers of justice. The defendant seems to have felt somewhat conscious of this; for, we see that the first execution, (while the debt was confessedly his own,) was levied by the High Sheriff; and before he would take the second into his own hands, he directed the clerk to endorse it for the benefit of his father.

Was the debt really and bona fide, transferred to his father, by this endorsement? I confess, I rather think that it was not. The whole case shews, that the execution was the property of Harris, up to the time of the endorsement. The bill charges this act to have been a mere sham, to enable the defendant to take the levying and sale into his own hands. In reply, the defendant says, that the transfer was not a sham, but a real transaction; the purpose of which was, to secure to his father the proceeds of the execution, to re-pay money which his father had advanced, to enable him to farm the Shrievalty.

In the first place, this seems to me to be one of those substantive and affirmative allegations, which a defendant ought to prove by something more than his answer. If he was the owner of the execution, it disqualified him to act. When this act is questioned, can he support it by the mere endorsement, and his own evidence that it was bona fide? We see no vestiges of a contract between him and his father, neither prior nor subsequent to the endorsement. We see no evidence that his father had advanced him money to farm the Shrievalty; and I think it was his place to have furnished us this evidence. He declared to Perrow, on the day of sale, that the execution under which he was about to sell, was his own; and that he must bring it to a close, for he wanted his money. He dealt with the execution, in every respect, as owner, rather than as an officer, acting for another. When he bought the negro, *it was for himself, not his father; and yet we hear of no settlement with his father since. There is no such allegation in his answer.

But, even if it appeared that the transfer was a real one, to satisfy a debt bona fide

due to his father, I should, as at present advised, still think that he could not deal with the execution as Sheriff. He was still too much interested to be that impartial and unbiassed agent, whom the law interposes for the protection of the rights of both plaintiff and defendant. He was still liable to his assignee for the debt, unless he made it by the execution. Nay, I am inclined to go even further; and though I do not mean positively to decide, I am free to state it as my impression, that a Sheriff, who is selling property under an execution, though he has no sort of interest in the debt, cannot legally buy of himself. I can find no decision of this point in our Reports; but all the analogies of the law are against it. It is well settled as a general principle, that trustees, agents, auctioneers, and all persons acting in a confidential character, are disqualified from purchasing. The characters of buyer and seller are incompatible, and cannot safely be exercised by the same person. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* The disqualification rests, as was strongly observed in the case of the York Buildings Company v. M'Kenzie, 8 Bro. Parl. Cas. 63, on no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is interested with the interests of others, cannot be allowed to make the business an object of interest to himself; for, the frailty of our nature is such, that the power will too readily beget the inclination to serve our own interests at the expense of those who have trusted us. Lord Eldon says, in *ex parte James*, 8 Ves. 337: "The doctrine as to purchasers by trustees, assignees, and persons having a confidential character, stands much more upon general principles than upon the circumstances of any individual case. It rests upon

205 *this; that the purchase is not permitted, in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases." To my mind, these principles seem to apply with great strength to the case of Sheriffs. They are appointed by the law, for the important purpose of carrying the judgments of Courts into fair and impartial execution. Clothed with the power of the Commonwealth, they levy their execution on what property they please. They fix the time and place of sale. They cry the property. There are a thousand ways in which they may discourage bidders, without committing themselves. They can say to those who wish to buy, "nothing but the money will do." They may even demand specie; while, if they bid themselves, there is no need of having a cent of cash. They can bid out the property to themselves, return the execution satisfied, and leave the plaintiff to get his money by legal measures. These are my impressions on this important and interesting point.

But, there are other objections to this sale. It is laid down in many cases, that if the plaintiff in an execution raise

doubts or make impressions, unfavorable to a fair sale, and then avail himself of these impressions, to buy in the property at an under rate, the sale will be set aside. In this case, it appears that there was a general impression among those present, that the Sheriff was to buy in the negro, and Dickie was to redeem. Garland says, there were but three or four persons at the sale. Montgomery says, he thinks there were four besides himself; others say, there were several, speaking in general terms. Now Perrow says, Harris told him there was such an understanding. Garland says, that while at the place of sale, Montgomery told him, that he had no doubt there was an understanding between the parties; and Clarkson says, that he had heard, (though he does not exactly know from

206 what quarter,) *that such an arrangement had been made. This evidence shews, that whatever was the foundation, such an impression was general among those present; and so far as Perrow's evidence will weigh, that impression came probably from Harris; for, he says that Harris told him so. This, though of itself, it might not form a decisive objection to the sale, certainly adds to the others.

But there is yet another objection. No person, I presume, would contend, that if the Sheriff were the only person at the sale, or the sole bidder, he might make a single bid, knock out the property, and support this as a valid sale. Such a proposition would contradict the whole tenor of the law, which has provided so anxiously for the publicity of the sale; would arm the Sheriff with a power truly tremendous; would subject the whole personal property of every debtor in the Commonwealth, to his grasp; and is, indeed, a position too monstrous to be debated. How was the fact in this sale? The Sheriff and Perrow were the only bidders. Perrow did not bid, till called on by the Sheriff; and then merely (as he says in his deposition,) to make a sale, without the intention or the power to purchase; and this known to the Sheriff. Was not the Sheriff, then, in truth, the only bidder? Unquestionably.

I am, therefore, clearly of opinion, that the decree should be reversed; the sale set aside; the cause sent back for an account, in which the Sheriff should be charged with the hire of the slave, and credited by the amount of the executions, interest, and costs at law; that the trustees be decreed to pay the balance, if any, appearing due, in a given time, such as the Chancellor may direct; and if so paid, that the assignee be decreed to deliver the slave and her increase, if any, to the appellants; and in default of such payment, that there be a re-sale of the slave. And if it should appear from such account, that a balance of hire of the said slave is due from the Sheriff, the same, as well as the said slave and her increase, shall be decreed to the appellants.

207 *JUDGE GREEN.

Without determining or giving any opinion upon the question, whether a Sheriff can purchase property sold under execution by himself, I think it clear, that

he cannot acquire an irredeemable title by such a purchase, unless it appear that his conduct has been perfectly fair, and with a view to procure the best price. In this case it appears that a pretty general impression prevailed among those who were present at the sale, (an impression which is traced, in part at least, to the Sheriff as its author,) that Dickie was to be permitted to redeem the slave, if purchased by the Sheriff; which was calculated to damp the biddings, and to sacrifice the property. Upon this ground, I concur in the decree proposed.

JUDGE CABELL concurred in the principles contained in JUDGE CARR'S opinion; and the decree was reversed, and one entered up, in pursuance of the foregoing principles.*

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*Guerrant v. Anderson.

May, 1828.

Sheriff—Sale of Mortgaged Slave—Rights of Purchasers.—If a Sheriff sell under execution a slave mortgaged by a deed not recorded, and void against the creditor, and he sells and the purchaser buys the property, subject to the claim asserted in the deed, the purchaser takes the slave subject to the payment of the mortgage debt. But if, in such case, the Sheriff sells all the title that he has a right to sell in the property, under the execution, whether the deed be valid or void, the absolute title passes to the purchaser discharged of any claim on the part of the mortgagee.

Unrecorded Deed—Effect of.—An unrecorded deed is void as to creditors, whether they have notice or not; but it will be good against purchasers with notice, or who have not purchased for valuable consideration.

Same—Same—Purchaser at Sale in Behalf of Creditor.—A purchaser under a sale in behalf of a creditor, holds the rights and occupies the place of the creditors; and therefore he will not be affected by notice of an unrecorded deed.

Appeal from the Superior Court of Law for the county of Buckingham, where Guerrant brought an action of detinue for a female slave, against Anderson. Issue was joined, on the plea of non detinet, a verdict was rendered for the defendant, and judgment given accordingly.

On the trial, a bill of exceptions was filed by the plaintiff, stating, that the plaintiff, to support his action, introduced an execution against Catlett and others, which was levied on a female slave of Catlett's, sold under the said execution, and purchased by Guerrant, the plaintiff; in which sale, Catlett's title only was sold: that at the time of the sale, the defendant made known his title to the said slave, which was derived from a deed of mortgage, conveying the slave in question, dated the 6th day of August, 1820; and said, that he was ready to relinquish his title to the slave, if the money was paid to him; to secure which the deed was made, and not otherwise; but the plaintiff refused to pay it: that it appeared that the plaintiff knew of the deed before the sale

under the execution: that the Sheriff admitted that he had seen the deed, before the day of sale; and he swore that he sold such right as Catlett had in the slave, subject to the deed, if it was, in law, liable and subject to it; and not subject to it, if the deed was not, in law, sufficient to subject it; and that the deed was produced and exhibited publicly on the day of sale by the defendant, who forbade the sale, and claimed the slave: that at the sale, the Sheriff held the deed in his hand, read it aloud, and proclaimed that he was selling subject to the defendant's claim under the deed. The plaintiff moved the Court to instruct the jury, that if, from the evidence in the cause, they did believe that the Sheriff did sell the slave for such right as he might sell under the execution, and independent of the deed, the title of the plaintiff under the sale was independent of the deed, and that they were not to regard the deed as evidence in the cause, because the same had not been recorded, or delivered to be recorded. The Court overruled the motion, and permitted the deed to go as evidence to the jury, and instructed them, that if they believed from the evidence, that the Sheriff sold and the plaintiff purchased the slave in question, subject to the defendant's claim asserted by the deed, the plaintiff is not entitled to recover the slave from the defendant, without first satisfying the claim, according to the terms of the deed; and if they believe, from the evidence, that the Sheriff sold, independent of, and without any reference to, the deed; yet, if they believed, from the evidence, that the Sheriff and plaintiff both had notice of the deed, at and before the day of sale, the plaintiff's title under the sale would be affected by it, and the deed evidence for the defendant, although not recorded, if otherwise satisfactorily proved to the jury, and that all the transactions were within eight months after the date of the deed; to which opinion, the plaintiff excepted, and appealed.

The case was submitted, without argument.

May 17. The PRESIDENT delivered the opinion of the Court.

The questions which belong to this case, turn on the two instructions of the Judge to the jury, which are set out in the bill of exceptions. The suit is in behalf of the purchaser of the slave in question, at a public sale, under an execution levied in the property, and proceeded in according to law, against the appellee, who claims the property under an unrecorded mortgage, executed by the defendant in the execution.

The counsel for the plaintiff moved the Court, upon the evidence exhibited to the jury, to instruct the jury, that if from the evidence, they believed that the Sheriff did sell the slave, for such right as he might sell under the execution, and independently of the deed, that the title of the plaintiff, under the sale, was independent of the deed; and that they were not to regard the deed as evidence in this cause, because the deed was not recorded, or delivered to be recorded. This motion was over-ruled; and the Judge instructed the

*Absent the PRESIDENT, and JUDGE COALTER.

†**Unrecorded Deed—Effect.**—To the effect that an unrecorded deed is void as to creditors whether they have notice or not, but good against purchasers without notice or who have not been purchasers for valuable consideration, the principal case is cited in Roanes v. Archer, 4 Leigh 562; Smith v. Smith, 19 Gratt. 548; Heermans v. Montague, 2 Va. Dec. 19; Delaplain v. Wilkinson, 17 W. Va. 275; State v. Johnson, 28 W. Va. 70; Abney v. Ohio Lumber, etc., Co., 45 W. Va. 452, 32 S. E. Rep. 250.

jury, that if they believed from the evidence in the cause, that the Sheriff sold, and the plaintiff purchased the negro in question, subject to the defendant's claim, asserted by the deed, he, the plaintiff, is not entitled to recover the slave from the defendant, without first satisfying the claim, according to the terms of the deed. To this instruction, there seems to be no valid objection. If the plaintiff purchased only the title of the mortgagor, the possession of the mortgagee could not be divested, until his claim under the deed was satisfied.

The second instruction under which the merits of the case turn, was in the following words; that "if the jury believed from the evidence, that the Sheriff sold independent of, and without reference to the deed, yet if they also believe from the evidence, that the Sheriff and plaintiff both had notice of the deed, at and before the day of sale, the plaintiff's title under the sale, would be affected; and the deed evidence for the defendant, though not recorded or delivered to the clerk to be recorded, if otherwise satisfactorily proved to the jury; and that all the transactions were within eight months after the date of the deed." The error in this instruction, consists either in not distinguishing between a purchaser of the rights of a

211 creditor, *from a purchaser from the debtor, or in confounding the condition of a creditor with that of a purchaser, with notice of a prior deed, and must have grown out of a misapprehension of the Statute, in relation to the subject. By the 4th section of the Act, to reduce into one the several Acts for regulating conveyances, and concerning wrongful alienations, it is declared, that all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to creditors, absolutely and without qualification; and as to subsequent purchasers, with the qualification, "for valuable consideration, and without notice." The words, "for valuable consideration," in the section, certainly have no application to creditors, there being none of any other denomination; nor have the words, "without notice," which make a part of the qualification of a purchaser to resist the unrecorded deed, any relation to a creditor, either by its position in the sentence, or its context. The sentence following this provision in the 4th section, makes this more plain, if it were necessary. Its words are, "but the same, as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall nevertheless be valid and binding;" omitting entirely, the word "creditors," and thereby fully explaining the meaning of the provision in the section that precedes it. The 2d section in the same Act, might be resorted to for the same purpose. In that section, the words, "for valuable consideration, and without notice," are only applied to subsequent purchasers; and the provision as to creditors, is included in a substantive sentence coming afterwards, to which those words can have no application. A contrary exposition, would be in

conflict with both the language and intention of the Legislature. Before the words "for valuable consideration without notice" were inserted in the Act, it was the settled law of a Court of Equity, though the unrecorded deed was void at law, to postpone such subsequent purchaser, on the ground that he was guilty of 212 a "fraud, in purchasing what he knew, in justice, belonged to another. Since the insertion of those words in the Statute, that rule has become a rule of law; but that rule was never extended by a Court of Equity to creditors, nor was it intended to be so extended by the Legislature; because, though a creditor has notice of an unrecorded deed, he commits no fraud by crediting the grantor upon his general responsibility. If, in the lawful pursuit of his rights, he gets a lien on the property by the delivery of an execution to the proper officer, as in the case before us, or otherwise, having equal equity with the party claiming under the deed, he falls within the settled rule of equity; that between parties having equal equity, he who has the law also, shall prevail. That the second instruction of the Judge would violate this rule, is perfectly clear; for, though the appellee was a purchaser and not a creditor, and in that character, in an ordinary case, would fall within the provisions of the Act in regard to purchasers, yet being a purchaser under a sale in behalf of a creditor, he holds his rights and occupies his place in this controversy; otherwise, the rights of a creditor would be of no avail.

On these grounds, the judgment is to be reversed, and the verdict set aside, and the cause ordered for further proceedings, in which the second instruction in the bill of exceptions is not to be given, but a contrary instruction, in the event that a similar motion is made by either party.

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*Land, &c. v. Otley.

May, 1826.

Wills—Construction—Intention Governs.—*In the construction of Wills, the first object is, to gather the intention of the testator from the whole will; and this intention must prevail, unless it violate some rule of law.

Same—Same—Case at Bar.—Where a testator leaves one half of his estate to his wife for life, and the use of the other half to her until his child or children come of age or marry, with directions that his children shall be supported and educated out of the latter half: the wife had no interest

***Wills—Construction—Intention Governs.**—The cardinal rule for the interpretation of wills is, to collect the intention of the testator from the whole will, taken together as a consistent whole formed of all its parts, and, if such intention be lawful, full effect must be given to it. Intention is the life and soul of a will, and the great point to be ascertained: when it is clear, and violates no rule of law, it must govern with absolute sway. *McCant v. Nuckolls*, 86 Va. 337, 12 S. E. Rep. 160, citing principal case. And in *Graham v. Graham*, 4 W. Va. 322, it is said: "In the construction of a will the first object is to ascertain the intention of the testator, for what he intended is to control. It is in fact the soul of the will; but it is to be drawn from the will, the whole will taken together, and not from an isolated clause. *Kennon v. McRoberts*, 1 Wash. 96; *Reno v. Davis*, 4 Hen. & M. 283; *Land v. Otley*, 4 Rand. 213." See the principal case also cited in *Wallace v. Dold*, 3 Leigh 266.

For further information on this subject, see monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

under this will, which, upon her death before the children attained their age or married, was transmissible to her representative.

This was an appeal from the Chancery Court of Williamsburg. The case was this:

Thomas Calvert died in the year 1813, leaving a will dated in 1808, at which time he had a daughter named Polly, and the prospect of another child. At the time of his death, both children were under age. The child afterwards born, in 1809, was called Thomas. He left also a widow, named Kezia. This controversy grew out of the construction of the will.

In the first clause, he gives to his daughter Polly, "now an infant, the whole of my personal and real estate, be it more or less; provided my wife, Kezia Calvert, should have another child lawfully begotten by me, I in that case give the whole of my property, to be equally divided between them both, and in case of their deaths before they either married or become of age lawfully, I wish all my estate to go to the children of my sister Polly Jones, wife of Col. Briton Jones, of Southampton county. Further, I desire it to be in the power of my wife Kezia, to have the full use of all my negroes, lands and all species of property, except my money, until my children or child become of age, or be lawfully married; then, one half of said estate, with all my money, to go to my child or children: during my wife Kezia's natural life, she shall be entitled to hold the half allotted for her as above, and at her death, to go to my children and their heirs, as above

214 mentioned. *Item: I desire that my child or children, as above, shall be supported, educated in a Christian-like manner, out of the money arising from the estate I leave, as above, and monies due me from different persons by bond, note or otherwise; and all money I may leave in the bank, to be put out at lawful interest, and the interest only to go into the hands of my wife Kezia, for the benefit of education of my child or children, and to be used for their benefit only. Item: I further say, in case of loss of my slaves, or misfortune attending my estate, if there should be not a sufficiency to support my children, and also to educate them, I desire, after the children or child is of the age of nine years, then to take a sufficiency of the money, which will be on interest, to defray their necessary wants. Item: It is my desire, that in case it should take the whole of my money allotted for them, my child or children, as above on interest, for their education, it must be disposed of. Further say, nothing is to be charged to my child or children by my wife Kezia for board or clothes, and in short, no charge that might affect their estate, as I have provided for them in the foregoing of this instrument, as well as for my wife Kezia," &c. "I wish there to be no sale of my estate, but that all my just debts to be paid out of the money I leave behind. Further, wish my wife to live on this plantation of her own, and endeavour to make a living in a plain and frugal manner for her own benefit."

Kezia, the widow, administered on the

estate, and in 1814 married Otley. She died in 1815, and Otley administered on her estate. The estate of Thomas Calvert deceased, was committed, by the County Court of Princess Anne, to Peter Land, Sheriff of that county, who took possession of all the said Calvert's personal estate, and received the rents of the real estate.

The bill was filed by Otley against Land and Thomas Calvert, by his guardian, claiming the rents, hires and profits received by the said Land, on account of the estate of Thomas Calvert, deceased, 215 until the determination of the estate of the said Kezia, which, he contended, did not happen at her death, but extended to the time when the children would have come of age, if they had both lived.

Land and Thomas Calvert, by his guardian, answer, that the estate of Kezia terminated by her death; and therefore, her administrator can have no claim for rents, &c. accruing after that period.

The Chancellor decreed, that the estate of Kezia did not terminate until Thomas, the surviving child of Thomas Calvert, should become of legal age, or marry; and that therefore, Otley, as administrator of Kezia, was entitled to the use of a moiety of the said estate, until the period above mentioned.

Land appealed to this Court.

The cause was argued by Leigh and Johnson, for the appellant, and by R. Taylor, for the appellee, with great ability and research; but the question is so fully discussed by the Court, that a report of the arguments at the bar is unnecessary.

May 22. JUDGE CARR.

This case turns wholly on the construction of Calvert's will. The will was made in 1808, when he had a daughter about 15 months old, and the prospect of another child. That child, a son, was born in 1809. The testator died in 1812; his daughter in 1813 or 1814; his wife administered on his estate; intermarried with the appellee Otley, and in 1815, died. Administration de bonis non was committed to the appellant, as sheriff. Otley delivered up to him all the estate; and afterwards filed this bill against him and the infant son of Calvert, claiming, that by the will, his wife had the use of all the property, both real and personal, till the arrival of the son at the age of 21; and that he, as her administrator, has the same right. The Chancellor has decided that such was the true construction of the will; and Land has appealed.

216 "In the construction of wills, the first enquiry is into the meaning of the testator. This is the animating spirit, the essence, the soul, of the will. The words are the clothing, the mere vehicle used, to convey his ideas. When we once ascertain the intention of the testator, that is the governing principle, and must prevail, unless it violate some rule of law. It would be a waste of time to quote cases to prove this. There is nothing technical about a will; no set form of words necessary. They are very often written (like the present) by persons who, wholly ignorant of forms, use their own homely and

awkward style to express their ideas; and if the language, however uncouth, be intelligible, and the meaning, when gathered, be lawful, it must be carried into effect.

In the case before us, the testator had real estate, slaves, money, &c. and his wife, it seems, had a plantation of her own. The first clause in the will gives all his estate, real and personal, to his daughter Polly; and if his wife should have another child by him, the whole property to be divided between them; and if they die before they come of age or marry, all the estate to go to the children of his sister Polly Jones. Having thus given to the primary objects of his bounty, the fee simple of his whole estate, he proceeds to carve out of it lesser and temporary interests. To his wife, he gives the power to have the full use of all his negroes, lands, and all species of property, except his money, till his children or child come of age or marry; then, one half of his said estate, with all his money, to go to his child or children; and his wife, during her life, to hold the other half allotted to her as above, and at her death, that to go to the children. The rest of his will is almost entirely taken up, in assigning funds, and giving other directions for the support and education of his children; about which he discovers great solicitude. They are to be supported and educated, 1st, out of the estate, of which his wife has the use; 2d, out of the monies due to him; 3d, his money in Bank is to be put out to

217 interest, and the interest *to go into his wife's hands, and to be applied solely to the benefit and education of his child or children; 4th, if from loss of slaves, or other misfortune to his estate, it should not be found sufficient to support and educate his child or children, then, when they reach nine years of age, so much is to be taken from the money at interest, as will be sufficient to supply their wants, and the whole, if found necessary. 5th. His wife is to make no charge against his children, for board or clothing, or any other charge, which will affect their estates.

The question for consideration is, what interest did the testator mean to give his wife Kezia, in the use of his estate, real and personal. Did he mean to give her a fixed and certain interest, a term for years, which would expire when the youngest of his children should, if living, reach twenty-one? Or, was this use a mere personal trust and confidence, given to her for a special purpose, and ceasing, of course, with the person? My idea of the will is this. The testator was chiefly solicitous about his children, one, a girl of very tender years, the other, unborn. He considered that the half of his estate, real and personal, was a sufficient provision for his wife, in addition to the plantation which she possessed, in her own right. The other half he wished applied to the support and education of his children, during infancy, and to go into their possession, at their marriage, or attainment of age. To the care of their mother, he must confide them while infants. No other could supply her place to them, or be

so safely trusted with their care. As she must have the care and the expense of rearing, sustaining, clothing and educating them, he gives to her the use, during their non-age, of the whole of his estate, and also the interest of his money, and assigns this as the fund in her hands, for their education and support; but, so soon as they married or came of age, and this care and expense would cease, the use of one half of the estate, and the interest of the money, were to cease also; and she was to retain the other half for life.

218 *It is insisted by the counsel for the appellee, that there is a clear, distinct, express gift of the use of the whole estate to the wife, till such period as would bring the children to 21; and that this vested interest could not be affected by the death of the wife before that time, but that her interest would survive to her representative. But, it must be recollected, that the polar star is the intention; and that to come at this, you must take the whole will, not a single sentence; and you are also to look at the relative situation of the testator. As to intention, when he was providing so anxiously for the support and education of those children, assigning first one fund, then another, to that purpose; injoining it upon his wife to make no charge against them, for board, clothes, or any thing else; can we possibly suppose, that he meant, in the event of her death, to abandon them to chance and dependence; that this fund, which he was so carefully husbanding for their support, should, by the same blow which deprive them of a mother, be transferred to her representative, and they cast upon the bounty, and committed to the care of an unknown guardian, an alien to their blood, with no tie to bind him to their protection, and interests in direct hostility with theirs? That, during a long minority of 18 or 19 years, the whole profits of his estate should be enjoyed by strangers, and his children dependent on them for the pittance which they might, to quiet their consciences, bestow on their maintenance and education? It is impossible that such a construction can, for a moment, be considered as called for by the intention of the testator, or as otherwise than in direct conflict with his intention. No man (it seems to me) can look upon this will, without seeing at a glance, that the testator did not intend to extend the provision for his wife, a moment beyond her life; had no idea of vesting in her such an interest in any part (much less, the whole) of his estate, as, at her death, would survive to her representative. That portion, in which he evidently meant to give her the interest which should endure longest, is the half which she is

219 *to retain, when his children come of age, or marry; and this is expressly limited to her life. How then can we say, that this half, so expressly limited, shall go, on her death, to her representative, together with the other half, as clearly intended, under no possible circumstances, to exceed her life, and very probably to end much sooner. It was attempted to answer this, by stating an equal

dilemma on the other side; that it is clear that the testator did not intend his children to have more than a maintenance till they attained their age, or married; and yet, if you do not suffer the property to go to the second husband, the surviving child must take it before either event. But, I deny this position. In the very first clause of his will, he gives his whole estate to his children. If I have shewn that he did not intend to vest in his wife, any interest which would survive her, there can be no question, that on her death, this clause would dispose of what she had; for, her interest was carved out of it, and only suspended its full operation, while that interest continued.

It was also contended, that the clause, giving his wife the half of his estate for life, contemplated a state of things which never happened, and therefore can have no influence on the construction of the will, but must be thrown out entirely. This would violate two settled rules. 1. That the construction now must be the same as at the moment of the testator's death, uninfluenced by subsequent events. 2. That in the construction of wills, you must take the whole together.

It was contended also, that there was no personal trust here, but a charge merely, for support and education of children, upon the fund in the wife's hands, which would follow it into the hands of her representa and could be discharged by him. That the testator intended to confide to his wife the bringing up of his children, is most evident. His very silence, if he had said not a word on the subject, would have been decisive of that; for, where the guardianship is not given by the father to

220 another, the conclusion *is inevitable that he intends the wife to discharge that office; a conclusion, strengthened by the actual situation of things in the case before us. The child then born was a girl 15 months old; the other unborn. With whom could these helpless beings be trusted, but the mother? But, the conclusion is not left to be drawn from the silence of the testator. Almost every clause in the will is predicated on the idea (which he seems to consider of course) that his wife was to have the bringing up of the children. Thus, although it is clear, that he thought the use of half his estate, a provision sufficient for his wife, he gives her the whole till they come of age, or marry, and charges it in her hands, with their maintenance and education. So, of the interest of his money. He dedicates this exclusively to the education of his children, and directs that it shall be paid into his wife's hands for that purpose. So again, he directs that his wife should make no charge against his children, for board or clothing, or any other charge, which would affect their estate. Why forbid her to do this, if she was not to have charge of them? It being most clear, that the testator intended that his wife should bring up the children, it seems to follow, from the very nature of the thing, that it was a case of personal trust and confidence; and to those who know the important influence, which training and

education exercise over the future conduct of individuals, there can be few trusts which would be considered more highly important, responsible and delicate; few more incapable in their nature, of being assigned or transferred. This, then, being a personal trust of such a nature, and the interest, (beyond the half which she had for life) being coupled with this trust, and given as the means of executing it, it must of course cease with the trust, which her death extinguished. I think I may truly say of this case, as Lord Mansfield did of *Haywood v. Whitley*, 1 Burr. 228, "tis so plain, upon the true intent and meaning of this will, that it is a shame to cite cases upon it." Yet as very many were cited, and most elaborately

221 *commented on at the bar, I will take notice of one or two.

But, I must first remark, that this case does not present at all, the question, on which so many of these cited, turned: whether the estate given to the children was a vested interest, or contingent, and dependent on their marriage, or arrival at age. The first clause settles that point. It gives absolutely and immediately, the whole estate to his children; and subsequently, only excepts out of it, the use of the property, upon a particular trust, limited both as to time and object; and it is a rule laid down by the Court, in the case last cited, "that wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property."

There were two cases cited from 2 and 3 Leon. Rep. A. devised that his land should descend to his son; but, that his wife should take the profits until his full age, for his education and bringing up. The widow died. It was resolved, that the second husband should not have the profits. "Nothing," (say the Court,) "is devised, but a confidence. The wife is a guardian or bailiff to the infant." These cases run on all-fours with that before the Court. It would be a waste of words, to point out the striking resemblance between them.

In *Everts v. Chittenden*, 2 Day's Rep. 378. Joel Everts made his will, as follows: "I likewise give to my wife the use and improvement of all my real estate, until my son Joel, (then five years old,) arrives at twenty-one years of age," (then she to have and enjoy the use and improvement of one-third of the said real estate, during her natural life,) "she, my said wife, bringing up my said son, until he arrives at twenty-one years of age. Item, I give to my son J. E. the whole of my real estate, to be and remain an estate to him for ever, excepting the use to be disposed of, as above mentioned." The widow entered upon the premises, married a second husband, and died, leaving her son a

222 minor. The infant brought ejectment *against the second husband for the land; and the question was, whether the wife's interest ceased with her death, or continued until her son would, (if he lived,) attain twenty-one years. A case more precisely like the one at bar, cannot be imagined. It was argued with great ability by counsel, and all the cases in

the books, bearing on the subject, discussed. The opinion of the Court, too, is given with excellent sense, and sound discrimination of the cases. They decide with great clearness, that the fee passed immediately to the son, subject to a personal confidence or trust reposed in the mother, which ceased at her death.

There are several other cases very strong for the appellant, such as *Lomax v. Holmeden*, 3 P. Wms. 175. *Mansfield v. Dugard*, 1 Equ. Cas. Abr. 195. *Haywood v. Whitley*, 1 Burr. 228.

The cases cited on the other side do not apply. They were either devises of property for a certain period, without any expression implying a limitation of the period, in any event; or, there was a trust raised by the devise, for payment of debts, or the performance of some other thing, which required that the trustee should hold till the term expired. In other words, the decision in those cases was founded on the settled doctrine of giving effect to the manifest intention of the testator. To follow those cases here, would be, not to give effect to, but to defeat, most palpably, the clear intention of the testator.

I am, therefore, of opinion that the wife's interest ceased with her life.

JUDGE GREEN.

Thomas Calvert having one child, Polly, born September 15th, 1806, made his will in April, 1808. He had afterwards another child, Thomas, born January 27th, 1809, and died in 1813, leaving his widow, Kezia, and his said two children surviving him. The daughter, Polly, died 223 *in 1814. Kezia, the testator's widow, intermarried with J. T. Otley, the appellee, and died in 1815. The principal question in the cause is, as to the extent and nature of the interest, given by the will to the testator's widow, and whether that interest terminated by her death, or by the death of one of the children in her life-time.

In determining the question, as to the extent and nature of the interest given by the will to the widow, the intention of the testator is the sole criterion; and that intention is to be collected from the whole will; so that if the intention of the testator, in respect to the interest of the wife, plainly expressed, were found to be inconsistent with the intentions of the testator, in respect to the children, the express limitation to her would be restrained by construction, for the purpose of giving effect to the whole will, as in *ex parte Davis*, 6 Ves. 147. The testator gave to his wife his whole estate, during the minority of the son, "his said wife, during that period, finding him with suitable education, maintenance and clothing; and if his said wife should die before his said son attained the said age, he appointed guardians and trustees for him, during his minority." In this case, it was clear that the testator contemplated the event of his wife's dying during the minority of his son; and in that event, appointed guardians and trustees for the son. This shewed, that in the event of his wife's death, during the minority of the son, the estate should immediately devolve upon the son, to be managed by

the appointed guardians and trustees; otherwise, there would be nothing for them to manage; and this manifest intent in favor of the son, corrected the generality of the devise to the wife. So the estate given to the wife expressly, would be enlarged by construction, if that were necessary to effectuate the intention of the testator, in respect to his children or his creditors, so as to give effect to the whole will, as in *Borraston's case*, 3 Co. 19. The devise was to the executors, until Hugh attained his age of 21 years, the profits to

be employed towards the performance 224 *of the will. Hugh died before he attained the age of 21, and the question was, whether the executors' interest continued until he would have attained the age of 21, if he had lived. The Court held, that the interest continued, although it was admitted by the whole Court, that the legal effect of a grant or devise to one, until another attained the age of 21 years, was, that the estate expired upon the death of that other, before he attained his age of 21; because it became impossible, by his death, that he could ever attain that age, and consequently, that if the estate did not cease upon the death of that other, it could never cease; and, that it was necessary, in that case, to enlarge the estate of the executors, beyond the strict legal effect of the devise to them, taken by itself, in order to effectuate another expressed intention of the testator, to provide for the payment of his debts, &c. and this term, until the time when Hugh would have attained the age of 21, would not have ceased, if the debts had been paid before it expired by its limitation, and the surplus profits would have belonged to the executor, who was not bound, at that time, to make distribution. *Powell on Devises*, 301, and the cases there cited. The reasons of the judgment in *Borraston's case* are not given at large in the report; but are stated in subsequent cases, affirming the principle of that case, as in *Lomax v. Holmeden*, 3 P. Wms. 175.

In these cases, the estate or interest, expressly given, is limited or enlarged beyond the legal effect of the terms in which it is expressly given, for the purpose of effectuating some other intention of the testator, plainly expressed or necessarily inferred from his will, which would be frustrated, if the express terms of the devise or bequest were allowed to have their strict legal effect. Examples of this rule may be found in the multitude of familiar cases, in which express devises for life or in fee simple, have been enlarged or limited to estates in fee tail, for the purpose of effectuating the manifest intention of the testator, as to the issue of the first taker. But, there is no example 225 of the *Courts controlling, by construction, the legal effect of the express terms of a devise or bequest, unless some intention of the testator, which would be frustrated without such control, appeared upon the face of the will, clearly expressed or necessarily inferred from the terms of the will itself.

What was the nature and extent of the interest, given to the wife of the testator,

by his will? After devising his whole estate, real and personal, to his daughter Polly, and any other child he should have by his wife, and in case of their deaths under age and unmarried, to the children of his sister Jones, the testator proceeds: "Further say, I desire that it be in the power of wife Kezia, to have the full use of all my negroes, lands, and all species of property, except my money, until my children or child come of age or be lawfully married; then, one half of said estate, with all my money, to go to my child or children; during my wife Kezia's natural life, she shall be entitled to hold the half allotted for her as above, and at her death, to go to my children and their heirs, as above."

There can be no serious doubt, that this clause of the will, standing alone, gave to the wife a beneficial and personal interest, either legal or equitable, to the profits of the whole estate, except the money, until the children attained their age or married, with remainder for her life, in one half of what had been given to her until that period. I incline to think that the interest given was a legal interest. "The full use of property," is an expression equivalent to the "profits" of the property; and a desire that the profits of a lease shall be put out to the use and benefit of B. is a devise of the lease itself. *Blamford v. Blamford*, 3 Bulstrode, 101. This, however, is a question of no moment in this case; for whether the interest be legal or equitable, it was transmissible to her representatives, unless it terminated in her life-time, or upon her death.

Some stress was laid in the argument of the cause, upon the expression, "I desire it to be in the power of my wife
226 *to have the full use of all, &c." as if this indicated an intention to give the wife only a personal authority or power, to be exercised by herself only in person, and which ceased with her life. This, I think, would be a dangerous refinement in the construction of wills. The devise of the profits or full use is, in substance, a devise of the thing itself; and as a power to dispose, or give at pleasure, is equivalent to an absolute property, so I should think, an unlimited power to have is equivalent to an absolute right of property.

It was also argued that the expression, "during my wife's natural life, she shall be entitled to hold the half allotted for her as above," meant that as the half was allotted to her for life, so the whole allotted above was allotted to her for life. Such a construction would produce singular effects. It would be giving her, at the same time, a life estate in half and the whole; or rather, a life estate in the whole for a limited time, and a half afterwards. The obvious meaning of that expression is, to designate what property it was, to a moiety of which she was to be entitled, after the children attained their age or married; to wit: half of what was allotted to her above; and it was used for the purpose of excluding her from any participation in the money. "Allotted to her as above," de-

signed the thing, of which she was to have one half, and not the estate or interest, of which she was to have half. Half of a life estate would be quite unintelligible.

It is also urged, that the intent of the testator was, that if his wife died before his children attained their age, or married, her interest should determine, because he has given her an estate for life, in half of the estate, after that period; and he could not have intended that she should have the whole estate longer than the half. An estate for years in all, with remainder for life in half, does not seem to me to imply any such inconsistency. Before the estate for life in the half could take effect in possession, the first estate in the whole must

have expired in the life-time of
227 *the widow. The condition that she should be alive at that time, was implied, just as if the first estate had been given to another, with remainder to his wife for life. The intent of the testator to give a life estate in half, after the expiration of a specified term, does not at all conflict with an intent to give her the whole estate, for that term; even if he had contemplated the possibility of her dying within the term, as well as of her living beyond it. But it is perfectly clear, that the testator, when he made this will, never for a moment thought of the event of his wife's dying before his children attained their age or married, and had no intention to provide for that event, either directly or indirectly. To say, therefore, that he intended to give her the whole for a given time, and if she survived that period, one half for her life, is not to say that he intended to give her the whole for a longer time than he intended to give the half. It was possible, that her title to the half might never accrue; but if it ever did, then that interest must have lasted longer than her interest in the whole. The former interest was not to commence, until the latter ceased to exist. Upon the legal effect and apparent intent of this clause taken by itself, I think it clear that the wife took a personal and beneficial interest in the property devised to her, to endure until the children came of age or married, with remainder in one half of that property for her life; an interest which did not terminate by her death before her children attained their age or married. A grant to one during the minority of another, does not determine by the death of the grantee, but the interest is transmissible to the representative of the grantee. *Dedicot's case*, 3 Leon. 9.

This being the legal effect, and expressed intention of the testator, in respect to the interest of the wife, is there any other intention expressed in the will, or necessarily implied, which would be frustrated by carrying into effect this intention as to the wife, and which, therefore, renders it necessary, in order to effectuate the gen-
228 eral intent of the *testator, to limit the wife's interest to a shorter period than this clause of the will imposes on it; that is, to add the provision, that her interest should cease, if she died before the children attained their age or married? It

is insisted that there is such conflicting intent.

The will proceeds, "I desire that my child or children, as above, shall be supported and educated in a christian-like manner, out of the money arising from the estate I leave as above;" "and monies due to me, and all my money I may leave in the banks, to be put out at interest, and the interest only to go into the hands of my wife for the benefit of education of my child or children, and to be used for their benefit only." He then provides, that in case of the loss of his slaves, or misfortune to his estate, there should not be a sufficiency to support and educate his children, then after they were nine years old, "to take a sufficiency of the money at interest, for that purpose, if it should require all." He then proceeds, "Further say, nothing is to be charged to my child or children by wife Kezia, for board or clothes, and in short, no charge that might affect their estate, as I have provided for them in the foregoing of this instrument, as well as for my wife Kezia." The will concludes, "Further wish my wife to live on this plantation of her own, and endeavor to make a living in a plain and frugal manner for own benefit."

The effect of these clauses of the will, was, to charge upon the property devised to the wife, so much as would be sufficient to maintain the children; and if the interest of the money was insufficient to educate them, then so much more as would be sufficient, with the interest, to effect that purpose. If the interest was more than sufficient to educate the children, the surplus belonged to them; but if the interest of the money, and the produce of the property, were not sufficient to maintain and educate them, then the principal of the money at interest, was to be resorted to, as far as might be necessary, for that purpose.

These funds, appropriated for the 229 support and education, were to *be applied to that purpose by the wife; she advancing a due proportion of the profits of the property, and receiving the interest of the money for that purpose; and she was, in no event, to bring any charge against the estate of the children.

Upon these provisions in favor of the children, and the first clause of the will, giving in terms, the whole estate immediately to them, it is said, that they were the chief objects of the testator's solicitude and bounty, and therefore, the will should be liberally interpreted in their favor. If the first clause of the will were expunged, the estate of the children would be as completely vested in them, immediately upon the testator's death, as it is by force of that clause. A devise to A. for years, or until B. attain his age, with remainder to B. vests the estate immediately in B. *Borraston's case*, 3 Co. 19. *Stanley v. Stanley*, 16 Ves. 489. A devise to his wife, until his children attained the age of 21 or married, would have been precisely the same in effect, and would have shewn as bountiful an intention in the testator, towards his children, as the devise in the form in which it stands. But, the provisions of the will, in fact, were intended

by the testator, to favor his wife, and not his children. He gave her more, and to the children less, than the law would have given them respectively, in case of intestacy; one half instead of one third. The testator, as I have before observed, never contemplated the event of her dying, before the children attained their age or married; or he would have made a provision for that event. Allowing that the children were the chief objects of the testator's care and bounty, what then? We cannot therefore disregard the testator's expressed will. He gave to his wife, his whole property, except his money, charged partially with their maintenance and education, until they came of age or married; and has indicated no intention, that they should enjoy any portion of the capital of his estate, until that period.

230 "It is said, that taking into consideration the relations between the testator and his wife and children, it is impossible to believe that he intended, in the event of his wife's marriage and death (which have happened,) that her second husband should succeed to all the profits of his estate, beyond the sum necessary to the support and education of his only surviving child, to the exclusion of that child. This is unquestionably true. The testator never had any such intention; and if he had anticipated either of these events, he would undoubtedly have taken care effectually, to prevent such consequences. But the testator had no such events in his mind, when he made his will, and had no intention whatever, either way, in respect to them. He gave to his wife an interest in the property, and looked no further. That interest devolved on her legal representative; he gets it by operation of law, and not by the will of the testator; and the disposition of the law prevails, because it is not against the expressed or implied will of the testator. This is the unexpected consequence of his expressed will. If the Court were, when an event has happened, as to which the testator has declared no intention whatever, (and because we believe that if he had foreseen or contemplated the event, he would have provided for it) to declare that his will has provided for the event, and that, contrary to the legal effect of the estate vested by the express terms of the will; what would this be, but to make, not to expound, the will?

It is argued, that the testator's wife was only intended to have the personal benefit of maintenance, out of the profits of the estate; a benefit which would, of course, cease at her death, and that the expressions that it should be in her power to have the full use, &c. and the wish that she would live on her own plantation, and endeavor to make a living in a plain and frugal manner, for her own benefit, indicates such intention.

I have already observed upon the first of these expressions. The other, so far 231 from indicating an intention to *limit his wife to a mere subsistence, to my mind, shews obviously, that he contemplated and wished his wife to accumulate money and property, for her own

benefit, by the use of his property. He had already declared, that he had provided for his wife, and prohibited her from charging any thing to his children. Why this prohibition, if she could have nothing of her own to advance, as would be the case, if she was only entitled to a maintenance. His property was to be used upon her land; why recommend her to make a plain and frugal living, for her own benefit? If she were only to be entitled to a maintenance, then her plainness and frugality would not be for her own benefit, but for that of her children. No inference, then, can exist, that her interest ceased on her death, upon the ground that she was only entitled to a maintenance.

Finally, it is said that the will gave to the wife no interest, but only created a personal trust and confidence for the benefit of the children, which expired on her death. What I have just said, shews that there was a beneficial interest vested in the wife, for her own benefit. Independently of the particular expressions, shewing an express intention on the part of the testator, to give her such an interest, the terms of the bequest to her give, of themselves, such an interest. Thus in 8 Vin. 292, pl. 15, it is said, "I give to my wife all my lease at F and all my household goods, she maintaining my children; but if she should marry, then a moiety of it among my children. The children shall have no more than a maintenance, unless she marry." This beneficial interest, however, was coupled with personal trust and confidence, for the maintenance, and in part, for the education of the children, out of the profits of the property devised to her; and the question is, whether, upon her death, as she could no longer perform the trust in person, her interest ceased. Powell, in his Treatise on Devises, p. 301, treating of such interests coupled with trusts, says, "In all these cases of interests, the estate shall not determine,

until the time limited, although
232 "the object of their creation fail; as, if the children to be maintained, die, or the debts be paid before the time limited to answer them, determines; and if the devisee in such cases, die, his representative shall have the lands in the mean time." To support these propositions, he cites many cases, some only of which I have seen. It is alleged, that the cases do not support the author's propositions. Let us examine some of them.

In the case of Balder v. Blackburn, Hob. 285, the testator devised the profits of his lands to his wife, to her own use and without account, till her daughter should arrive at the age of 18, provided the wife should pay the quit-rents and fines, and keep and bring up the daughter; remainder to the daughter in fee. The wife took a second husband, and died before the daughter attained the age of 18. The Court held, that this was "a plain term given to the wife, to her own use, which accrues to the husband; and the keeping and education of the child is not such a particular privy, but it may be performed effectually by another." This is precisely our case, except as to the wife being charged with the

payment of fines and quit-rents. There the estate was given to the wife, until the daughter attained her age of 18, "to her own use, without account;" here, "for her own benefit," and consequently and necessarily, without account. There, there was a direct personal trust upon the wife, to bring up the daughter at her own expense; here, there is a partial charge upon the property devised to the wife, for the maintenance and education of the children; and the personal trust to apply the funds to that purpose, is raised, not expressly, but by implication. There, the remainder was to the daughter; here, to the children. In that case, it was not necessary to enlarge the estate of the wife beyond the legal effect of the terms in which it was given to her, for the purpose of effecting the intention of the testator, to provide for the bringing up of his daughter; for, the remainder to the daughter would have taken effect immediately, on the termination of the mother's estate, *by any means, before the daughter attained the age of eighteen.

It was said at the bar, that the direction that the wife should pay the fines and quit-rents, had the effect of continuing the wife's interest, after her death; and in Everts v. Chittenden, 2 Day's Cases in Error, 357, the Supreme Court of Connecticut suggests the same opinion. The Court, which decided the case of Balder v. Blackburn, suggest no such argument; and that provision could not have had, upon any just principle, the effect to enlarge, in the slightest degree, the duration of the wife's interest. If land be devised to one without words of perpetuity, charged with the payment of money, an estate in fee is implied; because, the devise being intended to benefit the devisee, as he might die immediately after the testator, he might lose by paying the money, if he had only an estate for life. This goes upon the inferred intention of the testator. But, I have never before seen a suggestion, that an express estate for life or years, could be enlarged by a charge on the devisee to pay money. If you could enlarge it in such a case, by construction, it must be enlarged to a fee; for, there can be no criterion to determine upon any intermediate estate, between that expressly given and a fee simple. This case, therefore, and the case at bar, appear to be precisely the same.

In the case of Smith v. Havens, Cro. Eliz. 252, the testator devised, that if his wife think good to bring up his children, that then she shall have his lands, until his son attain to his age of 24 years. The wife died before the son attained to that age; and it was resolved, that that event did not determine her estate. The question was, "whether this was a matter of confidence only, or of an interest also in the land." Here, there was, most emphatically, a personal confidence in the wife, which her death made it impossible for her to comply with; yet, being coupled with an interest, the failure of the personal confidence did not destroy the interest. No matter what reasoning induced the
234 Court *to adjudge that there was an interest connected with the confi-

dence; having determined that point, the estate was considered as continuing of course.

To the same effect, in this point, is the case of *Cawthorpe v. Hayman*, Cart. Rep. 25.

It is true, when it appears from other parts of the will, that a clear intent of the testator will be frustrated, by continuing the estate, in such a case, of the wife, beyond the period of her life, such construction will be given, as will effectuate the whole intentions of the testator, as in the case of *ex parte Davis*, already noticed; and so, if it appear that the wife, upon the whole of the will, was not intended to take any personal interest, but only to take the profits as guardian, and upon a personal confidence, for the use of the child, upon her death, her power expires. Thus, 2 Leon, 221, pl. 280, A. devised that his lands should descend to his son; but he willed, that his wife should take the profits thereof, until the full age of his son, for his education and bringing up. The wife married another husband, and died before the full age of the son; and two Justices held, that nothing was devised to the wife, but a confidence, and she was a guardian or bailiff for the infant, which was determined by her death. But contrary, if he had devised the profits of the land to his wife, until the age of his son, to bring him up and educate him; for, that is a devise of the land itself. It appears from this, that the real question in such cases is, whether an interest passes, or not? If it does, then whatever personal confidence is connected with it, the death of the wife does not destroy her interest.

The case, before cited from Connecticut, was this: The testator bequeathed to his wife, the whole of his moveable estate; and gave her, likewise, the use of all his real estate, until his son came of age; "she, my said wife, bringing up my said son, until he arrive at 21 years of age. I give to my said son the whole of my real estate, excepting the use to be disposed of, as above mentioned." The wife

235 *married another husband, and died before the son attained his age; and the question was between the husband and son. The Court determined that the real estate vested in the son, subject to a personal confidence or trust reposed in the mother; and that she had no term for years in the land. The Court having determined that the wife took no interest under the will, but a trust and confidence alone was thrown upon her, the consequence necessarily followed, that the husband could claim nothing. In coming to this conclusion, the Court were obviously strongly influenced by the bequest of all the personal property to the wife, and also a third of the land for her life. These cases are distinguishable from the case at bar, in the decisive particular, that in those cases, the wife took no personal interest whatever in the property. In our case, she took some personal interest for her own benefit; and if she took any such interest, it did not terminate with her death. The plaintiff would, therefore, be entitled to recover, unless the interest of his wife in the estate

of her former husband, so far as it depended on the children's attaining their age of 21 years, or marrying, was destroyed by the death of one of the children in her life-time.

It was admitted by the counsel for the appellee, that if a grant be made to A. until B. attains his age of 21, and B. dies before he attains his age, the term ceases from the moment of B's death, because it is then ascertained, that he can never attain that age; and if the term did not cease at his death, it could never cease. An interest given by will in the same terms, would have the same effect, unless there were something in the will to shew, that the testator intended that the estate should continue, notwithstanding the death of the infant, until he would have attained his age, if he had lived; which was *Boraston's case*, 3 Co. 19, where the devise was for the payment of debts. In the absence of any evidence of intention to the contrary, the effect of a devise, is the same as of a deed. This was decided in *Lomax v. Holmeden*, 3 P. Wms. 176, and

236 **Mansfield v. Mansfield*, 8 Vin. Abr. 291, pl. 13; the same case in the name of *Mansfield v. Dugard*, Equ. Cas. Abr. 195.

When the testator wrote his will, he had one child living, and expected, though not confidently, another. He therefore gives his whole estate to his living child, Polly; and if he should have another, to both. In the after part of his will, he usually speaks of his child or children, meaning his child Polly, if he had no other, and both his children, if he had another. He gives all his estate, except his money, to his wife, "until my children or child become of age, or be lawfully married." He meant by "children," both, if he had two; and by "child," his child Polly, already born. His will was, in effect, to give to his wife, "until his child Polly, if he should have no other, should come of age or marry," or, "until his children, Polly and another, if he should have another, both became of age or married." Upon the death of Polly, this became impossible; and upon the principles already stated, the wife's interest in the whole terminated, and her right to one moiety for her life, took effect in possession; that being a vested remainder depending on her former estate, and the other moiety vested in Thomas, in possession. Or, if the term for years of the wife, in the moiety of the estate of which the remainder was given to her for life, merged in this vested remainder, (*Black v. Pagrave*, Cro. Eliz. 532;) then she was entitled, upon the death of the testator, to a life-estate, immediately in that moiety, with remainder vested in the children in fee; and to an estate for years in the other moiety, until the children attained their age of 21, or married, determinable by the death of both or either of them, before those events occurred, with a vested remainder in fee to the children. It is immaterial to enquire, whether the term for years, in the moiety given to her in remainder for life, merged in the life-estate; since her interest, in the events which have happened, was precisely the same, whether

the term was merged in the life-estate or not.

237 *Upon this construction of the will, upon the death of Polly, the interests of the widow and surviving child, became separate; each being entitled to the profits of the moiety of the estate; and the child must have been supported and educated out of the interest of the money, and the profits of his moiety of the residue of the estate, under the guardianship of his mother, as long as she lived, or until he attained his age or married. This consequence may be supposed to contradict the intent of the testator, to give his wife the whole profits, charged as aforesaid, until his child or children came of age or married. But it does not. His intent was, that if he had another child, his wife should have the profits of the whole, in consideration of supporting both; which she could not do, after the death of one; and upon the death of one, her interest ceased in a moiety, which vested in possession in the surviving child, as upon the death of both before their age of 21 or marriage, that moiety would have vested in possession, in the children of the testator's sister; the purpose, for which a moiety was given to the widow, having ceased, as well in the event of one, as of both. It is true, that this results, not from any expressed intention of the testator, in relation to the disposition of his property, in the event of the death of one only, or both of his children. For as to that, he had no intention; since he no more contemplated the death of both or either, before their age or marriage, than he contemplated the death of his wife, before that period. If he had contemplated the event of the death of one of the children, before his or her age or marriage, he probably would have continued his wife's interest in the whole estate, until the other attained full age or married. The effect of the deaths of one of the children and the widow, before the children attained their age or married, upon the duration of the estate of the wife, must be determined, not according to the intentions of the testator, (for, he had no intentions touching these events;) but according to the legal effect of those events, upon the estate given by the terms of the will.

238 *The difference between my construction of this will, and that adopted by the majority of the Court, does not materially affect the interests of the parties, in the events which have happened. I have gone thus at large into the subject, only for the purpose of avoiding, if I could, the establishment of a precedent for the construction of wills, of which I do not approve.

JUDGE COALTER.

As the testator lived until after a second child was born, and as the will speaks at his death, and may have been read over by him the day before, and have been intended as applying to the then situation of his family, it may, perhaps, be most proper to consider it as then made, and as speaking of his two children.

It may also be proper to consider the questions arising under this will, as at the

time of the death of Polly the daughter, and as if a suit had then been brought by Thomas, the surviving child, against his mother, to ascertain their respective rights on that event; or rather, to ascertain the then rights of Kezia, the widow of the testator, in his real and personal estate; for, except so far as limited by those rights, the whole would belong to the surviving child.

It is contended, on the one side, that she took an estate for years in the whole property, real and personal, to continue until the children came of age, or married; and that nothing but the marriage of both under age, or the coming of age of both, or the marriage of one, and the coming of age of the other, could determine this term for years, until the youngest child actually did, or might have come of age; and that after this, she was to have one half for life. On the other side, it is contended, that, taking the whole will together, it must be construed to mean, that the term for years was to cease at her death, if she died before they married or

239 came of age: that so long as they all lived, or *any one child lived and was under age, she still alive, and charged with their or its support, and in want of a support herself, she was to hold all: but when she died, even if they or either of them was then under age, as she could no longer support them, nor wanted any support for herself, the term ceased; in the same manner as if the testator had said, "For the support of my wife, and to enable her to support and educate my children, until they marry or arrive at 21 years of age, I give her power to use my whole estate until that time, provided she lives so long. If she dies before that time, then it is to go to them; but, if she lives beyond that time, then she is to have one half as long as she lives."

But, if the will cannot admit of this construction, then it is contended, that the terms for years ceased, nevertheless, at her death, and did not go to her personal representative; because she took a mere personal trust and confidence, uncoupled with such interest, either in herself or third persons, as would transmit the term to her personal representatives: that there was no interest of third persons to protect, after her death, (the children being better protected by receiving the whole estate, than a mere right to maintenance and education charged on it;) and her temporal comfort, the other object, ceasing with her life, then there was no future interest, as it regards her, to protect which would require the continuance of the term; and consequently, that on this ground, if not on the other, it must cease with her life, as aforesaid.

It was also said, though not much pressed in the argument, that on the death of Polly, the term for years was determined, unless there was something in the will which would prevent it and continue the term beyond that time; and that if it was determined by that event, either the whole estate then passed over to Thomas, or one half to him in fee, and the other half to his mother for life.

According to these last pretensions, if

the term for years ceased by the death of Polly, and the whole estate went
 240 *over to Thomas, then the personal representative of the wife would be responsible for the use she had of it, from that time; or for the use of one half of it, if she was entitled to the other.

It is proper, therefore, to examine the question, as one between Thomas and his mother, in order to ascertain her rights on the death of Polly; and also to examine it as one between him and her personal representative, in relation to the continuance of the term after her death.

If the will had given to the wife a term of this kind, uncoupled with any interest, charge, trust, or any thing to shew that a further duration of the term was intended, and without any express direction that she was to hold, until they or the survivor actually had, or should have come of age, had they lived, it may be admitted that it would have determined on the death of one or both, under age. But, this operation of the rule of law on such an estate, may be done away, either by express words in the will, or by manifest intent, deducible from the whole will, as in *Borraston's case*, 3 Co. 19; where, from construction, it was determined it should continue, until the son would have come of age, had he lived. Whether the term, then, determined on the death of Polly, or not, will depend on a sound construction of the will, taken all together. It seems to me, from its whole structure, not only that the wife was intended to have the nurture and education of the children; but that a provision for her, at least during her life, was intended to be made. She was to make a living in a plain and frugal manner, for her own benefit. For these purposes, she is to have the use of the whole, until they come of age or marry; and then, they are to take one half, and she the other half for life. She is no longer charged with support and education; and they must have the means of their own, and one half will be enough for her. But, if the term was to cease on the death of Polly, either the whole must go over to Thomas, or her life estate must then commence in a half,

241 and the other half must *go over to him. He then would take either the whole or one half, before he came of age or married; which would be contrary to the letter of the will. Would it be according to its intention? If it would, then his nurture and education by her would cease; for, if he took all, nothing would be left for her to support him with; if one half, she would only have the means of her own support left. She would not be compelled, (nor would she forfeit that by a refusal) to support him out of it; nor would his support be a charge on that part, leaving his half to accumulate; and although the will speaks at the death of the testator, yet it may not be improper here to remark, that when he had but one child, he designated the whole as a fund for the support of that child, and the mother; and even charged monies with education also. Suppose Polly had come of age or married; this would not have determined the term, until the other had also come of age, or

married; although Polly would want, and might have been entitled to, some support; and if she had died after marriage, and before Thomas came of age, would this put an end to the term; and would the whole estate go over, one half to her children, and the other to Thomas? Or, if only half went over, who would get it, Thomas or her children; or must they both be supported out of it?

But again. If the term ceased by the death of Polly, and the whole estate went over to the survivor, then, as before said, there would be nothing left for the maintenance of the wife, which, it seems to me, would so entirely defeat the will, that such construction could not be put on it. But, then it is said, the term only would cease, and her life estate in one half would begin, discharged from the support of Thomas, as much so, as if he had come of age; that the remainder in her for life, in one half, though limited on a term which has ended, not by marriage or coming of age, as specified in the will, but by another event, (and which, by that will, was to take effect, not on the death of one or both,

but on their marriage or coming
 242 *of age,) was nevertheless a vested remainder in her, to take effect on such determination of the particular estate; and, that it was not a contingent remainder, which would be bad, there being no freehold to support it. But, even if this would be the case, and she would thus not be deprived of all support; yet, her right to support and educate, and take the surplus would be defeated; as also, the intention of the testator, that she should have the rearing and education of the child, who was of very tender years, and who would thus be thrown on his guardian. Indeed, I understood it was admitted in the argument, that the trust, being for both, did not determine by the death of one; and that no Court could invade her right to rear and educate out of this fund, after which she was entitled to the surplus: that she would have forfeited the whole, had she failed to support and educate, and would not have the residue on merely paying for board, &c. But, if she is thus forced to take one half in remainder, long before the time specified in the will, it will be by mere operation of law upon the estates granted in the will, and not from any intention expressed or thought by the testator. But, as before said, although operations of law, of this kind, may take effect, when there is nothing in the will to control; yet, if there be over-ruling provisions there, these general rules of law will yield to such intention.

If I have succeeded in shewing, that the whole estate would not have gone over to Thomas, on the death of Polly, but that to do so, would manifestly violate the intention of the will; if a similar violation would take place in case one half went over; the argument is equally strong as to it. But if the term did not cease on the death of Polly, then the question, whether the remainder for life in one half was vested or contingent, does not arise. *Borraston's case* shews, that the term may continue beyond the time, when, in ordi-

nary cases, it would cease by the rule of law, if such continuance appears by the will, to have been intended. It seems to me, it was intended that it should
 243 continue after *the death of one child, living the mother; whether beyond her life, it is not at present, necessary to consider. But if it did continue beyond the death of Polly, then the remainder for life in one half, if vested, did not then begin in possession, the particular estate not being ended; and this would decide the question, as between Thomas and his mother. If, however, the term then ceased, and the remainder was contingent and void, then the whole would also go over to the son, and leave no support to the wife; which would be a strong argument to prove, that the rule of law ought not to be permitted thus to operate on the term, and produce this effect, if by any sound construction of the will, it might be avoided.

My impression is, that if there had been nothing else in the will, which, by construction or otherwise, would continue the term beyond the death of Polly, the mother could not, on that event, take one half for life, as a vested remainder in her; but whether she would or not, I shall not stop to enquire; being satisfied, as before stated, that there is enough in this will to continue the term, down to the time when the youngest child shall attain, or would have attained his age of 21 years; and had the mother survived that time, that she would then have taken one half for life.

This brings us to the enquiry, whether, notwithstanding the death of the mother, before Thomas arrived at his age of 21 years or marriage, the term is to continue and pass to her administrator, until it is determined by the marriage, or coming of age &c. of Thomas? This also, is to be determined by the whole will.

A provision was intended for a two-fold object. First, for her personal comfort, and to enable her to make a plain and frugal living, for her own benefit; and secondly, to enable her to raise and educate the children, until marriage, or their coming of age. For this purpose, the estate is to be kept together, and used on her plantation, and his debts to be paid out of the money he leaves behind. She is to

244 *charge nothing for their board and clothes; and in short, no charge is to be made that may affect their estate, inasmuch, he says, "as he has provided for them in the foregoing of this instrument, as well as for his wife." Was it his intention, that in case his wife died, during the minority of his children, that the estate still should be kept together on her farm by her heirs, that they might make a living for themselves, merely deducting the price of board and tuition, &c. of his children, though she could not have held it discharged of personal care, &c.? Or, was he looking simply to her personal comfort, and to that dependence on her for sustenance and education, calculated to preserve the parental authority; at the same time that she would be rewarded by the surplus, to be taken for her own benefit, for that care and attention he expected her to pay? He thus provides for them, as well as for

her. He looked to her personal comfort, and to a discharge by her, of the most important duties to his children, and enables her to discharge them. He looked to no other state of things. Shall we carry the provision farther? When they are no longer a charge, either for education or support, still she is to be provided for. Her comfort is looked to; though not beyond the time, when she will cease to want it. When that event happens, he looks to no one beyond her, but his children, and those of his blood, who are to take in remainder after them. Why shall this event's happening at one time, have a different effect from what it would have, happening at another? If we give it these different effects, it must be because we are forced to do so, by the rules of law operating on the estates devised, from which we cannot escape by any sound interpretation to be put on the will. I think we are not driven to this; but that the whole will justifies the interpretation that has been contended for. Plain men, unversed in legal subtleties, I think would put this construction on it; and it would seem, until otherwise advised, the appellee himself so considered it. Unlettered *men
 245 are generally very good judges of the intention of wills written by unlettered men.

On the whole, I am for reversing the decree.

The PRESIDENT concurred with Judge Carr, and the decree was reversed.*

Faulkner's Administratrix v. Brockenbrough.

May, 1836.

Mortgages—Payment of Money after Day Stipulated.—Where it is stipulated in a mortgage, that money shall be paid on or before a given day, and it is paid after that day, the mortgagee is not deprived of his right of action at law on the mortgage.

Same—Same—Effect of Acceptance.—The acceptance of the money by the mortgagee, after the day appointed for payment does not change the rights of the parties, at law.

Austin Brockenbrough, brought an action of detinue against Catharine Faulkner, administratrix of Thomas Faulkner deceased, in the Superior Court of King & Queen county, to recover a slave. The defendant pleaded non detinet, and issue was joined.

The jury found a verdict for the plaintiff, and the defendant moved for a new trial, which was refused by the Court. To this decision, the defendant filed a bill of exceptions, setting forth the evidence which was introduced on the trial. It states, that the plaintiff proved at the trial, that Elliott Muse and wife, had conveyed to him by deed of mortgage, for valuable consideration, the slave in dispute, on the 9th day of April, 1816. This deed recites, that the said Muse had executed his bond, with Walter Healy and George Healy his sureties, for the sum of
 246 *\$3000, payable to Austin Brockenbrough, on or before the 18th day of

*JUDGE CABELL, who was absent from indisposition, authorised the PRESIDENT to say that he concurred with JUDGE GREEN.

†See monographic note on "Mortgages" appended to *Faulkner v. Stuart*, 6 Gratt. 197.

April, 1817; and the said Muse, wishing further to secure the payment of the said sum of money, conveyed the property therein described, consisting of real and personal estate, and among other things, the slave in dispute; provided, that if Elliott Muse, Walter Healy or George Healy, should pay or cause to be paid to the said Brockenbrough, the said sum, on or before the 18th day of April, 1817, with interest, &c. the deed should be void.

The plaintiff also proved, that the defendant was at the institution of this suit, in possession of the said slave.

The defendant then proved, that the plaintiff, before the institution of this suit, had been paid by Walter Healy, one of the sureties to the bond above-mentioned, the whole amount of the money due to him, which the said mortgage was intended to secure; but that the said plaintiff had never executed a release; and that this suit was brought and carried on, for the benefit, and at the costs of the said Healy, the said plaintiff having consented thereto. On these grounds, the defendant moved the Court, at the trial, to instruct the jury, that the plaintiff could not recover in this action, if he was so paid off his debt; which motion being over-ruled, he moved for a new trial, which was also refused; judgment was rendered for the plaintiff, and the defendant appealed.

Leigh, for the appellant, admitted that, at law, if there be a feoffment with a defeasance, the condition must be strictly performed; but he contended, that in this case, the facts were not stated with the necessary precision. But, even if the money was paid after the day, Brockenbrough, could not recover, after he was fully satisfied; and he could not surely recover for the benefit of another, what he could not recover for himself. But the acceptance of the money by Brockenbrough, waives the forfeiture. In Co. Litt. 211, b. sec. 341, 342, 343, 344, there are analogous cases, in which the forfeiture is waived, by acceptance of money, &c. It appears by the same author, that a condition for a mortgagor to do some act, is always construed favorably for him, because its object is to create, and not to defeat the estate.

Stanard, for the appellee, denied that the record was uncertain, and insisted that it sufficiently appeared, that the money was paid after the day, appointed by the condition of the mortgage. The rule of law is express, that conditions of this sort must be strictly performed. The instances cited by Coke Littleton, do not apply. They only prove, that the place of performance may be changed by consent of parties. But the time of performance does not admit of such alteration. If a party receives money at a different place, from that stipulated, the payment is good, because if it was not there received, the debtor might go to the right place, if the money was not accepted there. But when the time has passed, he has no such option.

But it was incorrect in the appellant, to move for a new trial, on the ground of improper instructions given by the same Judge, before whom the motion is made.

Where there is a satisfied trust, an action may be maintained, either by the trustee, or the cestui que trust. *Hopkins v. Stevens*, 2 Rand. 423.

May 23. The PRESIDENT delivered the opinion of the Court.

The only question in this case, on the merits, which is presented by the bill of exceptions filed in the record, is, whether the instruction to the jury, asked for by the defendant, was properly refused by the Judge? After the plaintiff had exhibited his evidence, to wit: that Elliott Muse and wife had conveyed to him, by deed of mortgage, for valuable consideration, the slave in the declaration mentioned, and also the deed of mortgage duly recorded;

and also had proved, that the defendant was, at the institution of the suit, in possession of the said slave; the defendant then proved, that the said plaintiff, before the institution of the suit, had been paid by Walter Healy, one of the sureties to the collateral bond, in the said mortgage mentioned, the whole amount of the money due to him, which the said mortgage was intended to secure; but, that the said plaintiff had never executed a release, and that the said suit was instituted and carried on, for the benefit and at the costs of the said Healy, the said plaintiff having consented thereto. The defendant then moved the Court to instruct the jury, that the said plaintiff could not recover in this action, if he was paid off his debt for the benefit of the said Healy; which instruction, the Court refused to give.

Upon these premises, it is not easy to imagine, in what the Court erred, in refusing the instruction. There is nothing in the mortgage, which, by any possible construction of it, would make a payment after the day stipulated in the mortgage, equivalent to a payment at or before the day; and, as it lay upon the defendant to prove the payment at or before the day, in discharge of the defeasance in the mortgage, he ought to have stated it in the bill of exceptions, if the fact was so. Having omitted to state it, it must be taken, that the payment relied on, was after the day in the defeasance; and in that point of view, the law is very plain.

The estate of the mortgagee in the property included in the deed, until forfeiture, continues as at the common law, before the interference of the Courts of Equity. He is entitled to an estate as tenant in mortgage in fee, or for a term of years, as the case may be; or to an absolute estate in personal property, as regards the title; subject to any agreement as to the possession, and defeasible at law, by performance of the condition. *Ryall, &c. v. Rolle*, &c. 1 Atk. 179. 1 Pow. on Mortgages, 204. After the forfeiture by failing to perform the condition, whereby the estate becomes absolute, the mortgagee may enter upon it,

and take possession, without any possibility at law, of being evicted by the mortgagor; 1 Pow. on Mortg. 185; or, if the possession be in the mortgagor, he may recover it by suit, unless there be some agreement in the deed, (which does not exist in this case,) varying the rights of the parties at common

law. The judge, therefore, was correct in refusing the instruction to the jury, asked for by the defendant. The mere acceptance of payment after the day in defeasance, cannot, by implication or inference, change the rights of the parties, as to personal or real estate, at law; or the Statute of 7 Geo. 2, chap. 20, (which is not in force here,) would have been unnecessary, as regards the latter, in England. The fact that the mortgagee agreed that this suit should be for the benefit of Healy, the surety, who had paid the money, and at his costs, has no influence on the rights of the parties, at law, or in equity; as there also, a surety who paid the money would be entitled to the legal effect of the deed, upon the principle of substitution; which jurisdiction of equity would be entirely frustrated, if payment after the day, by the surety, would divest the legal title of the mortgagee.

Judgment affirmed.

250 *Clarke v. Tinsley's Administrator.

May, 1826.

Chancery Practice—No Issue—Order for an Account.*— In a Chancery cause, when a replication has been entered, and afterwards withdrawn, it is error for the Court to order an account, or to render a decree, until a new issue is made up. A deposition which had been taken, while the replication was standing, cannot be read, after it is withdrawn.

Same—Answer—Exceptions.—When exceptions are filed to an answer, they must be disposed of, before any further proceedings can take place in the cause.

This was an appeal from the Chancery Court of Lynchburg. The whole subject is so fully unfolded in the following opinion, that nothing more need be said.

Wickham, for the appellant.

No Counsel, for the appellee.

May 24. JUDGE CARR delivered his opinion.

Tinsley's administrator filed his bill against Clarke, a former Sheriff of Pittsylvania, stating, that his intestate had sent by mail to the defendant, Clerks' tickets for collection, keeping a list, and sending on one for the Sheriff to enter a receipt on, and return: that no receipt has been returned, so that he is without remedy at law. The bill, therefore, prays a discovery, an account, and decree for what may be found due. The defendant filed a very vague and unsatisfactory sort of answer, stating the length of time that his deputies did the business: that he has no doubt, if they ever received any fee bills, they have accounted for and paid them: that some of them are removed, some dead, and he does not think he ought to be sued after such a length of time. (He was Sheriff in 1808 and 1809, and deputy in 1810. The bill was filed in 1814.) At the May Rules, 1815, the answer was filed, the plaintiff replied to it, and a commission issued. Under this commission, the deposition of Richard Jeffries was taken. At the October Term,

1815, by consent, the replication was
251 set aside, and leave *given the plaintiff to amend his bill, and to the de-

fendant, to amend his answer. The amended bill calls for a more particular answer; that the defendant may say, whether he did not, while Sheriff, in 1808-9, or while deputy, receive tickets from Tinsley, as per list filed with the bill; whether he or his deputies did not keep books, and if so, is there not some entry of these there; and calls for extracts, &c. &c. The amended answer gives rather a lame account of the matter, speaks of the books, of tickets being entered in them, of payments made, &c. but produces no extracts. This answer was filed at the May Rules, 1817, and a replication and commission taken; and at the April Rules, 1818, the cause was set for hearing by the plaintiff. At the May Term, 1818, for reasons appearing to the Court, the replication is set aside, and the cause remanded to the Rules. At the October Rules, 1818, the plaintiff filed exceptions to the answers, and gave a Rule for a better answer; and the defendant insisting on the sufficiency of his answers, the plaintiff set down his exceptions for argument. Then comes this entry, at the May Term, 1819. "This cause came on this day to be heard on the bills, answers, exhibits and the examination of a witness, and upon the exceptions to the answers; on consideration whereof, the Court doth refer the accounts to a commissioner, who is to examine, &c." in the usual style. The commissioner reported a balance against the defendant, stating that the account was founded on the bill and answer, and deposition of Jeffries. After the report returned, but before it was acted on, the defendant took two depositions; one of his clerk, stating the information given by the books; the other of a witness, proving that the former was his clerk, while he was Sheriff. The Chancellor, in October, 1820, renders a decree on the report, as one to which there was no exception.

The course pursued at the hearing, as the record terms it, when the case came on upon the exceptions, was a singular one.

The replication having been with-
252 drawn, and *the cause sent to the Rules; all which had been done under the replication, was undone; and among other things, the deposition, which had been taken, was suppressed. When the cause came again before the Court, it was not for a hearing; there was no issue between the parties on the main subject. It was simply an appeal to the Court, to decide whether the answer was sufficient, or not. If it was thought sufficient, the exceptions would be over-ruled, and the cause sent back for further proceedings, to give the plaintiff a chance to reply, and take evidence. If the answers were deemed insufficient, the exceptions would be sustained, and the defendant ordered to put in a better answer; and the cause would be sent back to be matured for hearing. Instead of doing either of these things, the Chancellor simply directs an account, as on a hearing; and thus sends the matter to the commissioner in that crude state, without a decision whether the exceptions were good or bad, without any issue between the parties, without giving the de-

*The principal case is cited with approval in Bassett v. Cunningham, 7 Leigh 410; Hartman v. Evans, 38 W. Va. 672, 18 S. E. Rep. 811, and distinguished in Richardson v. Donehoo, 16 W. Va. 708.

fendant a chance to support his answer by evidence, and with the deposition to be read against him, which, by the subsequent proceedings, had been annulled. This was no doubt an oversight, occurring in the hurry of business. If the course pursued by the Court, could be considered as over-ruling the exceptions, then the answer, standing unreplied to, must be taken as true in every particular; but the record states, that the deposition of Jeffries was read, and the commissioner reports, that it was one of the grounds of his account. The evidence afterwards taken for the defendant, is not regarded in the slightest degree by the Chancellor; but the report is confirmed, simply because unexcepted to. Whether a formal exception was necessary, when the commissioner stated that it was founded wholly on the bill, answer and deposition, and when the defendant had taken evidence to impeach it, I shall not decide, as it is unnecessary. The proceeding upon the exceptions to the answer, was wholly irregular; and I think the decree should be reversed, and the

253 cause sent back, the *proceedings set aside subsequent to the exceptions to the answer, and those exceptions to be set down for hearing by the Chancery Court.

JUDGE COALTER and GREEN concurred, and the decree was reversed, &c.*

Mann v. Sutton.

May, 1826.

Specialty—What Constitutes—Joint Suit against Drawer and Endorsers—A single bill, under seal, is not a note, but a specialty; and therefore, the drawer and endorsers of such a note made negotiable and payable at the Farmers' Bank, cannot be sued jointly.

William Mann brought an action of debt in the Superior Court of Law for Caroline county, against Francis V. Sutton, maker, and William Sutton, John Sutton, jun. James T. Sutton, and Anderson Barrett, endorsers, of a negotiable note under seal, for \$3000, drawn and endorsed by the defendants, as aforesaid.

The defendants pleaded payment, and also demurred generally. The Court gave judgment for the defendants, and the plaintiff obtained a supersedeas.

Wickham, for the appellant, said that by our law, negotiable notes at the Virginia and Farmers' Banks are put upon the footing of foreign bills of exchange; and that a bill of exchange would not lose its character, by being under seal. If so, a joint action is given in both cases, by force of our Acts of Assembly.

254 *Stanard, for the appellees, denied that any case could be found, which supported Mr. Wickham's assertion, that a bill of exchange can be made under seal. By the fixed principles of law, the contracts of the maker and endorsers of an instrument under seal, are of different natures and dignity. The first is a specialty; the others are simple contracts. The form of action, the pleadings, and the verdicts are

different in the two cases. But the law only places notes negotiable and payable, &c. on the footing of bills of exchange. Can a specialty be called a note, without confounding the legal definitions of the two things? The law, in giving a joint action against the drawer and endorsers of a promissory note, committed some violence on the principles of the common law. Shall we extend this violence still further, by giving a joint action on a specialty?

May 25. JUDGE CARR delivered his opinion.

The instrument, which is the foundation of this action, is a single bill under seal, by which F. V. Sutton promises to pay to W. Sutton, or order, six months after date, negotiable and payable at the Farmers' Bank of Virginia, the sum of \$3000. There are several endorsers, and a joint action of debt is brought against the obligor and endorsers. A demurrer to the declaration was put in, and sustained by the Court below. The simple question presented is, can this action be sustained?

Upon general principles, there could not be the doubt of a moment. The contracts of the obligor, and the different endorsers, are several, distinct, and of different grades. The obligor has bound himself by a sealed instrument; the endorsers, by their hands merely. The defence cannot be the same.

But, we have an Act of Assembly, which authorises the holder of a foreign bill of exchange protested, to commence and prosecute an action of debt, for principal, 255 damages, interest, *and charges of protest, against the drawers and endorsers, jointly, or against either of them separately; and we have another Act, saying that notes made negotiable and payable at the Virginia and Farmers' Banks, shall be placed on the footing of foreign bills of exchange; and as this obligation is made negotiable and payable at the Farmers' Bank, it has been supposed, I presume, that this authorised the joint action. The conclusion to which I have come in this matter, differs toto cælo from this. The Act says, that notes made negotiable, &c. shall be on the footing of bills of exchange. This is not a note, but a specialty; differing in dignity, in the mode of defence, indeed, in all the legal consequences, flowing from it. It is a general rule, that these new remedies, innovating upon the settled doctrines of the common law, shall be taken strictly. But, the most liberal and latitudinous construction, it seems to me, could not extend the Act of Assembly to the case before us. I am clear that the judgment be affirmed.

JUDGES GREEN and COALTER concurred, and judgment was affirmed.*

256

*Dabney v. Taliaferro.

May, 1826.

Sheriff—Furnishing Supplies to Prisoners.—A Sheriff, as jailor, is bound to furnish a runaway com-

*The PRESIDENT and JUDGE CABELL absent; the latter of whom was confined, during a great part of this term, by a severe indisposition.

*See monographic note on "Sheriffs and Constables" appended to Goode v. Galt, Gilm. 162.

By common law the sheriff is *ex officio* jailor and

*The PRESIDENT and JUDGE CABELL absent.
*See generally, monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

The principal case is cited in Laidley v. Bright, 17 W. Va. 796, 797.

mitted to the jail, with such supplies as are necessary for the season of the year.

Same—Ex-Officio Jailor—Liability.—A sheriff is ex-officio jailor, and is liable for the misconduct of his turnkey or servant.

Instruction—Weight of Evidence.—An instruction by the Court, that the facts proved are not conclusive evidence, does not amount to an instruction as to the weight of evidence, because it leaves the whole matter open to the jury.

Sheriff—Jailor—Liability.—Quære. If a jailor is regularly appointed by the Sheriff, is he thereby discharged from responsibility for the acts of his jailor?

This action was originally brought in the Superior Court of King William county. It was an action of trespass on the case, brought by Taliaferro against Dabney, as Sheriff and jailor of the county of King William, to recover the value of a negro man slave, the property of the plaintiff, who was confined in the jail of the said county, as a runaway; which slave was rendered entirely useless to his master, by neglect of duty, on the part of the defendant, as Sheriff and jailor, in not furnishing diet, fire, and bed covering.

The declaration charges, that Dabney, by the law and custom of the land, was keeper of the jail, by virtue of being Sheriff of the said county, and bound to keep the said jail in all things as the law directs, for the confinement and safe keeping of all persons lawfully committed to the said jail, as prisoners: that by the same law, he was bound to furnish every prisoner, with wholesome and sufficient food, with sufficient fuel, when necessary and proper, and with cleanly and sufficient bed covering, &c. that the said Dabney, as Sheriff, and keeper of the said jail, on the day of January, 1821, received into the said jail, a certain runaway negro slave, named Bartlett, the property of the plaintiff, of the value of \$500: that the said Dabney, and those acting for him, so negligently and carelessly behaved and conducted himself and themselves, in that behalf, that the said slave became diseased and

257 *frost-bitten from cold, crippled and maimed, and was injured by and through the mere negligence, carelessness, and default of the said Dabney, and was wholly lost, and of no value to the plaintiff, to his damage \$1000.

The defendant demurred generally to the declaration; and pleaded, that at the time of the supposed injury, he was not the jailor or keeper of the jail of the said county of King William. Issue was joined, and a verdict was found for the defendant. On motion of the plaintiff, a new trial was granted; and on the like motion, the venue was changed to the Superior Court of King & Queen county, with leave to the plaintiff to amend his declaration, and to the defendant, to plead any additional plea or pleas in bar, within ninety days.

The cause was tried in the Superior Court of King & Queen, where the jury found a verdict for the plaintiff, and \$400 damages.

At the trial, the defendant filed two bills of exception. In the first, it is stated, that the defendant move the Court, to instruct the jury, that the defendant, if the

jailor of King William county, was not bound by the law of the land, to have furnished the runaway slave in the declaration mentioned, who was committed on the 7th of January, 1821, with blankets, or other bed covering, and with fuel; which motion was over-ruled by the Court, and an instruction to the contrary thereof was given to the jury.

The second bill of exceptions stated, that the defendant introduced evidence to prove that James R. Thornton, who was tavern-keeper at the court-house of King William, had the custody of the keys of the jail, before and after, and at the time the runaway slave was committed to King William county jail: that he received all prisoners who were committed to the said jail: that he dieted them, and received the compensation allowed by law for that service: that he held the keys, by consent of the Sheriff, and acted in his stead; and that he exercised complete control over the jail

aforesaid. The plaintiff introduced 258 evidence to *prove, that the defendant was allowed by the Court, the public allowance authorised by law to be made to the jailor, which was received by him. Whereupon, the defendant moved the Court to instruct the jury, that under the law of the land, the said Thornton, if it was proved to them that he was appointed by the Sheriff, keeper of the jail aforesaid, was alone answerable to the plaintiff's action, and not the High Sheriff; which motion was over-ruled by the Court, who instructed the jury, that the High Sheriff was ex-officio jailor of the county, unless he appointed some other person as jailor; and that the defendant was liable for the misconduct of the said Thornton, as his turnkey or servant, unless he could prove that he had regularly and legally appointed him the jailor; and that the mere facts attempted, as above, to be proved by the defendant, were not conclusive evidence of such regular appointment by the defendant.

Judgment was rendered for the plaintiff, and the defendant appealed.

Wickham, for the appellant, said that this action was founded on our Act of Assembly, and not on the common law: that the 1 Rev. Code, 235, sec. 34, which points out the duties of jailors, has no relation to runaways, as is proved by the allowance of forty cents per diem, for their maintenance and support. The Act concerning runaways is found in 2 Rev. Code, 284; but the term prisoners, which is used in the Act just quoted, is never applied to runaways. The allowance of forty cents per diem would be exorbitant for the maintenance of a slave.

But, if this action is founded on the common law, no specific duties, such as are required by the Statute, are imposed on the Sheriff. The declaration should only have alleged the breach generally, that the slave was negligently kept, &c. not that he was not furnished with wholesome and sufficient food, with sufficient fuel, with cleanly and sufficient bed covering, &c.

259 *But, the Sheriff is not answerable for the acts of the jailor. The jailor, it is true, is the servant of the sheriff; but the

the jailor his mere servant. *Stephenson v. Salisbury* (W. Va.), 44 S. E. Rep. 217.

See monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 457.

Sheriff is not the jailor. As to runaways, certain duties are imposed on the jailors by name, and not on the Sheriffs. In the 1 Rev. Code, 235, jailors are required to perform certain acts, which clearly do not belong to Sheriffs. In other cases, the Sheriffs are required to do certain things, where jailors are certainly not intended. These laws shew that the Legislature considered jailors and Sheriffs as distinct persons. The same distinction is observed in 2 Rev. Code, 285; where it is made the jailor's duty to advertise at the door of the court-house; but the Sheriff is to sell the slave, if it should be necessary. 2 Rev. Code, 287, sec. 12, 13, affords further instances of this distinction. That the jailor is liable for negligent conduct, is proved by Fitzh. Nat. Brev. 93-8, and 12 Co. 137, and Hawk Pl. Cr. b. 1, c. 1.

The instruction was wrong, because it pronounced an opinion on the weight of evidence.

Stanard, for the appellee, said, that it was the duty of the Sheriff to treat his prisoners with humanity; and if so, the declaration was good, in charging specifically, such gross negligence, as amounts to a violation of his duty in that respect. Besides this particular enumeration of instances of negligence, the declaration charges, in general terms, that the defendant negligently and carelessly conducted himself, &c. which removes Mr. Wickham's objection to the manner of charging the gravamen. 1 Chitt. Cr. Law, 808. 1 Institutes, 295.

The instruction was correct. The Court was called on to instruct the jury, that the Sheriff was not bound, under any circumstances, to furnish the prisoner with blankets or other bed covering, and with fuel, and the Court refused. In doing so, it well supported the spirit and humanity of our law. The law is express to this effect. 1 Rev. Code, 235. The distinction

between prisoners and runaways, 260 *committed to prison, is unfounded.

Sheriffs are jailors. 2 Inst. 589; and 1 Black. Comm. 346, says that jailors are the servants of Sheriffs. Therefore, the latter are responsible for the acts of the former. An Act of Assembly gives the Sheriff an action against the magistrates of the county, for keeping insufficient jails. 1 Rev. Code, 250. Why is this given, unless the Sheriff is responsible for escapes and other injuries, arising from the bad condition of the jail? It is even doubtful, whether any action would lie against the jailor. 2 Bac. Abr. Tit. "Escapes in Civil Cases," E. 2. The Sheriff and jailor are treated as the same persons, in all our laws.

May 26. JUDGE CARR delivered his opinion.*

Tallafarro had a negro man committed to the jail of King William county, on the 7th of January, 1821, as a runaway. The slave having become frost-bitten, while in jail, Tallafarro brought an action on the case against the Sheriff, charging that the Sheriff is, by the law of the land, jailor, and as such, bound to furnish necessary food, covering, fire, &c. to all prisoners:

that the defendant, as Sheriff, received into the jail of the county, his slave committed as a runaway; and that he, and those acting for him, so negligently and carelessly conducted themselves in that behalf, that the slaves became diseased, frost-bitten from cold, crippled and maimed, by and through the mere negligence, carelessness, and default in duty, of the said Sheriff and jailor, and was, and still is of no value to the plaintiff.

To this declaration, the defendant demurred generally, and also pleaded several pleas. A trial was had, and a verdict for the defendant. The Court granted a new trial; and, for reasons appearing, changed the venue to King & Queen. Leave also was given to the defendant, to plead anew, and to the plaintiff to amend. After 261 the removal, *a jury was sworn, and found a verdict for the plaintiff, for \$400; and the demurrer being over-ruled, the Court gave judgment for the plaintiff.

During the trial, two bills of exceptions were filed; and it was to the correctness of the Court in deciding these points, that the argument was principally confined.

In the first bill, the counsel moved the Court to instruct the jury, that the defendant, if jailor, was not bound by the law of the land, to furnish the runaway committed on the 7th of January, 1821, with blankets or other bed covering, and with fuel; which motion was over-ruled by the Court, and an instruction to the contrary given.

That the Court did not err in refusing the instructions asked for, seems very clear to me. For I cannot for a moment suppose, that by the law of the land, a human being may be imprisoned in mid-winter, and yet the jailor not bound to provide him with covering or fire. I should as soon think that he was not bound to furnish him food. If the Court, therefore, had stopped at merely refusing the instructions asked, there could have been no doubt of their correctness; but they over-ruled the motion, and gave instructions to the contrary; that is, being asked to say, that a jailor was not bound to furnish covering and fire to a runaway, committed on the 7th of January, the Court said that he was bound; and I think they were right. Can we suppose a state of the weather at that season, which would justify the jailor in neglecting to make any sort of provision for the cold, neither a blanket to cover, nor a fire to warm the prisoner? If the particular day on which he was committed was so warm, as to have rendered such provision unnecessary for the moment, could the continuance of such weather be counted on, with so much certainty, as to justify the total omission of attention to the subject? I speak not now under the Act of Assembly, but on the principles of the common law; and I am clearly of opinion, that these principles do not warrant or excuse such omission and neglect. The genius of our law is not so cruel and unfeeling. Non obtusa adeo gestamus pectora.

262 *The second exception. The defendant introduced evidence to prove, that one Thornton, the tavern-keeper, at the court-house, kept the keys of the jail,

*The PRESIDENT and JUDGE CABELL absent.

received prisoners, dieted them, and received the compensation allowed by law for that service: that he held the keys by consent of the Sheriff, and acted in his stead: that he exercised complete control over the jail. The plaintiff proved, that the defendant was allowed by the Court, the public allowance, authorised by law to be made to the jailor, which was received by him. Whereupon, the defendant moved the Court to instruct the jury, that under the law of the land, the said Thornton, if it appeared to them that he was appointed by the Sheriff, keeper of the jail, was alone answerable to the plaintiff's action, and not the High Sheriff; which motion was over-ruled, and the Court instructed the jury, that the Sheriff was ex-officio jailor, unless he appointed some other person jailor; and that the defendant was liable for the misconduct of the said Thornton as his turnkey or servant, unless he could prove, that he had regularly and legally appointed him the jailor; and that the facts attempted to be proved as above, were not conclusive evidence of such regular appointment.

This instruction consists of three positions taken by the Court. 1. That the Sheriff is ex-officio jailor. This I take to be the settled rule of the common law; nor do I see anything in our Statute changing it. On the contrary, they seem to take it as the basis, on which their provisions are founded. 2. The Court say, that the defendant was liable for the misconduct of Thornton as his turnkey or servant, unless he proved a regular appointment of him as jailor. This, I presume, would scarcely be denied. It would be strange to say, that the principle which pervades the whole law, *qui facit per alium, facit per se*, did not apply here. Suppose the Sheriff were to deliver the keys of the jail to his slave, and order him to attend to the prisoners, and carry them food, and this slave were to set the jail door open, and let them escape; would *not the Sheriff be answerable? Assuredly he would. 3. The Court said, that the facts attempted to be proved, were not conclusive evidence of the regular and legal appointment of Thornton, jailor. If this be considered an opinion as to the weight of evidence, it was erroneous; for this belongs solely to the jury. But it does not strike me in that point of view. On the contrary, it was submitting the weight entirely to the jury. To say that evidence is conclusive, is to decide that nothing can rebut it; is to conclude the jury and the party. Here, every thing was left at large. *Bogle v. Somerville*, 1 Call, 561. There was no error then in this. I have not touched the question, whether, if the Sheriff had regularly appointed Thornton his deputy, he could thereby have relieved himself from all responsibility for his acts, because the Court gave no instruction on that point, and it is not therefore directly raised. But, the inclination of my mind is, that the Sheriff, notwithstanding such appointment, would be liable, as in other cases, for the acts of his deputy.

JUDGES GREEN and COALTER concurred, and the judgment was affirmed.

264

*Martin v. Auditor.

May, 1826.

Statute—Sequestration—Case at Bar.—The representative of a British subject, whose estate was sequestered under the law of 1777, and who does not apply to the Auditor until 1822 for a certificate. Is not entitled to interest on his claim, after the 1st of January, 1811.

This was an appeal from the Richmond Chancery Court, where J. P. Martin, as administrator of S. Martin deceased, filed a petition of appeal from a decision of the Auditor of public accounts. The objects of the petition are fully stated in the following opinion. The Chancellor dismissed the appeal, and the petitioner appealed to this Court.

Wickham, for the appellant.

Attorney General, for the appellee.

May 27. JUDGE CARR delivered his opinion.

In October, 1777, the Assembly passed an Act sequestering the estates and property of British subjects, and directing the profits to be paid into the loan office, and certificates of such payment to be taken in the name of the proprietor, and delivered to the Governor and Council. In 1796, they pass a law saying, that in all cases where estates have been sequestered under the law of 1777, and money paid into the treasury, it shall be lawful for the Auditor to issue to the person, on whose account such payment has been made, a certificate for the value thereof, with interest at 6 per cent. from the date of the payment. In 1802, it is enacted, that the owners of certificates do deposit them with the treasurer, who shall give a receipt for them, specifying the amount, and distinguishing principal from interest; and upon such receipt being presented to the Auditor, he shall issue a new certificate for the principal, and a warrant for the interest. Secondly. If the holders of certificates do not apply before the 1st of January, 1803, for warrants for interest thereon, such interest shall cease after that period. An Act passed in 1809, reciting this second section, extends the time for which interest shall be given, on application to the Auditor, to 1811; with a saving to infants, *femes covert*, and persons of unsound mind.

The appellant is the administrator of Martin a British subject, whose estate was sequestered. He applied, in 1822, to the Auditor, who gave him a certificate for the principal, bearing date the 14th of May, 1822, without interest, and a warrant for the interest up to the 1st of January, 1811. The question is, has Martin a right to the interest from 1811 to 1822, the date of his certificate? And this question is to be solved by the Acts of Assembly, which I have stated. It is not a question of power, or of justice, but of intention purely.

The law of 1796, on the presumption, probably, that the certificates directed by the first Act, had been lost or destroyed during the revolution, dispenses with their production, and entitles every person, in whose name money had been paid into the treasury, to a certificate for the value thereof, with interest at 6 per cent. In 1802, the Legislature, anxious to liquidate

and discharge, as far as they could, these debts, direct that the certificates shall be produced to the treasurer, who shall give a receipt, on which the Auditor shall issue a new certificate for the principal, and pay off, by warrant, the interest; and that, if the holder did not apply before January, 1803, he should lose his interest after that time. This law the Legislature had a right to pass, and its meaning seems very clear. They intended, I have no doubt, to include in its provisions, every British subject, who had a claim for payments into the treasury; no matter whether he had obtained a certificate of such payment, or not. It is true, they say "the owners of such certificates," &c. but these terms are used, I think, because having, by a former law, directed all claimants to procure this evidence of their debt, they presumed 266 that "this was done; and that the "owners of certificates" comprehended all claimants. On what possible ground of policy or justice, could they intend to make a distinction against the diligent, who, in obedience to their law, had gotten certificates, and in favor of the negligent, who had slept on their claims? That non-residence would not give this advantage, or suspend the operation of the law, is clear; because the whole class, on which it was meant to operate, were foreigners; and this is more especially clear, under the law of 1809, extending the interest to 1811; for, this law has a saving of the rights of infants, femes covert, and insane persons; but none as to persons out of the Commonwealth.

Being convinced, therefore, that the law meant to embrace the case, and that the spirit and equity, if not the letter, does embrace it, I am for affirming the decree.

JUDGES GREEN and COALTER concurred, and the decree was affirmed.*

Garland v. Richeson.

May, 1826.

Bonds—Assignee—Title of—Suit by.—The assignee of a bond under our Statute, does not acquire the legal title to the debt, but an equitable right, which, by virtue of the Statute, he may assert at law in his own name; and he has his election to sue, at law, in his own name, or in that of the original obligee, for his benefit.

This was an appeal from the Superior Court of Law for the county of Amherst.

Hudson M. Garland brought an action of covenant against John Richeson, for the benefit of Samuel Garland. The instrument, on which the action was 267 brought *was a paper signed and sealed by the defendant, by which he bound himself to pay to Hudson M. Garland for his services as an attorney, as

*The PRESIDENT and JUDGE CABELL absent.

***Bonds—Assignee—Title of—Suit by.**—It is a general rule that an action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The legislature alone has power to make an exception to this rule. An exception is made by the Code, ch. 144, § 14, p. 583, which authorizes the assignee of any bond, note or writing not negotiable, to maintain thereupon any action in his own name which the original obligee or payee might have brought. The assignee acquires only an equitable right with a capacity, expressly given him by statute, to assert it at law in his own name. But the legal title, still remaining in the obligee or payee, a right of action is incident

much money as two persons, therein named, should certify, by endorsement on the said instrument, that the said services were worth. This instrument was assigned to James Garland, and afterwards assigned by him to Samuel Garland. The paper in question exhibited these facts on its face.

The defendant, after craving oyer of the instrument, pleaded two pleas, the first of which it is not necessary to notice. In the second plea, the defendant alleged that the plaintiff could not maintain this action, because the plaintiff, Hudson M. Garland, had assigned over the writing to James Garland before the institution of the suit, whereby he had no legal right or title whatsoever to the said written contract, at the time of the commencement of the said suit. Issue was joined, and the jury found for the plaintiff, on the first plea; and on the second, they found specially the facts relating to the assignment, as above set forth. The Court gave judgment for the defendant, and the plaintiff appealed.

Stanard, for the appellant.

No Counsel, for the appellee.

May 27. JUDGE CARR.

I have carefully examined the reasoning and the authorities relied on by my brother Green, in this case; and I have come to the conclusion, that upon precedent and authority, he is right. At the same time, I must say, that I believe the Legislature intended to give the assignee the legal title; and if this were *res integra*, I should strain hard to effectuate that intention. In the actual state of things, it is safest *stare decisis*, and leave it to the Legislature to explain their intention, or express their will. I concur.

268 *JUDGE GREEN.

This case turns upon the question, whether the assignee has, under our Statute authorising assignments of bonds, &c. a legal right to the debt, or only, as at common law, an equitable right to the debt, with a capacity to sue in his own name in a Court of Law, by virtue of the Statute, to enforce this equitable right? If the legal title to the debt passes by the assignment, then the assignor having no longer any title, legal or equitable, no action can be maintained in his name. If the equitable title only passes, then the assignee may sue in the name of the assignor, as at common law, upon the legal title remaining in the assignor, or in his own name, by virtue of the Statute, on his equitable right; the Statute, upon this construction, giving a new remedy without abolishing the old.

By the common law, anciently, a chose in action was not assignable; and the assign-

thereto, and the assignee may, at his election, sue at law in his own name, or in that of the obligee or payee for his benefit. *Clarkson v. Doddridge*, 14 Gratt. 44, citing principal case as authority. On the same subject, the principal cases are cited in *Feazle v. Dillard*, 5 Leigh 34; *Dunn v. Price*, 11 Leigh 209; *Pates v. St. Clair*, 11 Gratt. 23; *Hunter v. Lawrence*, 11 Gratt. 130; *Stebbins v. Bruce*, 80 Va. 399; *Charke v. Hageman*, 13 W. Va. 728, 730; *Tingle v. Fisher*, 20 W. Va. 509; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 735, 737, 23 S. E. Rep. 585; *Garber v. Blatchley*, 50 W. Va. 147, 41 S. E. Rep. 225; *Blane v. Drummond*, 3 Fed. Cas. 683. See further, monographic *note* on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

ment had no effect at law, or in equity. 3 Vin. Abr. 151, pl. 2, 152, pl. 10. Afterwards, Courts of Equity protected assignments made in satisfaction of a precedent debt, but not such as were made, either voluntarily, or for a consideration then paid; since, to protect such assignments, would lead to maintenance. Ibid. 151, pl. 5, and note. The Courts of Law adopted this distinction, and took notice of the equitable rights of the assignee, when a suit was brought in the name of the assignor for his benefit. Ibid. 152, pl. 9. At and after period, Courts of Equity respected and protected all assignments made on good consideration, without regard to the distinction above mentioned; and the Courts of Law followed the example. Ibid. 152, pl. 10, note; 150, B. pl. 2. And now, in all cases, the Courts of Law in England protect the rights of an assignee, suing in the name of the assignor, so far as not to permit the assignor to dismiss the suit or to release the action.

Our first Statute, authorising assignments, was enacted in 1705. 3 Hen. Stat. at Large, 378. It provides, "that
269 *it shall and may be lawful for any person or persons, to assign or transfer any bond or bill for debt, over to any other person or persons whatsoever," and that "the assignee or assignees, his and their executors, &c. by virtue of such assignment, shall and may have lawful power to commence and prosecute any suit at law, in his or their own name or names, for the recovery, &c. as the first, (obligee) his executors, &c. might or could lawfully do. Provided, that in any suit, commenced on such bond or bill assigned, the plaintiff shall be obliged to allow all discounts that the defendant can prove, either against himself, or against the first obligee."

An Act of 1730, 4 Hen. Stat. at Large, 275, extended the provisions of the Act of 1705, to promissory notes. In 1786, these Statutes were re-enacted in an abridged form, providing that "assignments of bonds, bills and promissory notes, and other writings obligatory, for the payment of money or tobacco, shall be valid, and an assignee of any such may, thereupon, maintain an action of debts in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant." In 1795, the provisions of the Act of 1786, were extended to all writings obligatory whatever; and these Acts were re-enacted at the revival of 1819.

I consider the Acts subsequent to that of 1705, as not intended to vary the construction of the first Act, in respect to the effect of the assignment, although the phraseology is varied, with a view to abridge the law, as is common in our revisals; and this opinion seems always to have prevailed in this Court, where it has been held, that the assignee takes the bond, not only subject to all discounts, according to the terms of the Statute, but to all equities (whether coming within the term discounts or not,) to which it was subject in the hands of the obligee; Norton v. Rose, 2 Wash. 233. Pickett v. Morris, Ib. 255. Stockton v.

Cooke, 3 Munf. 68; and that, notwithstanding the *Statute, the assignee was entitled to the same remedy in equity, that he was entitled to before the Statute; the remedy at law being cumulative, and not exclusive. Wynne v. Bowles, 6 Munf. 23.

To justify these decisions, the Court must have considered, that the legal title to the debt did not pass by the assignment, but only an equitable right, with the right to sue at law, in the name of the assignee: that the declaration, that it should be lawful to assign, was intended only to abrogate the rule of the common law, that the assignment of a chose in action was not available to any purpose; and that the right of the assignee to sue in his own name, resulted from the express provision, to that effect, of the Statute; which right would, without such provision, have resulted from the transfer of a legal title to the debt, and if such legal title had passed, the authority to sue in the name of the assignee would have been superfluous. If the Court had held, that the legal title to the debt passed by the assignment, then they could not have held, that any equity against the bond, not coming within the description of discounts, could bind the assignee, without notice of the equity; as, if the equity was founded on a fraud in the consideration of the bond. This could be no defence at law, not being a discount; and after judgment for the assignee at law, if the debtor applied for relief on that ground, to a Court of Equity, a plea that the assignee was a bona fide purchaser of the legal title to the debt secured by the obligation, without notice of any equity, would be a complete defence, on the maxim of the Court of Equity, which is without exception, that he who has the legal title, and equal equity, must prevail in that Court; and a purchaser without notice has a perfect equity. But, where a purchaser acquires only an equitable title, the maxim is, *qui prior est tempore, potior est jure*. So, if the legal title to the debt passed by assignment, a Court of Equity could not aid the assignee, otherwise than they could have aided any other person having a legal title, when he was prevented

271 *from pursuing his right at law, by fraud, accident or mistake. The original jurisdiction of the Court of Equity, to aid an assignee of a chose in action, was founded on the fact, that he had only an equity, which he could not assert at law. If the Statute had the effect of giving the assignee the legal title to the debt, as well as a remedy at law, then this foundation of the jurisdiction would fail; and although the assumption, by a Court of Law, of a jurisdiction once confessedly belonging exclusively to a Court of Equity, will not take away the original jurisdiction of the latter; yet, when a Statute converts an equitable estate into a legal estate, it destroys the jurisdiction of the Court of Equity. Thus, before the Statute of uses, all uses were solely of equitable jurisdiction. After that Statute, all uses executed by it, became subjects of the jurisdiction of the Courts of Law, and were taken away from equity; the latter retaining no juria-

diction over any uses, but those not executed by the Statute.

Upon authority, therefore, I conclude, that an assignee, under our Statute, does not acquire the legal title to the debt, but an equitable right, which, by virtue of the Statute, he may assert at law in his own name; and that he has his election to sue at law, in his own name, under the Statute; or, in the name of the original obligee, for his benefit, upon the strength of the legal title remaining in the obligee: that the judgment must be reversed, and judgment given for the appellant, notwithstanding the verdict of the jury upon the issue joined upon the second plea; that plea and verdict alleging matter, which, although true, is no bar to the plaintiff's action.

JUDGE COALTER concurred, and the judgment was reversed.*

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*Hays v. Wood.

May, 1826.

Real Estate—Purchase Jointly—Lien for Purchase Money Advanced.—Where two persons purchase a tract of land jointly, and one of them pays more than his proportion of the purchase money, while the other takes a conveyance of the whole to himself, the person who has advanced more than his share, has a lien on the land for the money so advanced.

Equity Jurisdiction.†—In such case, if the plaintiff does not pray to subject the land, but only for a personal decree for the balance due, equity will have jurisdiction.

Appeal from the Staunton Chancery Court, where Wood filed a bill against Hays, stating that Hays and himself made a joint purchase of a tract of land, which was sold for the sum of \$4000; and articles of agreement were entered into between them and the vendor, whereby the vendor bound himself to make a title for the said land to the said Hays and Wood; and they bound themselves in return, to pay to the vendor the purchase money aforesaid, in the manner stipulated; that the plaintiff paid up his full moiety of the purchase money, and more; whereupon he expected a conveyance to himself and the said Hays, of the land aforesaid; that the said Hays had fraudulently procured a conveyance of the said land, to be made to himself alone. The bill, therefore, prayed, that an account might be taken, if necessary, to ascertain how much the plaintiff had over-paid his moiety of the purchase money; that the said Hays might be decreed to re-pay the surplus to the plaintiff, and to convey one moiety to him, &c.

The answer of Hays states, that he made a verbal agreement for the land, for his own benefit alone; but afterwards, being unable to furnish all the means necessary for the purchase, he entered into a verbal agreement with the plaintiff, by which the plaintiff should aid the defendant in making his payments; and, if the defendant could sell the land in a short time, the plaintiff should have half of the profits; if not, the defendant should pay him back his advances and keep the land; that accordingly, the written contract was executed, mentioned in the bill, and

273 deposited *in the hands of captain John Field, as a mere security; that the plaintiff advanced to the defendant, towards the immediate instalment, a slave, &c. The defendant stated a variety of transactions, by which it would appear that the plaintiff was in his debt on other accounts, &c.

The accounts between the parties were referred to a commissioner who reported a balance due to the plaintiff of \$492 15 cents with interest, &c.

Depositions were taken, and the Chancellor decreed, that the report of the commissioner should be affirmed; and, dismissing so much of the plaintiff's bill as seeks a conveyance of the land therein mentioned, decreed that the defendant should pay to the plaintiff the sum reported by the commissioner, viz: \$492 15 cents, with interest, &c.

From this decree the defendant, Hays, appealed to this Court.

Leigh, for the appellant.

No Counsel, for the appellee.

May 29. JUDGE COALTER delivered his opinion, in which the other Judges concurred.‡

Richard Wood the appellee, and David Hays the appellant, on the 9th of October, 1815, purchased a tract of land from John Wood, for the consideration of \$4000, payable, as mentioned in the articles of agreement, entered into between them, on that day.

The bill alleges, that the appellee had paid more than his moiety of the purchase money; but that the appellant had received a title for the whole land. He therefore prays, that the appellant may be decreed to re-pay the surplus, and convey the 274 moiety of the land. The answer *al-

leges, that the appellant, in 1815, made a verbal agreement to purchase the land of John Wood, on his own account, but finding that he was unable to furnish all the property, paper, &c. necessary to make the first payment, and wanting some one to be responsible with him for the deferred payments, he entered into a verbal agreement with the appellee, that he should aid him; and if the appellant could sell the land in a short time, the appellee should have one half of the profits, and if not, that he would pay him back his advances, and keep the land; and in consequence of this, the written agreement aforesaid was entered into; and, as a better security for his performance, the agreement was to be deposited in the hands of captain John Field: that the appellee did make certain advances towards the purchase, &c. but afterwards agreed, that if the appellant would pay him the amount which he had advanced, he would give up all claim to the land, which he agreed to, and paid various sums to him, and orders he drew on him, &c. so as fully to reimburse his advances: that the appellee is in his debt on other accounts, &c. He admits, that he obtained a conveyance for the whole tract, but denies that it was fraudulently obtained, as charged in the bill; and should the Court direct an account, he prays that the balance due him, may be decreed, &c.

*The PRESIDENT and JUDGE CABELL, absent.
†See generally, monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 467.

‡The PRESIDENT and JUDGE CABELL, absent.

Taking it that these verbal agreements could have been proved, and were proved, which is not admitted; the appellee would have been entitled to a lien on the land, for the purchase money advanced by him, and not re-paid by the appellant; and in amending the bill according to this statement, the Court clearly would have had jurisdiction to settle the accounts, and decree payment, &c. But, without amending the bill, so as to subject the land as aforesaid, (which the appellee had a right to do, admitting that the statements in the answer are true,) the parties consent that the accounts should be taken, and a balance appearing due from the appellant, a personal decree is rendered against him for that balance. This it was competent for

275 them to *do; and this personal decree alone, when it might have been made to extend to the land, is beneficial to the appellant, and ought not to oust the Court of Equity, of its legitimate jurisdiction in this case.

On this ground, I perceive no error in the decree, so far as it regards the jurisdiction of the Court.

But it is said, that the exception by the appellant to the commissioner's report, ought to have been sustained. I have examined the accounts with considerable attention, and am not satisfied that the Court erred in this respect.

I think, therefore, that the decree ought to be affirmed.

Decree affirmed.

Rison v. Berry.

May, 1826.

Arbitration and Award—Award—Validity—Joint Award by Arbitrators and Umpire.*—Where a submission is made, of all matters in difference between two parties, in a particular suit then depending, to two persons, and such umpire as they shall choose, and their award to be made the judgment of the Court; and the arbitrators and umpire act together and make a joint award: such award will be good.

Same—Same—Same.—Although the award does not state that the third person, who signed the award, had been chosen by the arbitrators, as umpire, yet that fact may be proved by other evidence.

Same—Same—Same.—If the third person who signed the award, were a mere stranger, this would not vitiate the award.

This was an appeal from the Superior Court of Amelia county.

Berry brought an action of slander against Rison; and afterwards, the parties came into Court in person, and agreed to submit "all matters in difference between them in this suit, to the final determination of Allen Jeter and John Baldwin, and such umpire as they shall choose, and that their award thereupon shall be made 276 the judgment of *the Court; and that said arbitrators and their umpire may proceed to make the award ex parte, in case either party shall fail to attend them, after receiving ten days notice of the time and place appointed for that purpose."

The arbitrators returned their award, in these words: "On hearing the evidence

and argument of counsel, on both sides of the question, we, as referees, are of opinion, that the defendant Rison pay unto the plaintiff Berry, the sum of one thousand dollars."

(Signed,)

Allen Jeter.

John Baldwin.

Henry Haskew.

The defendant objected to the paper exhibited as an award, on the grounds that it does not conform to the order of reference made in this case, whereby the case was submitted to Allen Jeter and John Baldwin, and their umpire: that the award is made and signed by Allen Jeter, John Baldwin, and Henry Haskew, and does not shew on the face of it, that Henry Haskew was the umpire chosen by the referees; which objection the Court over-ruled, because it should be inferred from the award that Haskew was regularly chosen, and because it was proved by oral evidence, that he was so chosen; to which opinion, the defendant excepted; and judgment was rendered on the award.

The defendant appealed.

The case was submitted without argument.

May 29. JUDGE CARR delivered the opinion of the Court.†

The appellee brought an action of slander against the appellant. Pending the action, the parties in person came into Court, and agreed to submit "all matters in difference between them in this suit, to the final determination of Allen

277 *Jeter and John Baldwin, and such umpire as they shall choose, and that their award thereupon, shall be made the judgment of the Court; and that the said arbitrators and their umpire may proceed to make their award ex parte," on giving notice, &c.

The arbitrators, (as the bill of exceptions states) regularly chose Henry Haskew their umpire; at what time, does not appear. The arbitrators and the umpire proceeded together, to hear the cause, each signing their proceedings prior to the award; and finally returned into Court the following award: "On hearing the evidence and arguments of counsel on both sides of the question, we, as referees, are of opinion, that the defendant Rison, pay unto the plaintiff Berry, the sum of one thousand dollars." Signed, A. Jeter, John Baldwin, Henry Haskew.

It has been objected to this award, 1. That the submission was to Jeter and Baldwin, and such umpire as they may choose; and the award is signed by Jeter, Baldwin, and Haskew, without any statement by the arbitrators, that they had chosen Haskew umpire; so that he may be a stranger, which would vitiate the award. 2. Supposing Haskew, the umpire, it is contended, that he could not act, till after the disagreement of the arbitrators.

With respect to the first objection, I think there can be no doubt, that we must take Haskew as regularly appointed umpire. I see no necessity, either in reason or authority, to confine the evidence of the appointment to a statement in writing

*See monographic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

†The principal case is cited with approval in State v. Rawson, 25 W. Va. 34; Rogers v. Corrothers, 26 W. Va. 245.

†The PRESIDENT and Judge CABELL absent.

made and returned by the arbitrators; and the bill of exceptions states, that the fact was proved in Court. But take him for a stranger, who had joined the arbitrators in making the award. There is authority, both ancient and modern, that this would not vitiate. *Beck v. Sargent*, 4 Taunt. 232.

Supposing Haskew an umpire, we will consider, whether a joint award by the arbitrators and the umpire, be good? In *Bulstr. Rep.* 184, the case was this: A submission to four persons, and the umpirage of another; and the assumpsit was mutually to stand unto, and perform, the order of them five. The four persons, and the fifth as umpire, did make the award; and the question was, whether it was made according to the submission? Williams, Justice, said, "that the award was well made, and pursuing the submission; but otherwise it had been, if in the submission, they had been divided. As if it had been in this manner; that if the four could not agree in their award, that then the submission be to the umpirage of the fifth man; then these five could not all of them join in making this award. But the submission being here to four, and to the umpirage of a fifth, they all five may well join in their award; and so the award here made, by them all five, is clearly good and well made according to the submission; and the same award ought to be performed. The whole Court agreed with him herein." The case before the Court in *Bulstrode*, was exactly that which is before us. There, it was a submission to four, and the umpirage of another. Here, it is a submission to two, and their umpire; and their award to be the judgment of the Court.

It will be observed, that Justice Williams, not satisfied with deciding the case before him, went on to say, that if the submission had been to the four, and if they could not agree, then to the umpirage of a fifth man; they could not have joined in their award. This was an obiter dictum merely.

Soulsby v. Hodgson, 3 Burr. 1474. That case was this: A submission to arbitrators, and if they did not agree in a limited time, they were to choose an umpire. They disagreed, chose an umpire, and joined him in the award. The question was, whether the umpirage was duly made, according to the powers given to the umpire, or was vitiated and rendered void by the arbitrators joining in it. Wallace, for the defendant, cited the case from *Bulstrode*, "where, (as he says,) Williams, Justice, says such an umpirage would be bad." The Court were unanimous and clear, that this was the umpirage of the umpire only. He was at liberty to take

what advice, or opinion, or assessors, *he pleased. The Court add: "The case which was cited at the bar, is certainly a mistake, an error of the reporter. No such thing could be said, as is there reported; at least there could be no determination founded upon it. It is a distinction in words, without any real difference in sense and meaning." It is very clear, that this case did not intend to over-

rule the decision in *Bulstrode*; for it takes even stronger ground than is there assumed. But, it meant to shew the absurdity of the distinction attempted to be taken, between the case actually before the Court, and the case supposed in the dictum of Williams. It is a little curious, that Kyd, in his *Treatise on Awards*, has taken the dictum for the decision of the Court, and the actual decision for the dictum; and refers to this case in *Burrows*, as over-ruling, in effect, the case in *Bulstrode*. Kyd on Aw. 105.

In *Underhill v. Van Cortlandt*, 2 Johns. Ch. Rep. 339, the submission was to two persons, to value some mills, and other works; and if they could not agree, to choose an umpire. They chose the umpire before they went into the evidence, and all acted together. They were some days engaged, with the parties and witnesses before them; and finally, all three signed and sealed the award. One objection taken to it, was, that L. (the third man,) was chosen to assist the other two, and not as an umpire to decide, independently by himself, as he ought to have been, according to the intention of the covenant. In reply to this objection, the Chancellor considers that all parties having acquiesced in this appointment, and acted under it without objection, must be deemed to have concluded themselves, by their own free consent and agency, from setting up this objection to defeat the award. This reasoning applies strongly to our case. The umpire acted with the others from the first. The parties were before them by counsel; and their proceedings had all the form and publicity of a Court of Record. Exceptions are filed to their opinions on other points. Yet we

find no objection made, *no exception taken, to the arbitrators and the umpire acting together. Would it not be unreasonable and unjust, to suffer the defendant, who had lain back, and taken the chance of a decision in his favor, to come forward as soon as he finds it against him, and urge an objection, open to him from the first; and which, in good faith, he ought to have taken (if at all) at the earliest stage of the business? To return to the *New York* case. The Chancellor further lays it down, that if the umpire ought to have been chosen, and to have acted strictly as an umpire, still the act is valid; for the association of the other two appraisers with him, in viewing the premises, in consultation, and in the award, does not vitiate the award by him as umpire; and he states it as settled by *Soulsby v. Hodgson*, (before cited) that if the arbitrators join in the umpirage, it does not vitiate it.

Lord Alvanley also, in *Emery v. Ware*, 5 Ves. 848, says, "An arbitrator may make use of the judgment of another, on whom he can depend, and the valuation of that person is his, if he chooses to adopt it."

I know that the decree of Chancellor Kent, in *Underhill v. Van Cortlandt*, was reversed by the Court of Error, 17 Johns. Rep. 405; but the reversal was wholly on other points; and Spencer, C. J. (with whom the majority of the Court agreed,)

says, "The objection to the choice of an umpire, (if it were true, that the two persons first chosen had not differed in opinion,) is equally untenable. It is well settled, that arbitrators may nominate an umpire, before they proceed to the consideration of the subject submitted; and it is the fairest way of choosing an umpire." 2 Term. Rep. 644.

The latest case I have examined on this subject, is *Beck v. Sargent*, 4 Taunt. 232. That was a submission, "so that the two arbitrators should make their award, before or on the 21st of June; but, if no award made, before or on that day, then the parties should observe the award of an umpire, to be chosen by the arbitrators, so that such umpirage be made before the 28th of June." The arbitrators 281 *did not make their award, or choose an umpire, before or on the 21st of June; but chose one before the 28th; and the umpire, together with the arbitrators, before the 28th, made their joint award in the following terms: "We the undersigned, arbitrators and umpire, do award, &c." One of the objections taken to this award, was, "that the award of three is necessarily the award of a majority of them, who may happen to consist of the two arbitrators, in opposition to the umpire, and so no award of his; and at all events, it is not the award of the umpire alone." On this point, Mansfield, C. J. observes, "What the arbitrators do, in making the award, is nothing. The award is, in law, the award of the umpire alone. It is no more than if mere strangers had joined in the award, which could not vitiate." Heath, J. says, "It has been decided in very old cases, that the circumstance of another joining with the arbitrators in making an award, does not vitiate."

Thus, in the case before us, whether we consider this as the award of the arbitrators, joining Haskeu with them, either as umpire, or as a stranger; or, if we say that it is the umpirage of Haskeu, who has taken the arbitrators as his counsellors or assessors; quacunque via data, the award is good; and the judgment of the Court below must be affirmed.

282 *Garland v. Rives.

May, 1836.

Assignment for Benefit of Creditors—Provisions to Delay, etc.—Effect.—A creditor who takes a conveyance from his debtor, to secure his debt, but at the same time, inserts provisions in the deed, to delay, hinder, or defraud other creditors, comes within the Statute of Frauds, and the conveyance is void.

Same—Same—Same.—So, likewise, if the grantee be privy to a fraudulent intent on the part of the

***Assignment for Benefit of Creditors—Validity.**—This subject has been discussed at length in this series of reports so that no attempt will be made here to go into the question. See *foot-note* to *Skipwith v. Cunningham*, 8 Leigh 271; *foot-note* to *Williamson v. Goodwyn*, 9 Gratt. 508; *foot-note* to *Gordon v. Cannon*, 18 Gratt. 387; monographic note on "Assignments for the Benefit of Creditors" appended to *French v. Townes*, 10 Gratt. 518; monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348. On this subject the principal case is cited in *Skipwith v. Cunningham*, 8 Leigh 294; *Williamson v. Goodwyn*, 9 Gratt. 506; *Evans v. Greenhow*, 15 Gratt. 156; *Gordon v. Cannon*, 18 Gratt. 424; *Highland v. Highland*,

grantor, and takes a deed to secure his own debt, with provisions to delay, hinder, or defraud other creditors, the deed will be void, although his only motive was, to secure his own debt, and the other provisions were forced upon him by the grantor, as the only means of having his own debt secured. Such a grantee will not be considered as a bona fide purchaser.

Fraudulent Conveyances—Setting Aside—Notice to Grantee.—Under our Statute of Frauds, as well as the English Statute of 18th Eliz. a bona fide purchaser for value, having no notice of covin, fraud, collusion, &c. will be protected. To vitiate a conveyance, there must be a fraudulent design in the grantor, and notice of that design in the grantee.

Fraud—Concurrent Jurisdiction.—In cases of actual fraud, a Court of Equity has concurrent jurisdiction with a Court of Law, in remedying the fraud. In these cases, equity follows the law, and gives relief to the same extent as a Court of Law. And therefore, where a creditor comes into equity to set aside a conveyance tainted with actual fraud, and the grantee had notice of the fraud, the conveyance shall be set aside in toto.

Equity Maxims—"He Who Seeks Equity Must Do Equity"—Application.—The maxim of equity, that he who seeks equity must do it, only applies to an equity between the parties; but not to an equity which any third person may have against the plaintiff.

Chancery Practice—Enforcement of Judgment—Evidence.—Where a creditor, who claims under a judgment at law, comes into equity to enforce his judgment, that judgment is prima facie evidence against the debtor, or mere strangers; unless they can impeach it on the ground of fraud, or by shewing that a full defence was not made, and can produce new proof shewing that the debt is not due.

This was an appeal from the Chancery Court of Staunton; where Rives filed his bill against Garland, Wingfield, Coleman and Lewis Nicholas, to set aside certain conveyances, on the ground of fraud. The whole history of these transactions is fully and minutely detailed in the first part of Judge Green's opinion, which follows. It will, therefore, only be necessary to give a statement of the points made in argument, and the authorities cited in support of them.

Randolph, Call, Leigh and Stanard, for the appellant.

Johnson, for the appellee.

283 *It was contended on the part of the appellant:

1. That Garland's debt was valid, and being assigned to Wingfield and Coleman, they occupied Garland's place, and paid valuable consideration for the mortgage on the land, by giving up Garland's note, to Lewis Nicholas. The subsequent sale

5 W. Va. 68; *Dickinson v. Railroad Co.*, 7 W. Va. 442; *Goshorn v. Snodgrass*, 17 W. Va. 764, 772; *Harden v. Wagner*, 22 W. Va. 865; *Clafin v. Foley*, 23 W. Va. 441; *Livesay v. Beard*, 23 W. Va. 591, 592; *Shattuck v. Knight*, 26 W. Va. 600; *Knight v. Capito*, 28 W. Va. 648; *Parr v. Saunders*, 1 Va. Dec. 731; *Bensimer v. Fell*, 36 W. Va. 25, 12 S. E. Rep. 1081.

***Fraudulent Conveyances—Setting Aside—Notice to Grantor.**—In *White v. Perry*, 14 W. Va. 86, it is said: "In order to justify the setting aside of a conveyance, as fraudulent in part as to creditors, the fraud on the part of the grantor must not only be proven, but the grantee must be proven to be a party to such fraud, or cognizant of it; but when this is once satisfactorily established by evidence, whether direct or circumstantial, the deed must be declared void *in toto*, as to creditors, though some consideration may have been paid by the grantee. He must be not only a purchaser for valuable consideration, but he must be a bona fide purchaser, or his deed is invalid as to creditors of the grantor. See *Garland v. Rives*, 4 Rand. 282; *STANARD, Judge*, in *Hunters v. Waite*, 3 Gratt. 68." To vitiate a conveyance on the ground that it was made with intent to defraud the grantor's creditors, the grantee must have had notice of the grantor's intent. *Hickman v. Trout*, 83 Va. 491, 8 S. E. Rep. 181, citing the principal as its authority.

under the deed of trust was open and fair; and Wingfield and Coleman became the purchasers to the amount of their assigned claim.

2. The claim of Rives was usurious, and the judgment at law was no bar to an investigation of that claim in equity, because Garland was not a party to the suit at law. Besides, Rives is plaintiff in equity, and comes to enforce a judgment at law; in which case, the Court will not grant relief, unless *ex æquo et bono*, he ought to have it. 2 Madd. 408. Coop. Eq. Pl. 99. Morgan v. —, 1 Atk. 408. Johnson v. Northy, 2 Bern. 409. Baker v. Child. Ib. 226. Galbraith v. Nevil, 1 Doug. 5. Maze v. Hamilton, Call's MS. Rep. Wilson C. Nicholas's deposition ought to be received, because here there was an actual release, which distinguishes this case from that of Taylor v. Beck, 3 Rand. 316.

3. The conveyance to Wingfield and Coleman, and the subsequent purchase by them under the sale, were not only on valuable consideration, but they were *bona fide*. They were free from all the badges of fraud mentioned in Twyne's case.

4. But, admitting that the transaction was fraudulent as to Lewis Nicholas, and Wingfield and Coleman, still the deed to Garland cannot be impeached.

Upon general principles of equity, whoever goes into a Court of Equity for relief, must do equity before he can obtain it. A plaintiff in equity is always required to perform this condition; especially where the defendant is fortified with the legal estate. That Garland was a fair creditor, is unquestionable. He has obtained the legal estate; and Rives, another creditor, having no better claims, seeks to displace Garland. Will a Court of Equity

284 sanction such "an attempt? Certainly not. They will only exercise their accustomed jurisdiction, in giving satisfaction to Garland first, and to Rives afterwards, if any surplus should remain. It will not avail Rives to say, that the conveyance to Garland was fraudulent, and therefore ought not to be regarded in equity; for, the rule of equity is not founded on the soundness of the legal title, but simply on the fact that the defendant has obtained it. This is proved by Sir John Fagg's case, cited 1 Vern. 52, where the deed was obtained by robbery, and yet the Court of Equity allowed that title to protect the defendant. So, where a judgment is set aside as fraudulent, equity will not relieve, unless a *bona fide* debt due to the defendant, is first satisfied. The same point is decided in 2 Ch. Cas. 23, cited in Francis's Maxims, 66. Whatever may have been the demerits of Wingfield and Coleman, Garland cannot be accused of any fraudulent design. He could not derive any benefit from the provisions in the deed, which were calculated to secure the property to the other defendants. These were dictated by those who were to receive benefit from them, and Garland was rather the victim than the accomplice of their acts. His only object was to secure a just debt; all beyond this was extorted from him by Wingfield and Coleman.

Notice of the fraud of Wingfield and Coleman, will not render the deed from them to Garland, void. The proviso of the Statute of 13 Eliz. expressly speaks of persons, "not having notice," but our Statute has no such clause; and therefore, no such condition is necessary, to exempt a party from the operation of the Statute. The case of Wilson v. Wormal, Godb. 161, cited in Twyne's case, and in 13 Vin. Arb. 521, is no authority in this case, because the Court were divided, and it was a case where there was a trust for the grantor. But, Barwell v. Ward, 1 Atk. 260, is in favor of the appellant; for the property was permitted to stand as a security for what was justly due. A deed fraudulent

at law in part, will not be totally set 285 aside in equity. Taylor v. Blantern, Gilm. 209. Murray v. Riggs, 15 Johns. 571. A Court of Chancery cannot be called on to enforce actively the penal sanctions of a Statute. The case of usury is an illustration of this principle. Smith v. —, 1 Prec. in Ch. 80. The cases where the opposite principle prevails, are such as have one or more of these features; 1. Where the conveyance is purely voluntary; 2. Where there is a trust for the debtor, as in Twyne's case; or, 3. Where the deed is covinous in its concoction, as in Sands v. Codwiae. There, the whole deed was made subservient to the fraudulent design; 4. Where value is given, but it controuls the superior right of the party complaining; as where there has been a sequestration in a Court of Equity, a purchase by a creditor would be void. The cases of Hill v. Claiborne, 1 Wash. 185. Wright v. Hancock, 3 Munf. 521; and Bullock v. Irvine, 4 Munf. 450, may be referred to this principle.

For the appellee, it was said, that the Court could not re-examine the question of usury, which had been fully tried at law, and must therefore be conclusive on all other Courts. All Lewis Nicholas's property was completely vested in the Sheriff, whether it was mentioned in the schedule or not: and Rives comes into a Court of equity, only to remove the obstructions to the legal title. He only wishes to assist the judgment at law. Under these circumstances, it would be a departure from the main object of the suit, to make enquiry into the foundation of the original judgment. The passage from Coop. Eq. Pl. 99, founded on the case of Morgan v. — 1 Atk. 408, which has been cited, does not afford any support to the position taken on the other side. That case depended on something peculiar in the Court of Wales; and in Walker v. Wilter, Doug. 5, and note 2, to the same case, it is said by Lord Mansfield, that the decisions of the Court of Wales were clearly examinable; resting the whole force of that

286 case, on some peculiarity in that Court. It was considered as a foreign Court. As to the case of Baker v. Child, 2 Vern. 226, it merely proves, that a Court will look into their own decrees, when interlocutory; but, they will not examine new evidence. The case of Johnson v. Northy, 2 Vern. 409, proves this distinction. The case of Maze v. Hamilton, Call's

MS. Rep. does not decide this point. The Court of Appeals did not correct the judgment of the General Court; but, they interpreted that judgment differently from the Chancellor. They, in fact, executed the judgment of the General Court, according to its legal import. The case in 1 Equ. Cas. Abr. M. p. 82, 83, and *Scott v. Nisbett*, 2 Bro. Ch. Rep. sustain the position. But, this is a case, where the very question has been fully tried, and decided at law. It is not the case of a fraudulent judgment, or one which is a security for an usurious contract. The cases in which a judgment is conclusive, or not, may be found in 1 Phill. Evid. 223, 226, and *Moses v. M'Farlane*, 2 Burr. 1009.

(Call, here interrupted Johnson, and said, that the judgment was not an estoppel, unless it was on the very point; and that Rives had let loose the estoppel, by relying upon other matter. A Court of Law will take no notice of a decree in equity; and e converso, a Court of Equity will not respect a judgment at law. *Hooe v. Pierce*, 1 Wash. 212, shews, that the decree of a domestic Court of Admiralty is not conclusive upon persons not parties to the suit.)

To these observations, it was replied, that it was true the estoppel must cover the very point, but that point need not be stated in the judgment. If this were not true, the action of indebitatus assumpsit would be of very little value. In that action, the issue includes many subjects, some of which may be found by the verdict, others not. The judgment does not shew which subjects are recovered and which omitted. The only way then to give the judgment any validity, as a bar to any future action, is to prove by the verdict,

to what subjects the judgment applies. Section *v. Tutop, 6 Term Rep. 607. The estoppel is not let loose. Rives does not put usury in issue in the bill; but mentions it as a matter of history, to shew the fraudulent nature of the transaction.

But, if we are at liberty to question the judgment of the Court of Albemarle, what is the ground? That Wilson C. Nicholas's deposition was rejected. But this is a question, not for a Court of Equity, but a Court of Law. The point was excepted to, and there could be no reason for not deciding it at law. *Taylor v. Beck*, 3 Rand. 316, is conclusive on this point; because W. C. Nicholas, was a joint defendant with Lewis Nicholas.

But, if all the evidence was admitted, it would prove, that Rives's claim was not usurious; and, even if it were, Rives must receive his principal, with lawful interest.

These preliminary objections being removed, the main question comes on, whether the transaction was fraudulent and void. This question is a mixed question of fact and law.

As to the fact, there is express evidence of fraud intended by L. Nicholas, to defeat his creditors. Admit that Garland was a fair creditor, and that Lewis Nicholas was sincerely desirous to secure him; still the conveyance was not made directly to Garland, but to Wingfield and Coleman, who extorted great indulgence

from Garland. This indirection is strong evidence of fraud. Wingfield and Coleman were closely connected with L. Nicholas. The deed of trust to them, was of all his property, real and personal, to be sold on ten days notice. The sale was for cash. Garland relinquished a large part of his debt, and granted ten years indulgence, without interest. The case, therefore, exhibits some of the strong features of fraud, mentioned in Twyne's case. It was both a sale pendente lite, and made to defeat a creditor.

The next question is, whether Garland's deed is void.

1. The deed would be void, even if taken by Garland, bona fide, and without notice of Wingfield and Coleman's 288 *fraud. If the deed of the latter was fraudulent, they could not convey a good title to Garland, upon common law principles. The question is between two innocent men, and the rule caveat emptor, applies.

How does the Statute affect the question? The 3d section of the Statute of Frauds, 1 Rev. Code, 373, exempts those persons, from the operation of the Act, to whom lands, &c. have been bona fide and lawfully conveyed, &c. This last expression applies as well to the party conveying, as to the party receiving the conveyance. It therefore requires bona fides in the grantor, as well as in the grantee, to save the conveyance from the operation of the Statute. The words "having no notice," which are found in the 13th Eliz. are, it is true, omitted in our Statute; but these words in the English Statute, apply only to a voluntary conveyance, where there is no other evidence of fraud. They are merely from abundant caution, and have no legal operation, as the same consequence would follow from common law principles. *Sheph. Touchst.* 66. *Hildreth v. Sands*, 2 Johns. Ch. Rep. 42, shew, that fraud in the grantor, will vitiate a deed in the hands of a purchaser, without notice. The case of *Astor v. Wells*, 4 Wheaton, 466, was decided under the peculiar law of the State of Ohio. The deed was unrecorded, and a different decision would have repealed the Registry Act. *Estwick v. Callaud*, 5 Term Rep. 426, supports the distinction between voluntary conveyances, and those made with fraudulent intent.

But, Garland's deed has no valuable consideration. His debt was not due for ten years. He purchased of Wingfield and Coleman, not of Lewis Nicholas. He was a purchaser with full notice of the fraud between L. Nicholas, and Wingfield, and Coleman; and his deed was made on the very day of sale. He does not even deny notice. He was a party to the whole fraud.

The next question is, how far is the deed of Garland to be vacated? The claim of

Garland, is tainted with usury. 289 *as appears from his answers. But, if the conveyance from Wingfield and Coleman to Garland, is vicious in part, Garland, having notice of that vice, his whole interest will be forfeited. This would be the effect at law, as is proved by Twyne's case, *Cadogan v. Kennet*, and

Eastwick v. Calland. If it is void in law, it cannot be good in part, and bad in part, in equity. 13 Vin. Abr. 521. "Fraud," F. pl. 12. Pob. on Fr. Conv. 547. The case of *Barwell v. Ward*, 1 Atk. 260, must be referred to the principle, that the fraud was doubtful, and therefore, the conveyance was not set aside in toto; but, *Boyd v. Dunlap*, 1 Johns. Ch. Cases, 478, proves, that where the fraud is apparent, a Court of Equity will set aside the conveyance entirely. To the same effect, are the cases of *Sands v. Codwise*, 4 Johns. Ch. Rep. 598. *Claiborne v. Hill*, 1 Wash. 185. *Wright v. Hancock*, 3 Munf. 521, and *Bullock v. Irvine*, 4 Munf. 450.

May 29. JUDGE GREEN delivered his opinion.

The original bill in this case was filed by the appellee, a creditor of Lewis Nicholas, for the purpose of setting aside a conveyance of land, made by the debtor to John H. Coleman; another made to Charles Wingfield, and the said Coleman; and also, a transfer of personal property, made by Nicholas to Wingfield and Coleman; and a conveyance of land, made by the latter to Edward Garland; as being fraudulent and void as to him. A chronological review of the transactions brought in question, will best explain their nature.

On the 12th of November, 1818, Wilson Cary Nicholas purchased of the appellee a sterling bill of exchange, for 3000l. in consideration of which, he gave him his note, endorsed by Lewis Nicholas, for \$16,046, payable on the first of January, 1820, with interest from the first of December, 1818. A suit was instituted on this note, against Wilson C. Nicholas and Lewis Nicholas, in February, 290 *1820. The defendants, in June, 1820, pleaded severally, and rested their defence upon the ground, that the transaction between Wilson C. Nicholas and Rives, was usurious. Judgment was rendered for the plaintiff against Lewis Nicholas, in August, 1821; Wilson C. Nicholas having departed this life during the pendency of the suit. Lewis Nicholas was taken upon a Ca. Sa. issued upon this judgment, took the oath of an insolvent debtor, on the 21st of August, 1821, and was discharged. In his schedule, he stated that he had "no property of any description whatsoever."

Pending this suit, and on the 16th of May, 1820, John H. Coleman intermarried with a daughter of Lewis Nicholas; and on the first day of June, the latter conveyed to the former 384½ acres of land, part of a larger tract, on which Lewis Nicholas resided, and six slaves, professedly in consideration of an agreement made between them, before and in consideration of the marriage. This deed was recorded in November, 1820, and is one of the deeds impeached.

Lewis Nicholas being bound as endorser for a debt of \$6,991 84, due from Wilson C. Nicholas to the Farmers' Bank of Virginia, on the 9th of August, 1820, conveyed 22 negroes in trust, to secure the payment of this debt to the Bank, on the 1st of June, 1827, with interest thereon, payable

annually from the 27th of July, 1820. This deed was duly recorded, and is not questioned.

Edward Garland also held a negotiable note of Wilson C. Nicholas, endorsed by Lewis Nicholas, dated July 23, 1819, payable 30 days after date, for \$13,800. These three debts, together with one due to Saunders, upon a note of Wilson C. Nicholas indorsed by Lewis Nicholas, for about \$7,000, and which was in suit against Lewis Nicholas, before the arrangements hereafter mentioned were entered into, were the only debts of any consequence, due by Lewis Nicholas. And he states, that he never voluntarily engaged for these debts, except that to the Bank: that 291 *Wilson C. Nicholas being entrusted by him with his endorsements in blank, for the purpose of continuing the note endorsed by him at Bank, had filled them up, and delivered them to Rives, Garland and Saunders; without his knowledge or consent.

Garland, having in vain endeavoured to get a security from Wilson C. Nicholas for his debt, forwarded the note which he held to an attorney, (Mr. Dyer,) with instructions to bring suit upon it, expressing, at the same time, a wish to have the debt secured without litigation, and authorising the attorney to make any arrangements to that effect. A writ was ordered on this note, on the 23d of December, 1820, but never issued, in consequence of the arrangement afterwards made. In pursuance of Garland's instructions, his attorney entered into negotiations with Lewis Nicholas, and the latter expressed a willingness to secure the debt; but before any thing was done, it was proposed by Wingfield and Coleman, the sons-in-law of Lewis Nicholas, that if Garland would make a considerable discount, (the amount of which was communicated to Garland by his attorney,) they would purchase his debt, and give their own bond for the amount to be paid to him. Garland's attorney communicated this proposition to him, and informed him, "that it was understood, that Lewis Nicholas intended to sell all his property at public auction, and was willing to secure Wingfield and Coleman, as the owners of Garland's debt; and it was also understood, that Wingfield and Coleman intended to bid at the sale, to the amount of the said debt; and it was further proposed by Wingfield and Coleman, more effectually to secure the amount to be paid to Garland, by incumbering, for that purpose, any property which they might purchase at the sale." The attorney was unwilling to accede to the terms proposed, without Garland's sanction in person, and wrote to him, requesting him to go to Albemarle, that he might be consulted on the subject. Garland went to Albemarle, and after much hesitation, on account of the heavy discount required, 292 *at length, fearing that Rives might get a priority over him, and that he might lose his debt entirely, "he determined to accede to the proposition made by Wingfield and Coleman, and accordingly passed his debt to them, and took their bond for \$13,000," payable to him ten years

after date, without interest; "and after the transfer was made, Lewis Nicholas executed a deed of trust conveying certain lands, slaves, and other personal property, to secure the debt so transferred to Wingfield and Coleman." These statements are taken from Garland's answer, and correspond with the answers of the other parties.

These arrangements were made on the 18th day of January, 1821. That is stated to be the date of the bond to Garland for \$13,000, said to be given by Wingfield and Coleman, in their deed of trustees for Garland, of the 15th of February, 1821, hereafter to be noticed; and that is the date of the deed of trust, given by Lewis Nicholas to trustees for Wingfield and Coleman, spoken of in Garland's answer. Garland was privy to the terms of this last mentioned deed; as was Dyer, his attorney. Garland's answer admits the first, and Dyer, with Harris, the attorney of Lewis Nicholas, and Wingfield and Coleman, are subscribing witnesses to the deed. The original deed exhibited by Wingfield and Coleman, is here by subpoena duces tecum, and it appears to me, by inspection, that Dyer wrote about one half of the deed, from the beginning down to the description of the land conveyed, and Harris the remainder.

The particulars of this deed, (although it is not recorded and cannot be relied upon as giving any title,) are material. The original deed, as it was executed, is between Lewis Nicholas of the one part, Wingfield and Coleman of the second part, and T. J. Randolph and C. Cocke of the third part; and recites, that "the said Lewis Nicholas is justly indebted to Edward Garland as endorser of a note drawn by Wilson C. Nicholas, bearing date the 23d day of July, 1819, negotiable and payable thirty days after its date, at

293 *the Bank of Virginia, for the sum of \$18,300, and which said note, the said C. Wingfield and J. H. Coleman have fully discharged and paid to the said Edward Garland, on the part of the said Lewis Nicholas, and for which, the said Lewis Nicholas is desirous to secure and save them harmless." Since the execution of the deed, the words "on the part of the said Lewis Nicholas," and the word "for," and the words "and save," and the word "harmless," have been dashed out with a pen, but so as to leave them perfectly legible; and the other words, "the payment of," are interlined after the words "to the said Edward Garland." The word "to," has been inserted before the word "them;" so as to make the deed read as it is copied into the record. "And which note, the said Wingfield and Coleman have fully discharged and paid to the said Edward Garland, and the payment of which the said Lewis Nicholas is desirous to secure to them, the said Coleman and Wingfield." No note is made at the foot of the deed, of these interlineations and erasures, as made before signing or otherwise; whilst other interlineations in the deed, are noted as made before signing, and the witnesses subscribe under this note; a clear proof, that the erasures and interlineations above

specified, were made after the deed was executed.

Neither Nicholas's note, nor Wingfield and Coleman's bond, are exhibited. We have not the written evidence which exists, as to what passed between Garland and Wingfield and Coleman, on this occasion. If we had this evidence, we might see whether Garland endorsed the note to Wingfield and Coleman; and if he did, whether it was specially endorsed, without recourse to him; or, whether their bond is unconditional or otherwise. I doubt whether the note was really sold to Wingfield and Coleman. The deed, in its original form, declared that they had paid it to Garland, on the part of Lewis Nicholas; and, that it was intended only to secure

and save them harmless; a stipulation perfectly proper, if *they gave their bond for \$13,000, payable in ten years, without interest; not for the purchase of the debt for themselves, but in satisfaction of the debt on the part of Lewis Nicholas; in which case, they could only have claimed an indemnity against this responsibility. Such a stipulation would have been, in no manner, adapted to the case, if they had purchased the debt for themselves. However this may be, I shall consider the case as if the debt were really sold and transferred, as stated by the parties.

The deed proceeds, in consideration of one dollar paid by Wingfield and Coleman to Lewis Nicholas, to convey to them the lands on which he resided, containing 2100 acres, more or less, five negroes by name, (this was the residue of Lewis Nicholas's land and negroes, after taking out the land and negroes conveyed to Coleman, and the negroes conveyed in trust for securing the debt to the Bank,) and also, his equity of redemption in the slaves conveyed to secure the debt to the Bank, his stock of horses, cattle, hogs and sheep, all his plantation utensils, household and kitchen furniture, all the meat on hand, all his beds, bed clothes, and furniture of every description, a four wheel carriage, a wagon and two carts, and the crops of grain on hand, and what may be made hereafter: to have and to hold to Randolph and Cocke, in use and trust for Wingfield and Coleman and their heirs for ever; with authority to Randolph and Cocke to sell the whole of the land and other property for cash, after ten days notice of the time and place of sale, by advertising the same at the door of the court-house of Albemarle county, and out of the proceeds of sale, after paying expenses, to pay the said note, interest and costs, and the balance, if any, to Lewis Nicholas.

In the Enquirer of January 25th, 1821, an advertisement appeared under date of January 20th, and with the signature of Lewis Nicholas, notifying that on the 15th day of February, 1821, he would sell, on the premises, for cash or on a short credit, as he might choose on the day of
295 *sale, his tract of land of 2141 acres, his horses, cattle, household and kitchen furniture; also, all the other property which he owned. No slaves are mentioned in this advertisement; although

Lewis Nicholas owned, and professed to sell on the day of sale, the slaves mentioned in the deed of trust of January 18th, besides those conveyed in trust to secure the Bank debt, and those before conveyed to Coleman.

On the 15th of February, 1821, the sale was made professedly for cash, and Wingfield and Coleman were the purchasers of all the property sold that day, save one horse purchased by Omohundro; and the next day, they purchased the residue of the personal property, down to a set of razors, old case and brush, whether at public or private sale, does not appear; and Lewis Nicholas gave them a certificate under his hand and seal, at the foot of a schedule of the articles professed to be sold, that he claimed no right or title in any of the property, nor any control over it. This is dated February 26th, 1821. The amount of the sales to Wingfield and Coleman, was \$12,946 30 cents. There was no competition in the biddings, except in the purchase of the horse by Omohundro, and Wingfield and Coleman bid against each other for the land. The general impression, amongst those who attended the sale, was, that it was a mere contrivance to protect Lewis Nicholas's property from Rives's claim; and Wingfield and Coleman, (who, as long as the amount of their purchases kept within the amount of their claim, had no motive to bid low, so that their claim covered the whole property,) might obviously have bid what they pleased; and, indeed, without frustrating their object, bid against each other. Accordingly, the property sold for little more than half its cash value, if indeed so much as that.

To see this sacrifice of the personal property, it is only necessary to inspect the list of sales, and compare it, as to some of the items, with the evidence. Oats in the straw sold at 5 cents a hundred, and
296 fodder at $6\frac{1}{4}$ cents a hundred. *This very property, for which Wingfield and Coleman gave \$2,946 30 cents, sold afterwards, under the decree of the Court, for \$5,576 69 cents, cash. This is the amount of the Marshal's sales, after deducting the sales of tobacco and wheat. The sale by the Marshal was on the 21st of August, when there was a much smaller quantity of corn on hand, than at the time of the sale by Lewis Nicholas on the 15th of February. The price of the land, \$10,000, was inadequate in the same ratio. The whole tract was sold together. I think that the evidence, consisting of the opinions of witnesses, shews satisfactorily, that the land was then worth, in cash, at least \$8 per acre; which would amount to upwards of \$17,000; and upon the usual credits of one, two, and three years, at least \$10 per acre; which would amount to upwards of \$21,000. But, there is more decisive evidence of its value, than the opinions of the witnesses. Jesse Jopling testifies, that pending Rives's suit, Lewis Nicholas applied to him to be his security, upon an appeal, if the suit went against him; and offered to give him a deed of trust upon his land, continuing, as he said, about 2000 acres, which Lewis Nicholas considered as a good indemnity against the

debt, interest, damage and costs, which could not have amounted to less than \$20,000; in which opinion, Jopling concurred, and agreed to become his surety, if the appeal was taken; and on the day that Wingfield and Coleman purchased the land, they pledged it, and Garland accepted it as an ample security for \$13,000. These circumstances shew sufficiently the opinions of the parties concerned, as to the value of the land.

The negroes conveyed to Coleman in June, 1820, were exposed to sale in mass, on this occasion, as the property of Lewis Nicholas, with Coleman's consent, upon the advice of counsel that he had no title; and the land conveyed to him was conveyed with the residue of the tract to him and Wingfield, as if sold to them at this sale.

297 *On the 15th of February, 1821, the land was conveyed by Lewis Nicholas to Wingfield and Coleman; and on the same day, they conveyed the 2141 acres (the residue of the tract, excepting what had been conveyed in June, 1820, to Coleman) to Coles and Cocke, in trust to secure the payment of their bond to Garland, for \$13,000, dated January 18th, 1821, and payable ten years after date, without interest. These deeds were acknowledged before magistrates, and the privy examination of the wives of Wingfield and Coleman, taken on the same day, and recorded on the next day. In anticipation of the results of this sale, and according to the previous arrangements between the parties, these deeds were prepared before the day of sale, and arrangements made with persons, who had agreed to act as trustees in the deed, to secure Garland's debt, and the attorney for Garland attended on the day of sale, to have the deed executed. This appears from the deed of trust, and the answer of Coles, one of the trustees. After the deed was written certain interlineations were noted, as made before signing; and at the foot of this note, the usual clause of attestation was written; and below this clause, these words are written: "The names of the trustees also changed before signing." The time and reason of this change appear from Coles's answer. He says, "that when the sale had nearly closed, he was applied to by one of the persons who seemed most active, and, he presumes, was one of the legal advisers present, to become trustee to secure the payment of the bond, due from Wingfield and Coleman to Garland, by a lien on the land that was late Nicholas's: that he declined acting, under the general impression that he wished to have no part in the transactions of the day. But, being strongly urged on the ground that one of the parties that had consented to act, had, by some means, been prevented attending; and that they would find some difficulty in getting a fit person as his substitute; losing sight of the original impression, and being solely actuated by a wish to serve neighbours, he be-
298 came a party." The *other trustee, Cocke, states that the counsel on both sides attended the sale, and that his confidence in them, induced him to agree to act as trustee.

Wingfield and Coleman filed a cross bill, impeaching Rives's claim as usurious. The Court of Chancery decreed all the conveyances to be fraudulent and void as to Rives, and that his judgment was valid and unimpeachable; and Garland alone appealed. The only question, therefore, for this Court to decide, is, whether Garland's lien be valid or void as it respects Rives; whether Rives's judgment can be impeached in this way; and if it can, whether it is infected with usury, or not.

As to the conveyance in consideration of a pretended marriage contract, it may be observed, that there is not a shadow of doubt as to the propriety of the decree. There was no such contract; nor does Coleman, in his answer, allege that there was. The whole case in truth was, that Lewis Nicholas had frequently, in conversation with his neighbours, said that he should make his children equal, and that the law made the best will. Coleman had heard of these declarations, and Lewis Nicholas had advanced his daughter, Mrs. Wingfield, upon her marriage.

It is impossible to look at the particulars of these transactions, without a conviction, amounting to absolute certainty, that on the part of Wingfield, and Coleman, and Lewis Nicholas, the motive, under which it is attempted to cover and protect these transactions (the preferring a just creditor, and securing the payment of a just debt,) had not the weight of a feather with them: that their sole motive for dealing with that debt as they did, was to enable them by means of it, to prevent Rives, and perhaps Saunders, who were prosecuting their suits, from getting satisfaction to the amount of a cent, out of the property of Lewis Nicholas; and at the same time, to secure to Wingfield and Coleman, the sons-in-law of Nicholas, his whole property, except the slaves pledged to the Bank, at

about half its value, upon a credit of 299 ten years, without interest; *and indeed, without, in all probability, paying ultimately one cent out of their own funds. For, having a right to the 22 valuable labouring slaves, pledged to the Bank, for upwards of six years, charged only with the payment of the interest on the Bank debt, of \$420 per annum, they might reasonably expect to raise the \$10,300, or very nearly the whole, from the profits of the property, in the course of the ten years. Wingfield and Coleman could not possibly have any motive for preferring the debt to Garland, independently of the views which I have attributed to them. They were under no legal or moral obligation to pay it, or to take any care about its payment. They were not bona fide purchasers nor creditors seeking to avoid a loss. The question was not with them, *de damno evitando*, but emphatically *de lucro capiendo*. Nicholas, although under a legal, was under no moral, obligation, to pay this debt. He was only a surety, and that, not voluntarily. The obligation was imposed on him by the fraudulent use of the note to another purpose, than that for which he endorsed it. Garland was willing to have given Nicholas the same terms which he gave to Wingfield and Coleman,

and to have taken a direct and fair lien upon his property. To have acceded to those terms, would have looked like a preference of one creditor to another; and that, upon reasonable and intelligible motives. But, the rejection of the great advantages of these terms, and preferring to subject his property to a cash sale, for the whole amount of the debt and interest; giving to his sons-in-law the advantage of the discount and credit, instead of taking it himself; the struggling to reduce Garland to the lowest terms, not for the benefit of Nicholas, but of his sons-in-law; and the whole dealing of the parties in respect to this debt, and the use made of it; shew that the preferring of Garland's debt did not enter into the motives of these parties; and that the only motives which actuated them, were those before stated. As to these parties, it is a case of pure and unmixed fraud. If we were called upon,

300 in "any other character than that in which we are acting, to judge of their conduct, great allowances might very properly be made. A highly respectable man, advanced in years, in affluent circumstances, having a family brought up in ease, is suddenly involved in utter ruin, not by his own misconduct, but as the surety of a friend who had betrayed his confidence, and who, he believed, had been forced by his necessities into the hand of usurers, resorts to means advised as legal by respectable but mistaken counsel, to save a remnant of his property; and the members of his family unite with him in those measures. We cannot see such a case without great pain, nor condemn the actors with severity. But, such considerations cannot enter into any system of laws, nor be the foundation of any right, legal or equitable.

As to Garland, I have not a shadow of doubt, that, as he states in his answer, his only motive for taking the part which he did in these transactions, was to secure as much of his debt as, by any means, he could under existing circumstances; and that he would have preferred a direct security from Lewis Nicholas, to the course which was taken; and which he yielded to from necessity, as the only means of securing any thing; although he knew the purpose for which these arrangements were proposed by Lewis Nicholas and Wingfield and Coleman. When Lewis Nicholas declined to give a direct security, and Wingfield and Coleman made their propositions, a full outline of their scheme, and the use they intended to make of his debt, was communicated to him. If this did not, at the first blush, satisfy him that their design was to make a fraudulent use of it against Nicholas's creditors, he ought to have been convinced upon that point, when he and his counsel, on the 18th of January, 1821, were apprised of the terms of the deed of that date, which provided for the sale of Nicholas's entire property for cash, upon ten days notice, by advertisement at the court-house door only, to indemnify Wingfield and Coleman to the amount of 301 the whole "debt, for giving their bond for a part of the debt, payable ten years after without interest; and if that

was not sufficient to apprise him of their real intentions, his agent and counsel had full notice of the true object of all these arrangements, when, on the 15th of February, the whole scheme was completely consummated. Garland, if not a participator in the fraud, had at least full notice of it; and if not in all its stages, yet certainly before the execution of the deed under which he claims.

It could hardly be contended in a Court of Law, that this conveyance to Wingfield and Coleman, was not fraudulent and void as to the creditors of Lewis Nicholas. The Statute of Frauds, avoids all conveyances contrived of covin, malice, fraud, collusion or guile, with intent or purpose to delay, hinder or defraud creditors; except in cases where, though the grantor has a fraudulent intent, the purchaser acts bona fide, and gives a valuable consideration. Without the bona fides on the part of the grantee, the valuable consideration has no effect in rescuing the transaction from the literal terms and spirit of the Statute. If Wingfield and Coleman could be considered as bona fide creditors for \$13,000, and had aimed only at securing or getting payment of the debt, they would have been protected by the proviso of the Statute, no matter what had been the fraudulent intent of the grantor. But, the moment they passed this line, and mixed with this object, that of delaying, hindering, or defrauding creditors, any conveyance made in furtherance of this compound object, was absolutely void, and they were left (as they were before they attempted the fraud) creditors without a security. "Quod alias justum et bonum est, si per fraudem petatur, malum et injustum efficitur." One and the chief object with them, if not the sole motive for the part they acted in these transactions, was, by covin with Lewis Nicholas, to delay, hinder and defraud all his creditors, except Garland.

302 *But, it is insisted, that Garland being a bona fide creditor, and having taken a security from Wingfield and Coleman on the property conveyed to them by Lewis Nicholas, for the debt really due, he falls within the exception of the Statute of Frauds, being a bona fide purchaser for value; and that, although the conveyance to Wingfield and Coleman, was fraudulent and void. The construction of this proviso, has been much discussed, and many cases upon that point, have been cited. A careful attention to the terms of the Statute, and a comparison of it with the Statutes of 13th and 27th of Elizabeth, will, I think, without a particular examination of the authorities cited, satisfy us as to its true construction.

The Statute of 13 Eliz. against fraudulent conveyances as to creditors, has this proviso; "that this Act, nor any thing therein contained, shall not extend to make void any estate or conveyance, &c. had, made, &c. or hereafter to be had, made, &c. which estate or interest, is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, &c. not having, at the time of such conveyance or assurance to them made, any manner of notice, or knowledge

of such covin, fraud or collusion as aforesaid."

The Statute of 27 Eliz. for securing subsequent purchasers against conveyances intended to defraud them, had a proviso to the same effect as the above stated proviso of the 13th Eliz. except that the words in italics, at the close of the proviso of the 13th Eliz. as above quoted, were omitted in the proviso of the 27th Eliz. The reason of this difference in the terms of the provisos of these Statutes, is obvious. If a conveyance were intended to defraud subsequent purchasers, that intent could not possibly be known to have existed, until a sale was actually made by the vendor to a subsequent purchaser; and if a purchaser for valuable consideration, procured a conveyance from the fraudulent grantee before any other made a purchase from the

fraudulent grantor, then, at the time 303 of the purchase from the *fraudulent grantee, the purchaser could not only not have notice of any fraudulent intent in the original grantor, but could not do an injury to any one; as no one had an interest in the subject, who could object to his purchase. Such a purchase for value would be bona fide; and the purchaser would be entitled against any subsequent grantee from the fraudulent grantor; although he had notice that the conveyance to his grantee was voluntary. This was a necessary provision; otherwise, all voluntary gifts would have been inalienable, at least during the life of the grantor; and such purchases from the fraudulent grantee have always been supported against subsequent purchasers from the fraudulent grantor. These are the expressions in the books; though it is clear, that until the grantor sold to a purchaser, neither he nor the grantee could be guilty of any fraud, as to subsequent purchasers; and it might happen, that there never would be such subsequent purchaser.

But, as to fraudulent conveyances, to the prejudice of creditors, they were immediately void as to such creditors; and but for the proviso, the enacting clause might have avoided the deed made with intent to defraud creditors, although that intent was confined to the grantor only, and was not known to the grantee. I do not, however, think that this would have been the effect, even of the enacting clause alone. The expression "collusive," can apply only to cases, in which both parties concurred in the fraudulent intent. However that might be, if the grantor and grantee had colluded to defraud creditors, the conveyance would be absolutely void as to creditors; and the fraudulent grantee could not, but for the proviso, have transferred any title to a bona fide purchaser from him. Nemo potest transferre plus juris in alium quam ipse habet; and to guard against this consequence, was, I think, the chief object of the proviso. It provides for the validity of a conveyance to a bona fide purchaser for value, having no notice of the covin, fraud, collusion or guile; such covin 304 or *collusion, of which the purchaser was to have no notice, must, if it existed, have been between the original grantor and grantee. In case of a voluntary

grant, considered as fraudulent as to a subsequent purchaser, because voluntary, the purchaser from the donee, having notice that the deed was voluntary, would not, thereby, have notice of a fraud, as there could exist no fraud until there was a subsequent purchaser, which might never happen; and the Statute of the 27th Eliz. therefore dropped the expression in respect to purchasers without notice, found in the Statute of 13 Eliz.

Notice to the purchaser from the fraudulent grantee of property conveyed with intent to defraud creditors, was important. Such a purchase, with notice of the fraudulent intent, would be a fraud; because, it would tend to assist the consummation of the fraud, in prejudice of the known existing rights of creditors, who, but for such purchase, would be enabled to reach the property fraudulently conveyed. It was for this reason, that the proviso of the 13th Eliz. excluded from its benefit, purchasers with notice of the fraud, expressly; although the effect of the proviso would have been the same, if this special provision, as to purchasers without notice, had been omitted. The former member of the proviso had only preserved the interests of bona fide purchasers for value; and a purchaser, with notice of the fraud, would not have been a bona fide purchaser, and so not within the proviso. This, I think, is the reason why the Legislature of Virginia, in transferring the substance of the two English Statutes into our Statute of Frauds and Perjuries, had adopted the substance of the provisos of both the English Statutes, omitting that part of the proviso of the 13th Eliz. which speaks of purchasers without notice, as superfluous in the case of creditors, and improper in the case of subsequent purchasers. The proviso of our Statute is in these words: "This Act shall not extend to any estate or interest in any lands, &c. goods, &c.

305 which shall be, on good consideration and bona fide, lawfully conveyed or assured to any person or persons, bodies politic or corporate." The bona fides required by this proviso, to exempt the conveyance from the operation of the Statute, seems, in its literal import, to be required from both the grantor and grantee; and this was insisted on by the counsel for the appellee, as the true construction of the Statute. The same words were used in the Statute of the 13th Elizabeth; yet, their generality was controlled by the subsequent words, in respect to purchasers without notice; according to which, the purchaser was protected, if he had not notice of the fraud of his own grantor; so that the bona fides was required only of the purchaser. And this last, I think, is the just construction of our Statute, which dropped the explanatory words to be found in the English Statute; because, as was before said, they had really no effect, in case of a purchaser under a conveyance to defraud creditors; and were wholly inapplicable, if not improper, in respect to that provision of our Statute taken from the 27th Eliz. in relation to conveyances intended to defraud purchasers.

Considering Garland then, as he really

was, from the moment he assigned Lewis Nicholas's debt to Wingfield and Coleman, and took their bond, as no longer a creditor of Lewis Nicholas, but of Wingfield and Coleman, and as being a purchaser from them, for the security of their debt to him; and, as having, as he really had, full notice of the fraud, and of the invalidity of their title; he could, upon general principles of equity, acquire no better right than they had; and upon the terms of the Statute, cannot be protected as a bona fide purchaser. He stands, to all intents and purposes, in their shoes.

Suppose, however, that to avoid the consequences of Garland's claiming, as he does, as a purchaser from Wingfield and Coleman, for securing a debt due from them to him, with full knowledge that they had no title as against Nicholas's creditors, we were, as it is contended we ought, to consider him as still virtually a creditor of Nicholas, *and virtually claiming as a purchaser from him, for the security of a just debt; what would be the effect? Certainly, no more favorable to Garland than if, on the 18th day of January, (when all those indirect arrangements were made with his knowledge, and, so far as he was concerned, with his assent and concurrence) a direct lien had been given by Nicholas to Garland instead of Wingfield and Coleman, with an agreement between the parties, intended to have the very same consequences, which the arrangements actually made were intended to produce, and did effect. That agreement would have been this: that Garland should release a part of his debt, and give a credit of ten years, without interest, for the payment of the balance: that, notwithstanding this abatement and credit, he should take a deed of trust, falsely representing the whole debt to be due and immediately payable, subjecting the whole of Nicholas's property, down to the last mouthful of meat and bread, to immediate sale for cash, upon ten days notice at the courthouse door only: that at this sale, Wingfield and Coleman should purchase to the nominal amount of the debt, and discharge the portion of the debt agreed to be paid at the end of ten years without interest: that this sale should be made immediately, to avoid the effect of the lien of Rives's judgment, expected to be rendered in the first week in the succeeding March; and suppose this agreement were carried into effect, the sale made, the whole property purchased by Wingfield and Coleman at about half its cash value, and that, in effect, upon a credit of ten years; and Garland to have retained the lien on the land given to him by Nicholas, claiming under it only the sum agreed to be paid at the end of the ten years. In that case, the parties would all have been substantially, in the condition in which they now are: Nicholas without property; Wingfield and Coleman claiming all that was his, subject to a lien on the land for \$13,000, payable in ten years' without interest; and Garland claiming a lien for the same debt, and upon the same property, as he now claims; with this only difference, 307 *that he would, in that case, claim

under a deed from Nicholas, who had a title to convey, instead of claiming under Wingfield and Coleman, who have no title, and could convey none to him. In such a case, the fraud of Nicholas and Wingfield and Coleman would have been just as palpable, and no more so, than it is in the case which has occurred; and Garland would not only have had the same notice of, but would have been a direct actor and participator in, the fraud, a party to the covin and collusion, and could not be held to be a bona fide purchaser under the proviso of the Statute. In any point of view in which I can consider this case, I see no ground upon which to hold that Garland has any legal title to the land in question.

It is however insisted, that although Garland's trustees have no legal title, which they could assert in a Court of Law against that vested in the Sheriff by operation of law, for the benefit of Rives, or the lien of Rives's judgment and Ca. Sa. executed; yet, when the latter applies to a Court of Equity to aid in enforcing his legal rights, that Court, upon its general principles, will not assist him, further than by subjecting the property to Rives's claim, after first satisfying Garland; and various classes of cases supposed to be analogous to this, are referred to, as illustrating the principles upon which a Court of Equity acts in such cases.

Before I examine the cases relied on as to this point, I premise, that a Court of Equity, in all cases of actual fraud, has a concurrent jurisdiction with a Court of Law, in remedying the fraud; and the remedy in equity is frequently more beneficial than at law, by means of its power to compel discovery, and to cause fraudulent deeds and securities to be cancelled, or conveyances to be made; thus effectually putting an end to future litigation. In these cases of actual fraud, equity follows the law, and gives relief to the full extent to which a Court of Law could give relief. *Bennet v. Musgrove*, 2 Ves. sen. 51; a case which will be

more particularly adverted to hereafter. The case under consideration is a case of actual fraud, and a strong case; in which, if Garland was not a party, he is a purchaser with full notice, from Wingfield and Coleman, who were the chief actors in the fraud; and I believe there is no exception to the rule of equity, that a purchaser with notice, stands, in all respects, in the shoes of his vendor. Rives, therefore, comes into a Court of Equity, *ex debito justitiæ*, not appealing either to the favor or discretion of the Court.

The invariable maxim of equity is, that he who asks equity must do it. But, this maxim is confined exclusively to the cases, in which there is an equity between the parties; where, although the plaintiff is entitled to relief, he yet owes, in conscience, (though possibly not at law) a debt or duty to the defendant. *Francis's Max.* 1. In such cases relief is given, on the condition, that the plaintiff does, what in conscience he is bound to do, to the defendant. An equity which any third person may have against the plaintiff, can

never be available, under this maxim, to the defendant.

In this case, neither Garland, nor any other, has any equity against Rives. Between two creditors engaged in a race of diligence, in seeking a prior right to satisfaction out of the debtor's property, there can be no equity. It is the *tabula in naufragio*; and he who obtains the prior legal right to satisfaction, must prevail, both at law and in equity. Where the equity is equal, the law shall prevail.

To this maxim, that he who asks equity, must do equity, to the person from whom he asks it, are to be referred very many of the cases cited in the argument; as, the cases of conveyances, bonds or judgments, or any other securities obtained by fraud; the cases of usury and annuities, in which the securities are void by Statute. In such cases, the plaintiff, who asks the aid of a Court of Equity to relieve him against the vitious security, is bound, in equity and conscience, to refund to the defendant against whom he seeks relief, the real consideration which he has received from him; and it is upon that condition, that relief is given.

Another class of cases relied upon, is that which shews the extent of favor shewn by a Court of Equity to creditors, and bona fide purchasers without notice. These cases cannot apply here. Garland is not a bona fide purchaser without notice; and although a creditor, so is Rives, both equally entitled to favor. There is no instance, in which, as between creditors, he who has obtained the legal advantage, has not prevailed.

The next class of cases insisted on, is that in which it has been held, that a conveyance to several grantees may be void as to one, and good as to another; as in case of a marriage settlement, in which interests are given to those who are strangers to the consideration. The deed would be good as to the wife, and all coming within the considerations of the deed, but void as to all the rest, so far as creditors are concerned. The wife would be a bona fide purchaser for value; the strangers, mere volunteers. So, if a deed be made to secure a just debt, and the equity of redemption is reserved to a stranger, or to the family of the debtor; such a deed would be good as to the creditor, and void as to the reservation of the equity of redemption. In such cases, the limitations to volunteers are void, not because there is any actual fraud, but because of the want of valuable consideration. The wife or creditor, in such cases, might not know that the grantee had any fraudulent intent; as he might not in fact, and they would have no concern in the disposition of the surplus interest of the grantor. But, if the creditor, in such case, were to concur in any actual fraud, with intent to frustrate the rights of other creditors, as in lending his aid, in any way, to give colour to any consideration, falsely alleged, as the inducement to such a reservation of the equity of redemption, such his concurrence in the actual fraud of the grantor, would avoid his deed, as to the creditors intended to be injured thereby.

310 *To this class of cases, may be referred those cases, in which a husband stipulating to settle on his wife, a just equivalent for her right of dower relinquished, with a view to defraud his creditors, settles property grossly exceeding in value the dower, in which case it has been held, that the deed was valid, so far as to secure the just equivalent, and void as to the surplus. In these cases, the wife is held to be an innocent and bona fide purchaser, to the extent of the value of the dower-right relinquished, and the fraud of the husband is not imputed to her. But, if she were sui juris, and concurred in the fraud, the deed would be wholly void, under the Statute of Frauds and Perjuries.

It is lastly asserted, that there is another class of cases, in which, when it is doubtful, whether the conveyance impeached, was or was not founded in an actual fraud and collusion, to defeat or delay creditors, a Court of Equity will take a middle course, and allow the deed to stand as a security for the money really due, and give to the creditor the surplus; and a decision of Chancellor Kent of New York, to this purpose, is cited. *Boyd v. Dunlop*, 1 Johns. Ch. Rep. 478.

With great and habitual respect for the opinions of this distinguished Judge, after examining the authorities which he cited, and those cited in the argument of this cause, I cannot think that the principles asserted in that case, are supported by precedents, or sanctioned by any just reasoning.

If the conveyance is impeached upon the ground of actual fraud, intended to defeat or delay creditors, and the allegation of fraud is supported by proofs, the deed ought to be set aside in toto, and cannot stand as a security for any purpose of reimbursement or indemnity. *Sands v. Codwise*, 4 Johns. Rep. 536, 598, 599. If it be not supported by proof, I can see no ground, why the Court should deprive the defendant of the benefit of an advantageous purchase, fairly made, so far as respects the creditors, upon the mere suspicion, that a fraud upon creditors was intended.

311 *There seems, however, to be another ground of equitable jurisdiction in favor of creditors, independent of the Statute of Frauds. When a purchaser takes advantage of the circumstances of a necessitous debtor, to purchase his property at a great sacrifice, without any intention to frustrate the claims of his creditors, for the benefit of the debtor or his family, but for the sole purpose of benefiting the purchaser; and the circumstances are such as would induce a Court of Equity to relieve the vendor; in such a case, a judgment creditor, standing in the shoes of the debtor, independent of the Statute of Frauds, would be entitled to the same relief that the debtor would be entitled to, and could only be relieved upon the terms of paying out of the property or otherwise, what the debtor justly owed, upon the principles before discussed. The relief is founded in these cases, not on a suspicion of fraud practised with the intent to injure creditors; but on the fraud prac-

ticed on the debtor himself to his own prejudice; and that satisfactorily proved.

The only cases cited in *Boyd v. Dunlop*, bearing upon this point, are *Herne v. Meeres*, 1 Vern. 465. 2 Bro. Ch. Cas. 177, note S. C. and *Bennett v. Musgrove*, 2 Ves. 51. All the other cases, (*How v. Weldon*, 2 Ves. 516, *Proof v. Hines*, Cas. Temp. Talb. 111. *Grove v. Watt*, 2 Sch. & Lefr. 492, &c.) are cases in which the grantor sought relief against his own contract, and was subjected to equitable terms. The case of *Barwell v. Ward*, 1 Atk. 260, was cited in the argument as bearing on the same point. These cases are all (as far as I am informed,) that are to be found in the English books, affecting this question.

The case of *Herne v. Meeres*, was decided in 1687; that of *Barwell v. Ward*, in 1744; and that of *Bennett v. Musgrove*, in 1750; and in the last case, I have no doubt Lord Hardwicke, who decided *Barwell v. Ward*, intended to state distinctly the grounds upon which those cases were decided.

312 *The case of *Bennett v. Musgrove*, was this: A bill by a judgment creditor, who had an elegit executed, to set aside a fraudulent conveyance made by the debtor to the defendant. Two objections were taken; that a Court of Equity had no jurisdiction, as the plaintiff had a remedy at law; and that there was not sufficient evidence of fraud. Lord Hardwicke said, "A plain case to give the plaintiff relief, which is, to be let in to the benefit of that, to which such a creditor is entitled, though a creditor at large is not. But, when a judgment is obtained affecting it from the time, and execution, he is entitled, because that affects the reality of the land, and this, whether it be one kind of fraudulent conveyance, or another. For, if it is by collusion, he clearly may; but, if it was obtained from his debtor himself, by fraud on the debtor, on or about the time he obtained his judgment and elegit, he might, as standing in the place of the debtor, come into this Court to be relieved against that conveyance, and to have the same benefit of relief," as the debtor, I presume, might have had. The Lord Chancellor proceeded to declare, that the Court had jurisdiction in a case of actual fraud, whether the plaintiff could recover, or not, at law. And notwithstanding the consideration, specified in the deed, of 50l. a debt due to Musgrove, he set aside the deed, so far as it interfered with the plaintiff's right, under his elegit, the utmost extent to which a Court, either of law or equity, can give relief under the Statute of Frauds. The deed is void, only as to the creditors. After they are satisfied, the surplus belongs to the grantee.

Herne v. Meeres, as reported in *Vernon*, is to this effect: The bill was by creditors of Cox against Meeres. Cox was outlawed and absconded. Meeres purchased from Cox, with notice of all the facts, a life-estate at three or four years purchase. The creditors, afterwards, obtained a judgment, and filed their bill to be relieved against this purchase as a trust, or else as a fraud, it being at a great under value.

The Court is reported to have said, 313 "The *purchase is at a great under-

value, and huddled up in haste, at a time when young Cox concealed himself from his creditors, and carries another ill circumstance with it, that the defendant is a trustee in the marriage settlement; and for him to buy the life-estate of the husband, was to take away the maintenance and support thereby intended and provided for the wife and children, on whose behalf he was entrusted, and all this, with notice of the plaintiff's debts, and proceedings at law, which ought to have some weight in the case; and although the plaintiff's securities were not such as did immediately affect the land, yet the notice was such, and Cox's absconding, had he been a trader, would have made him a bankrupt, and then the defendant must have lost all his money; and so, at law, when a conveyance is found to be fraudulent, the creditor comes in and avoids all, without the re-payment of any consideration money; and in equity, therefore, when the Court can decree back the principal and interest, there is no hurt done, and a lesser matter in such a case will serve to set a conveyance aside."

It is difficult to extract from this reasoning, the principle on which relief was given. There is no intimation of any suspicion of a collusion to defraud the creditors. The reference to the trust, the inadequacy of price, and the distressed circumstances of Cox, would tend to shew, that the transaction was a fraud upon Cox, against which he might be relieved; and the terms of the decree, as stated from the register in 2 Bro. Ch. Cas. 177, (n.) seem to place the relief on that ground. It states, that "the bargain made by Sir T. Meeres with Cox, was not fairly obtained, in respect of the circumstances Cox was in; but ought, in conscience, to be made void, the premises purchased by him, being more than double the value of the money paid by him, and therefore he should be considered as a mortgagee." I think this case proceeded upon the principle stated by Lord Hardwicke, in *Bennett v. Musgrove*; the substitution, in equity, of a judgment creditor, to the right

314 of his debtor to impeach a conveyance, for a fraud practised upon him. The circumstances under which the conveyance was procured, were such, as that in equity, Meeres was a trustee for Cox; and this equitable right of Cox might be pursued in equity by a judgment creditor; as such a creditor might, in the case of a mortgage, claim, in equity, the benefit of the debtor's equity of redemption.

The case of *Barwell v. Ward*, decided by Lord Hardwicke, in 1744, was this: The defendant's brother conveyed to her the moiety of a reversionary estate, for less than half its value; and in a month after, was committed to jail, and became bankrupt by failing to give bail, for two months. By the Chancellor: "The present is a plain case, and appears to be a fraudulent conveyance to cover the estate, for the deeds were executed when Ward was in declining circumstances." "No more than 60*l.* paid for the moiety of an estate in reversion, of the value of 39*l.* a year, which is pretended to be redeemable upon

the payment of 60*l.* but no clause of this kind is in the deed itself; for, it is an absolute bargain and sale. The Court in this case, ought to do no more, than to let the deed stand as a security for the money really and bona fide advanced;" and accordingly ordered an enquiry as to the amount. It is difficult to ascertain, from the report of this case, upon what principle the Court proceeded, if not upon this: that the assignees were entitled to assert the rights of the bankrupt, and asserted their claims in that character; and that the conveyance was admitted by the defendant to be redeemable.

If, however, the rule laid down in *Boyd v. Dunlop*, as deduced from those cases, be the true rule, then this case does not fall within the rule; since it is a clear case of actual and gross fraud in *Wingfield and Coleman*; and *Garland* is a purchaser from them, with full notice of the fraud and invalidity of their title. If the rule I have gathered from those cases is the true rule, then there was, in this case, no fraud or imposition on *Lewis Nicholas*, of 315 which *he could complain; and, consequently, the rule is not applicable to this case.

Upon those scanty and equivocal materials, we are urged to sanction the doctrine, that a Court of Equity will allow a party to advance his money, with a view to enable a debtor to secure to himself or his family, fraudulently, all his property against his creditors, except what may be necessary to re-pay the money advanced; or, a creditor to permit his debt to be used in like manner; and when the fraud is detected and exposed, to suffer the deed, declared by the Statute to be utterly void as to creditors, to stand as a security to their prejudice, for the money advanced or the debt due. So, that the experiment would be made, without hazard to any party concerned. This, I think, would be to repeal the Statute. It would offer the greatest temptation to such fraudulent experiments; and the delay, at least, which is commonly one of the principal objects of such transactions, would be effected without loss to the parties concerned in the fraud.

The only enquiry which remains to be made, is, whether it be competent for the appellant to impeach the judgment, on which the appellee's claim is founded, on the ground that the original transaction was usurious; and if he can, and should succeed in impeaching it, whether *Rives's* claim would be thereby wholly avoided, or relief given for the usurious excess only.

It seems, from the case of *Scott v. Nisbett*, 2 Bro. Ch. Cas. 640, that a plaintiff, coming into a Court of Equity, and claiming by force of a judgment at law, any third person, affected by the judgment, may resist the plaintiff's claim, upon the ground that it is usurious, if that question had not been tried and decided at law; and in such case, the Court of Equity will adopt the same rule, that prevails when the usurer is a defendant in equity; relieving only as to the usurious excess. It is, however, unnecessary to examine these doctrines.

316 *In this case, *Rives's* suit was depending, and eagerly prosecuted, at

the time that the conveyances were executed for the purpose of defeating the fruits of his action. The suit was defended on the plea of usury; and every fact, upon which it is now sought to establish the charge of usury, was submitted to the Court of Law and the jury, except only the negotiations between Rives and Nicholas, respecting a purchase of lands, which appears in Rives's answer to the cross bill; but in such a form as not to affect the question of usury. The deposition of Wilson C. Nicholas was properly excluded in the trial at law, and is not evidence in this cause. Upon the question, whether one is or is not a debtor, an adversary judgment against him is evidence *prima facie*, that he is a debtor, even as against strangers, who claim, under him, property affected by the judgment. If they attempt to impeach the judgment, it must be done on the ground of fraud, or by shewing that a full defence was not made, and producing new proof, shewing that the debt is not due. But, in a case like this, of a purchase pending the suit, and for the purpose of fraudulently defeating the objects of the suit, it seems to me, that the purchaser ought to be bound by the judgment, as the debtor was bound.

If a Court of Equity could, in this case, pronounce this transaction usurious, upon the very same facts, on which the Court of Law and jury have pronounced it not to be usurious, then it would virtually be an appeal from the Court of Law to the Court of Equity; and the Court of Equity would re-examine the judgment of the Court of Law, and virtually reverse it. This is not within the jurisdiction of a Court of Equity; which relieves against judgments at law, not because they were wrong, but because of some new matter, which the Court of Law did not, or could not, pronounce a judgment on, or which, for some just cause, the party could not bring to the consideration of the Court of Law. Whether the transaction in question, was a loan or a sale, was emphatically proper for the

317 *decision of a jury; and a jury having decided that question, upon the very same evidence now submitted to a Court of Equity, that decision is conclusive, although we might differ in opinion from the jury, as to the effect of the evidence.

Upon the whole, the decree is right, and should be affirmed.

JUDGES CARR and COALTER concurred and the decree was affirmed.*

M'Dowell v. Burwell's Administrator.

June, 1826.

Sheriffs—Official Bond—Debt against Surety.—An action of debt will not lie against the surety of a Sheriff, on his official bond, to recover the penalty imposed by law, for failing to return an execution. Such penalty can only be recovered by motion:

*The PRESIDENT and JUDGE CABELL absent.

†**Sheriff—Failure to Make Due Return of Execution—Liability.**—In *Grandstaff v. Ridgely*, 30 Gratt. 16, it is said: "The court is further of opinion that, although a sheriff is liable to a fine, at the discretion of the proper court, for his failure to make due return of an execution, he is also liable to an action on his official bond by the party injured by such failure. The fine is in the nature of a punishment for a personal offense, and is not considered as any

and an action of debt will only lie for the damage actually sustained by the Sheriff's failure to return the execution.

Bond—Action on—Averment of Breach of Condition—Recovery.—An averment of a breach of the condition of a bond, although it may not entitle the plaintiff to all he demands, will entitle him to recover what he is legally entitled to in consequence of the breach.

Sheriffs—Action against Sureties—Evidence.—In an action against the sureties of a Sheriff for breach of duty, judgment obtained against the latter, are not evidence against the former.

Same—Same—Same.—The admissions of the Sheriff, are not evidence against the sureties in such case.

Bill of Exceptions—Parol Evidence Connected with Record Excluded—What Bill Should State.—Where parol evidence is excluded, which might be proper when connected with a record, the bill of exceptions should state that such record was offered. Otherwise, it will be presumed that the parol evidence alone was offered.

This was an appeal from the Superior Court of Law for Henrico county.

John M'Dowell, surviving partner of John M'Dowell & Co. brought an action of debt, in the name of the Governor, on the official bond of Peter B. Whiting, 318 Sheriff of Gloucester county, against

John H. Blair, administrator of Nathaniel Burwell, deceased, which said Nathaniel was a surety of the said Whiting, in the bond aforesaid. The following opinion will give a full view of all the proceedings in the cause, and the principles involved in it.

W. F. Wickham, for the appellant.
Williams, for the appellee.

June 1. JUDGE GREEN delivered his opinion.

This is an action in the name of the Governor, at the relation of the appellant, upon the official bond of P. B. Whiting, Sheriff of Gloucester, against the appellee, the administrator of one of the sureties. The bond bears date January 2d, 1797; and one of its conditions is, that if P. B. Whiting should "well and truly execute and due return make of all process and precepts to him directed, and in all things shall truly and faithfully perform and execute the said office of Sheriff during the term of his continuance therein, then the aforesaid obligation to be void, or else to remain in full force and virtue." The declaration, after setting forth the bond and condition, assigns for breaches of the condition, that sundry executions were delivered to P. B. Whiting, which he failed to return, and that for such failure, the relator recovered against him sundry fines upon motion, the judgments for which fines remain in full force and unsatisfied. The defendant demurred to the declaration, and pleaded, in bar to the action, the judgments for fines against the Sheriff, which were set out in

satisfaction for the damage sustained by the creditor in being unjustly kept out of his money by the default of the sheriff or his deputy. When the fine is paid by the sureties of the sheriff, in any subsequent proceeding against them to enforce the judgment or decree upon which the execution issued, they will be entitled to a credit upon the judgment or decree for the amount of the fine, or fines, so paid. Code of 1873, ch. 49, § 28, p. 475. See also, *M'Dowell v. Burwell*, 4 Rand. 317; *Pardee v. Robertson*, 6 Hill's R. 550." See principal case also cited with approval in *Fletcher v. Chapman*, 2 Leigh 505; *Henrico Justices v. Turner*, 6 Leigh 128. See further, monographic note on "Sheriffs and Constables" appended to *Goode v. Galt*, Gilm. 153.

‡**Bill of Exceptions.**—See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

the declaration; to which the plaintiff demurred. The defendant also pleaded conditions performed, upon which issue was taken. Upon the trial of the issue, the plaintiff offered in evidence copies of the records of the judgments for fines set out in the declaration, and the copy of a record of a suit in Chancery, in which the

319 Sheriff was plaintiff, and the relator in this action was defendant. The plaintiff in Chancery, in his bill (which was sworn to) admitted that he had received the executions, for the failing to return which, the judgments for fines had been given, and that he had failed to return them in due time; and, after stating an excuse for not returning them, alleged that he had returned them before the filing of his bill. The object was, to enjoin the judgments for fines. The injunction was awarded and dissolved in 1817. The defendant objected to this evidence as inadmissible, and the Court rejected it. The jury found for the defendant, and the plaintiff excepted to the opinion of the Court rejecting the evidence.

The first question which presents itself on this record is, whether the sureties of the Sheriff are responsible for fines imposed upon their principal, upon motion for failing to return executions, and whether those fines can be recovered in an action on the Sheriff's bond. This, it seems to me, was the only question intended to be presented by the plaintiff. The delivery of the executions, and the failure to return them, seems to be stated only as matter of inducement, to shew the grounds upon which the fines were imposed, and not as the gist of the complaint. Neither the time when the executions were issued and delivered to the Sheriff, is stated, nor is any venue laid as to those facts, nor is it alleged how long the Sheriff failed to return them, nor that they were never returned.

At the common law, the failure of an officer to return process when ruled to do so, was a contempt for which he was punished, as the discretion of the Court, by fine or imprisonment, or by both. This was, in its nature, a criminal proceeding, and in the name of the King, to punish an offence to the public. It was no bar to the remedy of the party injured, by action against the Sheriff for the damages arising from his default. The fine belonged to the King; 2 Vin. Abr. 434, pl. 11; but, in practice, one-third of it was in England, given to the party aggrieved. *Rex v. Cudmore*, Cumb. 250. Nor could any Court impose a fine to the party grieved. 2 Vin. Abr. 452.

320 *In 1748, 5 Stat. at Large, 517, an Act passed imposing a fine upon the Sheriff, for failing to execute and return process, of 1000 pounds of tobacco, one moiety to the King, the other to the party grieved, to be recovered by action of debt or information in any County Court in the Colony, and providing that he should be further liable to the action of the party grieved, at the common law, for his or her damages.

In 1753, 6 Stat. at Large, 344, it was enacted, that for failing to return an execution, the Sheriff might be fined upon ten

days notice, (without prescribing how notice was to be given,) by the Court from which the execution issued, at its discretion, in a sum not exceeding 10l. which fine should be for the use of the plaintiff in the execution, with a proviso, that he should, notwithstanding the fine, be liable to the action given, and the penalty inflicted by the Act of 1748.

In 1792, 13 Stat. at Large, 378, an Act passed reciting that it was doubtful how judgment should be rendered against an officer failing to return an execution, and providing, that upon motion by the party injured, the Court might fine him in any sum not exceeding 5 per cent. per month, for the time of his failure to make the return.

In 1794, it was enacted, that the executors and administrators of a Sheriff or other officer, and his sureties, and their executors or administrators, should be liable to the like fine and penalty, recoverable in the same manner as was by law directed against a Sheriff himself failing to return an execution.

The proviso in the Act of 1748, reserving his common law remedy for damages to the party injured by the failure of a Sheriff to execute and return process, proceeded from an excess of caution, and was unnecessary. That right would have remained without any such reservation. A debt might have been wholly lost by such failure, and the specific penalty to be recovered by a *qui tam* action, could not have

321 been construed to deprive the party of his original *right to full satisfaction for all damages suffered by the default of the officer. This new penalty would have been justly considered as cumulative; and the same principle of construction applies to all the subsequent Statutes upon the subject.

The fine imposed upon an officer for a failure to return process, either at the common law, or by the Statute, was in its nature, a punishment for a personal offence, and not a satisfaction to the party injured for the damage thereby sustained by him, and ought to be graduated by the degree of delinquency, and not by the damage done to the party; for, as to that, he had another and appropriate remedy. The nature of the fine, was not changed by giving it to the party grieved, under the Statute, any more than by giving one third of it to the party, at common law. "When a Statute imposes a penalty for a contempt, as the contempt is personal, so is the penalty." Lane, 107. Accordingly, whilst the executors of the Sheriff and his sureties were responsible, under his official bond, for the actual damage to the party by the Sheriff's failure to execute and return process, they were not responsible for the penalty imposed by the Act of 1748, or the fines imposed by the Acts of 1753 and 1792. And so the Legislature considered it; for, in 1794, they extended the fines and the remedy, upon motion to assess and recover them, to the executors of the Sheriff and to his sureties and their executors; and it is by virtue of this Statute only, that they can be responsible for fines. Indeed, it was only by virtue of the Act of 1755,

6 Stat. at Large, 483, that a party injured, could sue on the official bond of the Sheriff; and this remedy was confined to the recovery of "all damages which he may have sustained by reason of the breach of the condition of the bond."

Does the Act of 1794, make the fine and penalty recoverable by suit upon the bond? I think not. The Act of 1755, only authorises the recovery of the damages actually suffered by the default of the 322 officer. Suppose a *debt to be wholly lost by such default. Could the creditor recover in an action on the bond, not only the whole debt and interest, (which is the utmost extent of his damages,) but a fine at the discretion of the jury, and not of the Court, or fines previously assessed by the Court? The sureties are only bound by, and to the extent of, the terms of their obligation, and that, as well as the Statute authorising the suit on the bond, only binds them to the extent of the actual damage. They are under no legal or moral obligation to answer further. Upon what principle the Legislature considered them liable beyond this, it is hard to perceive; and the law subjecting them to a responsibility beyond their engagement, for fines upon motion, and a penalty recoverable in a *qui tam* action, and not upon their bond, is so harsh, that it ought to be construed strictly, and the remedy confined rigorously to the terms prescribed by the Statute. The surety, therefore, is not responsible in this action, for the fines imposed upon the Sheriff.

Here the case should have ended; and the demurrer to the declaration should have been sustained, unless the declaration were susceptible of the construction, that the general averment, that the executions were delivered to the Sheriff, who failed to return them in due time, was the gist of the complaint, and the allegation of the judgments against the Sheriff for fines, mere surplusage: that the suit was to recover damages actually sustained by the Sheriff's failure to return the executions, and not the amount of the fines. This seems to have been the construction given to the declaration by the Court below; and it is perhaps susceptible of that construction. The generality of the averment of the delivery of the executions to the Sheriff, and of his failure to return them, would have been fatally objectionable upon a special demurrer, but not on a general demurrer. An averment of a breach of the condition of the bond, although it may not entitle the plaintiff to all he demands, will entitle him to recover what he is legally 323 entitled to in consequence of the breach. This question, *however, is not intended to be decided, as it is not necessary to the decision of the cause.

It remains, therefore, to enquire, whether the evidence offered to prove the breach of the condition, by shewing that the Sheriff had received the executions and failed to return them, was properly rejected.

The judgments were not evidence of these facts, as against the sureties, in any degree. They did not *per se* bind them. It was *res inter alios acta*, and emphatically so, for the sureties had no more in-

terest in the subject of these judgments than any other strangers. But, if they could have been proper evidence in any possible state of things, they were properly excluded, upon the ground upon which the admissions made by the Sheriff, in his bill, were excluded; that they were not the best evidence which the nature of the case admitted. This is an inflexible rule. Inferior evidence can never be received, when it appears that better evidence is in the power of the party. Thus, no admissions of a party can be received to prove a matter of record; and the admissions of the party, that he had executed a bond, is not competent to prove its execution, if there be a subscribing witness. If he can be procured, he must be produced; if not, his hand-writing must be proved as the next best evidence to his testimony on oath. In the same bill in which the Sheriff admits the receipt of the executions, and his failure to return them in due time, he states that they were returned. The plaintiff giving in evidence this bill as the confession of the Sheriff, was bound, in a Court of Law, to take it altogether, unless he could disprove it in any particular. The moment, therefore, that it appeared that record evidence existed of the issuing of the executions and of their delivery to the Sheriff, the inferior evidence of his confessions became incompetent. If the executions had not been returned, and thus become a part of the records of the Court, or if the returns did not shew the failure of the Sheriff to return them in due time,

then his confessions would have been 324 admissible, to *shew, in the one case, that they were issued, and that he had received them and failed to return them in time, and in the other, to shew that he had not returned them in time. In such a state of things, those facts could only have been proved by parol evidence; and when parol evidence is admissible, the confessions of one of several persons jointly bound, are competent and *prima facie* evidence against the others. It was argued, that although the evidence of the records was necessary, yet the confessions were competent evidence, and should have been admitted; and that *non constat* but that the plaintiff gave, or was ready to give, the records in evidence. If he gave, or was ready to give, this evidence, it should have been stated in the bill of exceptions; and if it appeared that parol proofs were necessary to supply any fact not appearing by the record, the confessions would have been admissible for that purpose. Otherwise, such a course would utterly frustrate the rule of law requiring the best evidence which the nature of the case admits.

The judgment should be affirmed.

JUDGES CARR and COALTER concurred, and the judgment was affirmed.*

325 *Gilliam's Administrator v. Perkinson's Administrator.

June, 1836.

Written Instrument—Evidence—Subscribing Witness. —It is a general rule, that the evidence of a subscribing witness to an instrument, is the best, and

*The PRESIDENT and JUDGE CABELL absent.

must be adduced, if it can be had; and if it cannot, proof of his hand-writing will be required.
Same-Same-When Evidence of Party's Handwriting Admissible.†-But, if the subscribing witness merely makes his mark, if he is dead, proof of the hand-writing of the party executing the instrument, will be proper.

This was an appeal from the Superior Court of Law for Prince George county.

Perkinson brought an action against Gilliam, to recover compensation for his services as an overseer. A written agreement was entered into by the parties, containing the terms of the contract, signed by the parties, and attested by Charles A. Gilliam and Cannon Perkinson. The latter only made his mark. The defendant pleaded, and issue was joined.

At the trial, the plaintiff introduced the said agreement; but the defendant objected to it, on the ground that Charles A. Gilliam, one of the subscribing witnesses, was a mulatto man; and that Cannon Perkinson, being dead, the mark attached to his name was not proved to be his. But the Court over-ruled the objection, and decided that proof of the hand-writing of the defendant Gilliam, would be sufficient; which was accordingly proved. To this opinion, the defendant filed a bill of exceptions.

The jury found a verdict for the plaintiff, and the Court gave judgment accordingly. The defendant appealed.

Spooner, for the appellant.

Attorney General, for the appellee.

June 3. JUDGE CARR.

Gilliam and Perkinson, entered into written articles of agreement, by which Gilliam employed Perkinson as
 326 *his overseer. This agreement was witnessed by Charles A. Gilliam and Cannon Perkinson, the first writing his name, the last making his mark. The overseer and his employer disagreed, and the overseer sued on the agreement. At the trial, it was admitted that Charles A. Gilliam, the witness who wrote his name, was a mulatto, and incapable of giving evidence; and that the other witness, who made his mark, was dead. The question was, whether the plaintiff should be permitted to prove the hand-writing of the defendant to the agreement, without having first proved the mark of the deceased witness, or used due exertions to obtain such proof. The Court permitted proof of the hand-writing of the defendant, without laying any other ground for it than the death of the witness; and we are to decide whether this was error.

The general rule on this subject is, that if there be a subscribing witness to an instrument, his evidence is the best and must

be adduced, if in the power of the party. But if the witness be dead, or blind, or insane, or infamous, or interested since the execution of the deed, or beyond the process of the Court, or not to be found after diligent enquiry; in all these cases (and others perhaps might be stated) the course is, to prove the hand-writing of the attesting witness. This is evidence of every thing on the face of the instrument. The sealing and delivery will be presumed; and it is laid down in many cases, that it will not be necessary to prove the hand-writing of the party to the deed. Other cases, however, have required such proof to connect the party with the instrument.

The latest case I have examined on the subject, is that of Nelson v. Wittal, 1 Barnew. & Ald. 19, decided in 1817; and there the question seems to be considered as not settled. Lord Ellenborough says, "It has been the constant practice, in cases where the subscribing witness is dead, never to look at any thing beyond proof of the hand-writing of the witness, and I should think, that in all cases, it

was prima facie evidence of the in-
 327 strument having been *executed by the person whose name it bears.

The question, however, may perhaps admit of some doubt." Bayly J. says, "It is laid down in Mr. Phillips's Treatise on the Law of Evidence, that proof of the hand-writing of the attesting witness, is in all cases, sufficient. I always felt this difficulty, that, that proof alone, does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it; but the proof of the hand-writing of the attesting witness, establishes merely that some person assuming the name which the instrument purports to bear, executed it; and it does not go to establish the identity of that person; and in that respect, the proof seems to me, defective." Abbott, J. seemed to think proof of the hand-writing of an attesting witness sufficient, and as one reason for his opinion, states, that if it had been necessary in ancient deeds, to prove, besides the hand-writing of an attesting witness, that of the party also, a great difficulty would have arisen; for, in those times, the parties seldom wrote, but merely fixed their marks, "which would scarcely be distinguishable from one another." If there be no subscribing witness, or he denies having any knowledge of the execution, or the name of a fictitious person is inserted, or if, after diligent enquiry, nothing can be heard of the witness, so that he can neither be produced, or his hand-writing proved, the execution of the instrument may be established by proving the hand-writing of the party, or his admission, that he executed it. While I acknowledge it to be the rule, that proof of the hand-writing of the attesting witness, is considered better evidence of the execution, than proof of the hand-writing of the party executing, I am free to confess, that I think it a rule founded rather in technical strictness, and artificial reasoning, than in sound good sense. When I see the name of a

†Written Instrument—Evidence—When Evidence of Party's Handwriting Admitted.—It is now the settled rule, where the witness to an instrument is dead, and it is impracticable, after all possible diligence has been used, to prove his handwriting, to admit proof of the handwriting of the party himself. *Raines v. Phillips*, 1 Leigh 484, citing the principal case as authority. The general rule is, that if the attesting witness be dead, or blind, or insane, or infamous, or interested since the execution of the deed, or beyond the process of the court, or not to be found after diligent inquiry, their handwriting may be proved. *Manns v. Stevens*, 7 Leigh 703, citing the principal case to sustain the statement. See monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276; monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

person, with whose hand-writing I am well acquainted, signed to an instrument as a party, it gives much stronger assurance *to my mind, that he executed it, than I should feel from the mere knowledge of the hand-writing of an attesting witness. This last, seems to be one removed further from certainty. The witness may have honestly attested what he believed to be the fact, and yet be deceived by the obligor's assuming a name which he did not bear; or the witness may have knavishly signed his name, knowing that the person, whose name the instrument bears, never executed it. But, when we see the name of the obligor affixed to the bond, and know that it was written by himself, it is so difficult to account for its being there, except by his executing the writing, that the mind can feel little doubt of the execution. This has always been my opinion of this rule, and I am pleased to find it corroborated by such good authority as the Supreme Court of Pennsylvania, consisting of Tilghman, Yates and Brackenridge, in *Clark v. Sanderson*, 3 Binn. 192; Chief Justice Spencer, in *Hall v. Phelps*, 2 Johns. Rep. 451; and Chief Justice Parker, in *Homer v. Wallace*, 11 Mass. Rep. 309. I do not mean that they all concur on the exact point of hand-writing. The first three do; and the other two are equally in favor of relaxing the rigor of the old rule.

In the case before us, however, I consider no relaxation of the rule required, to support the judgment of the Court below. The attesting witness being dead, the first call would be for proof of his hand-writing; and wherever that could not be had, the hand-writing of the party might be proved. Whether this inability proceeded from fortuitous circumstances, or the very nature of the transaction, would be immaterial. In the case before us, the witness has made his mark. Now I ask, how could this be proved? There is a distinct, individual character, in the hand-writing of every man who can write; and with those who have written much, that character is so fixed and striking, that persons acquainted with it, will feel no more difficulty in recognizing it, than in knowing the face of the writer. *Where the name of a witness is written by himself, therefore, it may generally be proved with something like certainty. But here, there was no writing. The name of the witness is written by another; and he makes a cross mark; perhaps, the first, and the last, he ever made in his life. To attempt to prove such a signature as this, would be a mockery of justice; and the Court, seeing this, did right in allowing the hand-writing of the party to be proved. I am for affirming the judgment.

The other Judges concurred, and the judgment was affirmed.*

Wood v. The Commonwealth.

June, 1826.

Plea of Nul Tiel Record.—In what cases the plea of nul tiel record is proper.

*The PRESIDENT and JUDGE CABELL absent.

†Plea of Nul Tiel Record.—See principal case cited

Recognizance—Scire Facias—Fatal Variance.—When a recognizance is entered into before two Justices, and it omits to state that it was taken in the county to which the Justices belong, while the Scire Facias, in reciting the recognizance, sets forth the county in which it was taken, the variance will be fatal.

Record—Defect—Averment.—No defect in a record can be supplied by averment.

Appeal from the Superior Court of Law for Albemarle county.

A Scire Facias issued from the County Court of Albemarle against Isaac Wood and John Wood, praying execution on behalf of the Commonwealth, on a recognizance entered into by the defendants, conditioned for the personal appearance of Isaac Wood at a Court of Albemarle county, ordered to be holden for his examination on a charge of having stabbed a certain Charles Pemberton. The Scire Facias recites, "that Isaac Wood and John Wood, on the second day of November, 1816, at the parish of and county aforesaid, personally appeared before Charles Yancey and Jeconias Yancey, two of the Justices of the Peace for the county of Albemarle, &c." It then recites the recognizance, and concludes, "as by the said recognizance in our County Court of Albemarle sent and now remaining in the said County Court, manifestly appears. And whereas, the said Isaac Wood has failed to make his personal appearance before our said County Court of Albemarle, directed by the said Justices to be holden as aforesaid, at the time and place aforesaid, according to the condition of the said recognizance, as appears to us of record."

The defendant John Wood, cravedoyer of the recognizance, and demurred, assigning several causes of demurrer; one of which was, that it does not appear from the said recognizance that it was executed in Albemarle.

The recognizance does not state, as set forth in the Scire Facias, that it was entered into in the county of Albemarle.

The County Court gave judgment for the defendant, and the Commonwealth appealed to the Superior Court of Law, who reversed the decision of the County Court. The defendant John Wood, appealed to this Court.

Stanard, for the appellant.

Attorney General, for the appellee.

June 5. JUDGE GREEN.

A party may plead nul tiel record, and if upon inspection by the Court, the record is not such as is described in the pleadings, he will have judgment; or he may craveoyer of the record, which makes the record a part of the pleadings in that case; 18 Vin. Abr. 184, pl. 20, 21; and when it is spread upon the record byoyer, if the party admits *that the record of

with approval in *Hutsonpiller v. Stover*, 12 Gratt. 587.

Recognizance—Scire Facias—Fatal Variance.—See principal case distinguished in *Gedney v. Com.*, 14 Gratt. 324. The principal case is also cited in this case at pp. 325, 330.

Scire Facias—Demurrer.—There is no doubt that a scire facias may be demurred to. *Garland v. Ellis*, 2 Leigh 556, citing principal case as authority. See principal case also cited in *Archer v. Com.*, 10 Gratt. 640.

Record—Defect—Averment.—To the point that no defect in the record can be cured by averment, the principal case was cited in *Hamlett v. Com.*, 8 Gratt. 88.

which oyer is given him is the true record, and relies that it does not support the pleadings or Scire Facias, it seems to me that he should not deny that there is such a record, by plea; but, that he ought to demur, upon the ground that it varies from the pleadings or Scire Facias. If he denies the verity of the record of which oyer is given, he should plead nul tiel record after oyer. 18 Vin. 183, pl. 18.

In this case, the Scire Facias recites, that the defendant, on the 2d day of November, 1816, at the parish of at the county of Albemarle, personally appeared before two of the Justices of that county, and entered into a recognizance, which was returned to, and remains in, the said County Court, and was forfeited, as appears to us of record. This last expression refers to all the preceding recitals. Upon the recognizance, of which oyer was given, nothing appears of its being entered into in Albemarle; and therefore, that fact, (and an important one,) does not appear of record, and I think cannot be averred. No defect in a record can be supplied by averment. This is a fatal variance, and the judgment of the Superior Court should be reversed, and that of the County Court affirmed.

The other Judges concurred.*

332 *Davis v. Payne's Administrator.

June, 1826.

Distress—What Liable—Property of Third Person.†

The property of a third person never was liable to distress, unless it were found upon the premises; and even where it is found there, the distress is taken away by the Act of 1818, 1 Rev. Code, ch. 113, sec. 15.

Voluntary Conveyance—Personalty—When Valid.‡

A voluntary conveyance of personal property, by a party not indebted at the time, is good against subsequent creditors, if the deed be duly recorded, or the possession remain solely and bona fide with the donee. Otherwise, it is void by the Statute of Frauds.

Same—Same—Recordation.—Such a deed cannot be recorded in a Corporation Court.

Distress—Redress for—Equity Jurisdiction.—Even if the landlord should distrain property as being fraudulently removed from the premises, and should not shew that it was so fraudulently removed, nor that the distress was levied within the time allowed by law, nor that the property ever was on the demised premises, the tenant ought not to seek his redress in a Court of Equity, but by damages at law.

This was an appeal from the Richmond Chancery Court, where Robert C. Davis, and James M. Davis, infant children of Isaac Davis, by Joseph Butler, their next friend, filed their bill, setting forth the following case: that their father Isaac Davis, became the tenant of a house and lot in the City of Richmond, which was held by Samuel Payne, in right of his wife, who had been the widow of Adam Craig, deceased, and who held the said property in right of dower: that the said Isaac Davis finding the said lot to be extremely unhealthy removed from it; and the said Payne claimed of him rent to the amount of \$225, and levied a distress on a

slave called Jenny Pin, the property of the complainants, to satisfy the said rent: that the officer has advertised the said slave to be sold in a few days, and the said Isaac Davis, from his embarrassed circumstances, is unable to give security in order to contest the claim of the said Payne, although he conceives that nothing is due on account of the rent; while the complainants, by reason of their non-age, cannot avail themselves of the benefit of the Act of Assembly, which would authorise others to interplead, because they would be unable to give the bond required by law in such cases: that the said slave is the property of the complainants, and not of 333 their father: *that she did not reside on the said lot, and of course not a proper subject of distress for rent due for it, &c. They therefore call upon Payne to answer the premises, and pray the Court to injoin the sale aforesaid, &c.

The injunction was awarded until the further order of the Court.

The plaintiffs exhibited with their bill, the copy of a deed, dated the 22d day of June, 1816, between Isaac Davis and Robert C. and James M. Davis, his infant children, by which Isaac Davis, in consideration of the natural love and affection he bears for his said sons, and of five dollars to him in hand paid, gives and grants to them seven slaves, among whom is the girl in question, Jenny Pin. This deed was recorded in the office of the Court of Hustings of the City of Richmond, on the 25th day of June, 1816.

Samuel Payne demurred to the bill, on the ground that the remedy at law was complete, by action of replevin. He also answered, affirming that the rent for which the distress was made, was actually due: that the slave in question had been covertly removed from the premises, and he authorised her seizure wherever found, under the Act of Assembly: that she had been generally on the leased tenement, and was part of the household of the said Isaac, and seldom if ever hired out: that he denies that the said slave is the property of the complainants, and if any conveyance exists, it is fraudulent and void, made for the purpose of covering the property of the said Isaac Davis, and defeating his just creditors, &c.

Depositions were filed by both parties, touching the fraudulent nature of the conveyance, and the residence of the slave in question on the rented lot; but there is no proof that Isaac Davis was indebted at the time of his conveyance to his sons.

The suit abated by the death of the defendant, and was revived in the name of his administrator.

On the hearing, the Chancellor dissolved the injunction, and dismissed the bill.

The plaintiffs appealed.

334 *Nicholas, for the appellants.
Bacchus, for the appellee.

June 5. JUDGE GREEN.

In this case, the property was distrained, not on the demised premises, but as the property of the tenant fraudulently removed from them. The property of a third person never was liable to distress, unless it were found upon the premises. Therefore,

*The PRESIDENT and JUDGE CABELL, absent.

†See monographic note on "Landlord and Tenant" appended to Mason v. Moyers, 2 Rob. 606.

‡See monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

The principal case is cited in Southerlin v. March, Price & Co., 75 Va. 236.

the Act of 1818, 1 Rev. Code, ch. 113, § 15, exempting the property of strangers found upon the premises, from distress, provided the party asserted his title by replevin, has no application to this case. If the property in question belonged to the tenant, it was liable to distress; if not, it was not liable even before the Act of 1816.

A voluntary conveyance by a party not indebted at the time, is good against subsequent creditors, if the deed be duly recorded, or the possession remain really and bona fide with the donee; otherwise, it is void under our Statute of Frauds. In this case, it is neither alleged nor proved that Isaac Davis was at all indebted, when he made the deed in question to his children; and the only enquiry, in order to determine whether it is valid or void as against Payne, is whether it was duly recorded or not.

The Act to prevent frauds and perjuries, passed in 1785, 12 Stat. at Large, 160, declared all conveyances, not on consideration deemed valuable in law, to be fraudulent within that Act, unless the same be by will duly proved and recorded, or by deed in writing, acknowledged or proved, if the same deed include lands also, in such manner as conveyances of lands are directed by law to be acknowledged or proved; or if it be of goods and chattels only, then acknowledged or proved by two witnesses in the General Court, or the Court of the county wherein one of the parties lives, within eight months after the execution thereof, or unless possession shall really and bona fide remain with the donee.

The Act of 1792, regulating conveyances, authorised the conveyances therein mentioned to be recorded in the General Court, District Courts, or County or Corporation Courts. That Act does not embrace the case of absolute deeds of personal property, nor any description of conveyances of personal property, except marriage settlements and deeds of trust and mortgages.

The Act of 1813-14, directed that all deeds relating to personal property, should be recorded only in the Court of the county where the property was. This Act, whilst it took away the jurisdiction of the General and Superior Courts, to admit to record deeds of personal property, and even that of the Corporation Courts, in respect to the description of conveyances allowed to be recorded in them by the Act of 1792, cannot, by any possible construction, be considered as enlarging the provisions of the Statute of Frauds, so as to authorise an absolute deed of personal property to be recorded in a Corporation Court. There never was a time until the last Revisal, when such a deed could be recorded in a Corporation Court. The deed, therefore, under which the appellants claim, being upon its face voluntary, and not recorded as the law required, and possession not having accompanied it, is void as to creditors under the Statute of Frauds.

It is insisted, that although it appears that Payne was a creditor, and had a right to distrain the property of the tenant fraudulently removed from the premises, within the time limited by law, yet it does not ap-

pear, that the property was so fraudulently removed, or that it had been on the premises, or that the distress was levied within the time allowed by law; and that the appellants are entitled to the protection of the Court, unless it appears, that Payne was a creditor legally entitled to distrain the property as he did.

336 "I do not think that these considerations, ought to have any weight in a Court of Equity. Payne was a creditor, and had a just right to satisfaction out of the property in question, and could have subjected it at law, if not by distress, by judgment and execution. If he has proceeded illegally, he is responsible for damages at law, at the discretion of a jury, according to the circumstances as they may appear before them. As against Payne, the appellants have no equity.

The objection, that Mrs. Payne was dead before the distress was levied, need not be examined, as the fact does not appear in the record.

JUDGES CARR and COALTER concurred, and the decree was affirmed.*

Chapman, &c. v. Harrison.

June, 1826.

Execution—Payment to Sheriff after Return Day—Effect.—A payment to a Sheriff in discharge of an execution, after the return day of the execution is passed, is not binding on the creditor.

Equitable Relief—Defence Available at Law.—Equity will not grant relief on the ground of a defence which might have been made at law, unless the plaintiff alleges and proves a good excuse for not having used it at law. CARR, Judge.

Injunction—Perpetuation of.—It is error to perpetuate an Injunction against a party, without having him before the Court.

This was an appeal from a decree of the Richmond Chancery Court, affirming a decree of the County Court of Brunswick, in which Court Harrison filed a bill against Rhoda Goodrich, administratrix of John Goodrich deceased, and John H. Chapman. The following opinions present a full view of the case.

337 *Leigh, for the appellant.

Attorney General, for the appellee.

JUDGE CARR.

Goodrich obtained a judgment against

*The PRESIDENT and JUDGE CABELL absent.

Executions—Payment to Sheriff after Return Day—Effect.—A sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not bind the creditor, nor would it impose any liability upon the sureties of the sheriff on his official bond. Although the sheriff may be responsible in his private capacity for money so received, no responsibility would attach to him in his official character on that account. *Grandstaff v. Ridgely, Hampton & Co., 30 Gratt. 15*, citing principal case as authority. And in *Cockerell v. Nichols, 8 W. Va. 163*, it is said: "It is well settled that the officer cannot levy a writ of *heri facias* on the property of the debtor after the return day thereof. But if the officer levies the execution upon the property of the debtor before the return day he may, generally, sell the property by virtue of the levy after that day, and may also, generally, receive, in such case, payment of the debt, in whole or in part, after such return day and before the sale of the property levied on in relief of the property levied on. And where the execution is not levied before it expires, which is on the return day thereof, a payment to the officer, on the execution, in whole or in part, after the return day thereof is passed, is not binding on the creditor." *Chapman v. Harrison, 4 Rand. 336*. On the same subject, the principal case is cited in *O'Bannon v. Saunders, 24 Gratt. 141*. See further, monographic note on "Executions" appended to *Paine v. Tutwiler, 37 Gratt. 440*.

Harrison, and issued his execution. It went into the hands of Wallace, a Deputy Sheriff, in September, 1814, (as we see by his endorsement,) and was returnable to the 4th Monday in November. He returned it to the clerk's office, (at what time, we do not know,) without any other endorsement than that marking the time when it came to hand. The plaintiff died. R. Goodrich, his administratrix, sued out a Scire Facias, obtained judgment, and issued execution. Harrison then filed his bill to injoin. He states, that the original judgment was obtained in 1815; the execution put into the hands of Wallace, the deputy; and that he paid the full amount thereof, to him, as will appear by a receipt filed. On this receipt, the bill rests the whole equity of the case. As a reason why he did not avail himself of this receipt on the trial of the Scire Facias, the plaintiff states, that he told Chapman, the agent of the administratrix, of the receipt, and referred him to his attorney who had it; and that Chapman said, it was Wallace's hand-writing, and he was satisfied; which prevented his attending to his defence, as he expected to hear nothing more of the affair; and his attorney, who had the receipts, supposing that the proceeding, in which they were to be used, was a motion, did not attend to the Scire Facias. The administratrix and Chapman as her agent, are made defendants; and he is called on specially to state, whether he did not say he was satisfied, on examining the receipt, and that it did cover the execution. In his answer, Chapman, directly responding to the interrogatory, avers, that he said no such thing: that on the contrary, he was dissatisfied

after examining the receipt: that the plaintiff ought *to have used this defence at law, or shewn some good excuse for not doing so; and that having failed in this, equity has no jurisdiction, on which he insists, as if formally pleaded. This may be considered as the plea and answer of the defendant, and raises the question of jurisdiction expressly.

The rule on this subject, as settled by many cases in this Court, I understand to be this: That a party having a good legal defence, shall not, after judgment at law, bring the case into equity upon the legal matter, without alleging and proving a good excuse for not using it at law. The bill in this case did allege a sufficient excuse. If Chapman had told the plaintiff, that the receipt was Wallace's hand-writing; that it did cover the execution, and that he was satisfied; and having thus lulled him into security, had gone on, and taken a judgment against him, without defence, equity would have considered it a fraud, and would so far have relieved against it, as to give him the benefit of that defence, whatever it might be. But Chapman denies that he ever told him any such thing; denies that he had any excuse for not making his defence at law. It devolved on the plaintiff, then, to prove the excuse he had alleged. He should have examined evidence to establish the conversation, and also to prove the mistake of his counsel. Having failed to do this, we are bound by the settled rules of evidence to

say, that he stands without excuse for not making defence at law; and of consequence, that equity has no jurisdiction of the case. Upon this ground, I think the Court below erred in not dismissing the bill.

Another palpable error was, perpetuating the injunction against the administratrix, without having her before the Court. The record states her to be a non-resident. Publication is ordered, but no evidence that it was ever made.

If it were proper to examine the case upon its merits, after deciding against the jurisdiction, I would say that in my opinion, the defence set up ought not to avail the party before any tribunal. The receipt is long after the return *day of the execution, and speaks as of a payment made at its date, when the deputy had no power to bind the creditor by his act; and the affidavits introduced to prove a payment, while the execution was in force, do not, to my mind, prove any such thing. They are so loose, vague, and unsatisfactory, that it would be unsafe to rely on them as proof of any thing. But, give them full weight; they do not shew that the Sheriff received a cent of money. He has made no return of satisfied in whole or in part, on the execution; and though he should have made a promise that he would enter a credit for some execution against somebody, of which we have an imperfect rumour, as he did not choose to comply with this promise, I do not think the creditor bound by it. I think both judgments should be reversed and the bill dismissed.

JUDGE GREEN.

An injunction was awarded to judgments upon Scire Facias to revive other judgments, upon the allegation that the debtor had paid the full amount of the executions upon the original judgments, to the Deputy Sheriff, in whose hands those executions were. To prove this allegation, the receipts of the Sheriff, dated April 25th, 1815, are produced. One of the executions was returnable to the fourth Monday in November, 1814; the other, to the fourth Monday in January, 1815. The defendant relies that the payment to the Sheriff was after the executions were returnable, and they not having been levied, the payment does not bind him, and was no satisfaction of the judgments; especially as the Sheriff has returned the executions, without any endorsement of what was done under them. The plaintiff has offered proof by parol, for the purpose of shewing, that notwithstanding the date of the receipts, the payments were made before their dates, and whilst the Sheriff was authorised to receive the money. It is not suggested that the executions were ever levied. This

proof is extremely loose *and vague, both as to the fact, and date of the payments. The receipts are prima facie evidence, that the payments were made at the date of the receipts, and there is internal evidence in the transaction, that this was the truth of the case. The principal and interest, up to the date of the receipt, with costs and Sheriff's commissions, amount to \$208 67. The receipt is for

\$208 58, a difference of nine cents; whereas, the principal and interest to the return day, with costs and Sheriff's commission, amount only to \$202 94; a difference of \$5 64, a few cents more than the interest from the return day to the date of the receipt, with the Sheriff's commission thereupon; a clear proof that the payment, however made, was made when the Sheriff had no authority to receive the money; so that the debtor could have made no defence at law.

Both decrees should be reversed, the injunction dissolved, and the bill dismissed.

JUDGE COALTER.

On the first view of this case, I would have been satisfied to have reversed the decree for the error assigned in relation to Rhoda Goodrich, a judgment in whose favour has been enjoined when she was not before the Court. It is often proper to dissolve an injunction, and even dismiss a bill, before all the parties interested are before the Court; as in cases where it is apparent that the plaintiff has made out no case as to any one, and has sought no discovery, and could have no decree, except for an injunction against those not before the Court. There is nothing to prevent the dismissal of a bill in such a case. But, it does not follow that the party, whose bill may be dismissed because he has failed to shew his equity, shall have a decision in his favour upon that equity, against one who is not before the Court.

The question then is, whether the appellee has shewn sufficient grounds why his bill ought not at present to be dismissed?

341 *It is said he has not; first, because he has made out no case which could have availed him as a defence at law, had every thing that now appears been made known to that Court; and between these parties, the equity being equal, the law must prevail. Secondly, it is said, that if this defence would have prevailed at law, there is no sufficient excuse why it was not made there; and therefore equity will not relieve.

As to the first. I am fully satisfied that whilst the executions were in the hands of the Deputy Sheriff, an arrangement was made with him, by which he was to receive the benefit of other executions then in force, in favor of the appellee, and who, in consequence thereof, had agreed not to proceed to levy the executions on the property of the appellee; and I am also satisfied, that he did receive the avails of those executions, either to the full amount of the executions against the appellee, or that the appellee, in some other way, paid up the balance, as he believed, in full discharge of those executions; and that the Deputy Sheriff is the party who really ought to pay the amount of the judgments sought to be enjoined. From the delay in suing out the Scire Facias in this case, I have also little doubt, but that the creditor or his representative had reason to believe, that the appellee was discharged, and that their recourse was against the Deputy Sheriff. No return has ever yet been made on the executions, although they are in the clerk's office, the Deputy Sheriff having merely

endorsed when they came to hand, but not what he did with them. It may be, that the creditor, having for several years endeavoured in vain to get the money from him, was better satisfied with no return, although he could have forced one, than with a return of the truth of the case; or it may be that Wallace is dead, and that the executions have been found among his papers, and returned by his executor or administrator to the clerk's office. It may be too, that funds enough were placed in his hands by the appellee, when the execution was in full force, to discharge

342 *the whole debt, and that he agreed to apply them and return the execution satisfied. All these things, I think, are highly probable; much more so, than to suppose that this receipt in 1815, was given when in reality the Deputy Sheriff had not received the full amount of the executions.

I think it highly probable too, that those funds may not have been instantly available to the Deputy Sheriff, though agreed to be received by him in discharge of the executions, or so far as they would go; and if not enough, that the balance was finally to be made up on a settlement: that such settlement took place in a short time after the return day, and most probably when the executions were yet in the hands of the Deputy Sheriff, and the receipts given; and that the Deputy Sheriff ought, in justice, to have returned the executions satisfied. All this might probably have appeared more fully, had the Deputy Sheriff been made a party to the suit, and had the appellee taken the trouble to develop more fully the nature of these transactions.

I was therefore, at first, disposed simply to reverse the decree, and send the cause back; for, had the executions been thus fully and legally discharged, though the Sheriff failed to return them satisfied, and did not give receipts for the money until after the return day, such payment before the return day, was a complete defence at law, and under the circumstances of this case, ought to be equally available in equity. On more full examination, however, the fact that the executions were calculated up to the date of the receipts, throws more doubt upon the subject, as to the time when these transactions took place, and as to the real nature of them when they did take place; and as the appellee has been indulged with a hearing in equity, after a failure to defend himself at law, he ought, and that promptly, to have made out a clear case there. He ought to have shewn clearly, that he could have availed himself of this defence at law, had it been made there; but, not having shewn this, with sufficient certainty, it is perhaps most proper no longer to delay the case for further explanations on his part, but to dismiss the bill.

343 *Had he shewn such a case as would have been a clear defence at law, I am satisfied this Court ought to have relieved. My opinion on this subject, as supported I think by the great current of decisions in this Court, growing out of the peculiar situation of our country, and of our Judicial

systems, which renders it necessary for Courts of Equity to extend relief here where it might properly be refused in England, I have lately had occasion to express in the case of Oswald, Deniston & Co. v. Tyler, ante, p. 20. I still entertain the same opinions as there expressed. Here the party had fully and fairly paid off the executions whilst they were in full force, and in the hands of the Sheriff, (which is the postulatium in this view of the case) and had obtained receipts a few months thereafter, the efficacy of which to protect him he had no doubt of; or, if we hold him bound to know the law, that these receipts, without further proof that the payment was made when the executions were in force, would not do, he would know also that he had such proof. The fact was, that he had paid the debts, and thought the receipts all sufficient. Some five or six years after, he is served with a Scire Facias, to shew cause why executions shall not again issue; no arrest; a simple notice to shew cause. This, as he alleges in his bill, he takes to be a notice of a motion about to be made against him at the next term. He employs counsel to defend him against such notice, and gives him the receipts. He also communes with his neighbour, the agent or manager of this business, on the way. He tells him that he has such receipts; refers him to his attorney for an examination of them; is told by the agent that he had seen them, that they were in the hand-writing of Wallace, the Deputy Sheriff, and that he was satisfied. This conversation, he avers, threw him off his guard; and his mistake of the nature of the process also, threw the attorney off his guard; and so judgments were obtained at law.

The plaintiff, in the bill, avers on oath, that he did understand that the defendant was satisfied. How does the
344 *answer deny or disprove this? It does not deny the conversation, and that he did admit that he had seen the receipt, and that he was satisfied they were in the hand-writing of Wallace. But, he denies that he told the complainant, after seeing the receipts, that he was satisfied; but, on the contrary, he was dissatisfied then, and is now, and will be so, until he receives the money; but, that he told the plaintiff so is not averred. As, however, he told him he was satisfied that the receipts were in the hand-writing of Wallace, he might well have supposed that was all that was necessary to satisfy him about. But, the defendant may well have been dissatisfied at not having received the money, and remain so until he does receive it; and this in fact is all he substantially says, and that in answer to a bill which calls upon him to answer "unevasively and particularly." The truth is, that he did then believe it was a good defence. He says, "although from the first appearance of the papers, it would seem that if the proper defence had been made, the complainant ought to have been allowed the said receipts as offsets against the executions, yet upon a proper examination it will be found that he ought not; for, that they bear date after the return day, &c." Had

he given them this proper examination, and come to the conclusion above, at the time of this conversation? In charity, I think not; for it would have been a direct fraud to have answered in such a way in relation to them, as might have been construed into an admission that they were a defence. He ought to have said, "I have given these papers a proper examination, and, though I admit they are the hand-writing of Wallace, they will not avail you. They are after the return day." He would then have been told, "But, I will prove that these payments were before the return day." There is a great immorality in any man who has once enforced the payment of his debt, to compel a second payment, merely because, from mistake or surprise, he has gotten a judgment at law for it. Such injustice is only tolerated by the Courts,
345 not as justice between *man and man, but on the ground of policy in putting an end to controversies by one suit, when that can be done; as a punishment to the negligent, not as a premium to injustice; for injustice, abstractly speaking, it certainly is. The punishment is often greatly inadequate to the offence, and will not be imposed, when from fraud, accident or surprise, the defence has not been made at law. I think sufficient accident or surprise, if not fraud, exists in this case; and had the party now shewn, as I think, in all probability, with proper diligence he might have shewn, that he had a defence at law, I would grant him relief. He has hitherto failed to do this; and I think I go far enough in saying, that this controversy ought not further to be protracted; but that the bill, on this ground, ought to be dismissed.

Both decrees must be reversed, and the bill dismissed.*

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*Bailey v. Clay, &c.

June, 1826.

Pleading and Practice—Declaration—Precedent Condition.—The failure to allege the performance of a precedent condition, in a declaration, will be cured by a verdict.

Same—Allegata et Probata.—The general rule is, that no party can be required to prove, upon the trial, any matter not alleged by him in his pleadings, unless the fact not alleged is necessarily implied from the facts stated in the pleadings. In cases coming within the general rule, all matters necessarily implied from what is alleged, are presumed to have been proved on the trial, after verdict.

Same—Omission of Necessary Matter in Pleading—Effect of Verdict.—But matters collateral to the fact in issue, and necessary to the right of the party, if they are omitted in the pleadings, cannot be presumed to have been proved, and therefore their omission could not be cured by the verdict, at common law.

Contract for Sale of Land—Condition Precedent.—In a contract for the purchase of land, where no time is limited for the conveyance of the property, and a time is limited for the payment of the pur-

*The PRESIDENT and JUDGE CABELL absent.

†**Pleading and Practice—Omission of Necessary Matter in Pleading—Effect.**—See principal case cited in *Morse v. Rector*, 44 W. Va. 207, 28 S. E. Rep. 765.

‡**Contract for Sale of Land—Condition Precedent.**—In a contract for the sale of land, where there is a definite time appointed for the payment of the purchase money, and no fixed time for making the deed, the making of the deed is not a precedent condition to the right to demand the money. *Clark v. Curtis*, 11 Leigh 578, citing principal case as authority. The principal case was distinguished in *Roach v. Dickinson*, 9 Gratt. 164.

chase money, the conveyance is not a condition precedent to the right to demand the money.

Undertaking to Pay Money—When to Be Performed.—A general undertaking to pay money, without appointing a day of payment, obliges the party to pay immediately; but an undertaking to do a collateral act, as to convey lands, entitles the party to perform it at any time during his life, unless hastened by the request of the other party.

Contract—Non-Performance—Measure of Damages.—The stipulated price of property sold, is the proper measure of damages, for the non-performance of the contract, if no evidence is offered to shew that some other standard is more proper.

This was an appeal from the Superior Court of Law for Halifax county, where Romulus M. Saunders and Henry M. Clay brought an action on the case, against William Bailey. The action was founded on an agreement, by which the said Saunders and Clay should sell and convey to the said Bailey, forty-five feet of a lot in the town of North-Milton, at the rate of forty dollars for each front foot; one half at the following Christmas, and the other half twelve months thereafter, and that the said property was to be improved by the said Bailey in some convenient time. The plaintiffs, in their first declaration, say, that they always have been, and still are, ready and willing to execute a good and sufficient conveyance of the said lot, &c. Yet, the said Bailey did not, and would not, pay the said sum of money, or any part thereon, nor did improve the said lot,

but hath hitherto neglected and refused to do "the same, to the damage of the plaintiffs \$5000, &c. But this count does not allege any assumpsit by the defendant. There are also two general counts.

The defendant pleaded non-assumpsit.

Afterwards, the plaintiff obtained leave to amend their declaration, and filed a new one setting forth the agreement, laying an assumpsit, and alleging a breach. To this declaration, the defendant likewise pleaded non-assumpsit. Issue was joined; and at the trial, the defendant demurred to the plaintiff's evidence; in which the plaintiff joined.

The defendant excepted to the opinion of the Court, who had instructed the jury that the price agreed on by the parties, must be the measure of the said damages.

The jury gave damages for the breach of contract, taking the price fixed by the agreement as their guide, and dependent on the judgment of the Court on the demurrer to evidence. This verdict was set aside by consent, and upon a new trial, the defendant filed four bills of exceptions, one of which was like that above mentioned. The other three are not important, as they are not noticed by this Court. The jury found a verdict for the plaintiffs, and assessed their damages to eighteen hundred dollars, with interest, &c. that sum being founded on the agreement.

The Court gave judgment for the plaintiffs, and the defendant appealed.

Leigh, for the appellant.

Stanard, for the appellee.

June 8. JUDGE GREEN.

The plaintiffs in the Court below, originally filed two several declarations, with distinct conclusions, "to their damage of \$5000, and therefore, they bring suit, &c." The first of these declarations, set out the

written contract between the parties, and alleged that they had always been

348 "ready, and were still ready, to perform the contract on their part; but, that the defendant had failed and refused to pay the purchase money of the lot; but alleged no promise or assumpsit by the defendant. The second declaration follows the first, and is connected by these words; "and afterwards, to wit," &c. and alleges an assumpsit by the defendant, in consideration of a lot sold to him by the plaintiffs; and then follows a count upon a general indebitatus assumpsit, for money had and received. Then follows the assignment of breaches upon the two last counts, and the conclusion "to their damage," &c. To this declaration, or these declarations, the defendant pleaded non assumpsit, and issue was joined. At a subsequent Term, the plaintiffs had leave to amend their declaration, and the record proceeds, "which was accordingly awarded, and which declaration so amended, is in these words and figures, following, to wit." This declaration is perfect in all its parts, having the regular commencement, statement of the cause of action, and conclusion. It contains a single count upon an assumpsit, in consideration of the agreement set out in the declaration. The defendant had liberty to plead de novo, and pleaded non assumpsit, upon which, issue was joined.

If it were material to the decision of this cause, I should think, that the amended declaration, plea, and issue thereupon, were substitutes for the former pleadings, which were no longer a part of the record, although one of the exceptions speaks of the first count of the declaration, as one that was in issue before the jury. It is, however, unnecessary to decide this question; since, if the first set of pleadings are considered as a part of the record, any errors in them, which might have been fatal upon demurrer, are cured by the Statute of Jeofails.

The great objection insisted on by the appellant, is, that upon the true construction of the contract, a conveyance of a good title to the lot sold by the appellees to him, was a condition precedent to their right, to demand the purchase 349 "money; and, that such a conveyance, or offer to convey, was neither alleged in the pleadings, nor proved upon the trial. If such were the true construction of the contract, the failure to allege a conveyance, or a tender of a conveyance, in the declaration, would, after verdict, have been cured by the Statute of Jeofails. Yet the plaintiff would have been bound to prove such conveyance or tender upon the trial. It is a general rule, that no party can be called upon to prove, upon the trial, any matter not alleged by him in his pleadings; unless the fact not alleged, is necessarily implied from the facts stated in the declaration or other pleading. As, if a feoffment is pleaded without alleging livery, livery must be proved; because there can be no feoffment without livery. *Spieres v. Parker*, 1 Term Rep. 145. 1 Saund. 228, note 1. In such cases, after verdict, even at the common law, all matters so necessarily implied from what was alleged,

were presumed to have been proved on the trial, since the party might be called on to prove them; and the omission to aver such matters in the pleadings, was cured by the verdict. But, if some matter collateral to the fact in issue, and necessary to the right of the party, was omitted in the pleadings, the party could not be called upon to prove such collateral fact, upon the trial; and therefore, it was not after verdict presumed to have been proved, and consequently, such omission was not cured by verdict at the common law. Of this, several examples are cited in the note to Saunders, before referred to. In *Collins v. Gibbs*, 2 Burr. 899, it was held, that when a promise depends upon the performance of something to be first done, by him to whom the promise is made, and in an action upon such promise, the declaration does not aver performance by the plaintiff, after verdict for the plaintiff, the omission is cured by the common law; because the plaintiff might be called upon to prove his performance at the trial, and from the finding of the jury, it is presumed, that he did prove his performance. This is the explanation given by the note in Saunders, of that case.

350 *The question is, whether the conveyance of a good title, or tender of such conveyance, was a condition precedent in this case, to the demand of the purchase money. If it was not, then there was no necessity to allege in the pleadings, or prove at the trial, any such conveyance or tender. If it was, then, although after verdict, the omission to make such an allegation in the pleadings, is cured by the Statute of Jeofails, and indeed would have been cured at the common law. The plaintiffs were bound to prove such conveyance or tender upon the trial: They failed to do so; for the tender, such as it was, was made long after the time appointed for the payment of the purchase money.

The case of *Pordage v. Cole*, 1 Saund. 319, appears to be a case in point. There the contract was, that the defendant should give the plaintiff 775l. for all his lands, the money to be paid at mid-summer 1668; and the Court held, that the conveyance of the land was not a condition precedent to the demand for the money. In the case at bar, the contract is, that the plaintiffs agree to sell and convey to the defendant, a lot at the rate of \$40, for each front foot, one half at next Christmas, and the other half in twelve months thereafter. In both these cases, no time is limited for the conveyance of the property, and a time is limited for the payment of the purchase money; and according to the rule laid down, in *Thorp v. Thorp*, 1 Salk. 171, when the money is to be paid at an appointed time, and the day of payment is to happen, or may happen, before the thing which is the consideration of the payment of the money is to be performed, the performance of the thing is not a condition precedent to the right to demand the money. A general undertaking to pay money, without specifying the time of payment, obliges the party to pay immediately; but an undertaking to do any collateral act, as to convey lands, entitles the party to

perform it at any time during his life, unless hastened by the request of the other party. Here the purchaser had a right to demand a conveyance immediately, 351 and so the parties understood *it; as is proved by the stipulation to make improvements; and upon a demand made, and a failure to convey, they might have maintained an action upon the covenant, before payment of the purchase money. But, the defendant never called upon the plaintiffs to convey the lot according to their contract; and until such a demand is made, and they fail, upon such demand, to make the conveyance of a good title, they are in no default, and have not violated their agreement. The defendant may now call upon them for a conveyance, and if they fail to convey a good title, recover damages for the breach of their agreement. In this case, the conveyance of the land, not only might, upon the terms of the agreement, be properly made after the time appointed for the payment of the money; but in the events which have happened, it may now be made in pursuance of the contract, long after that time. Upon this point, I think there is no error in the judgment.

As to the exception to the instruction of the Court, in respect to the measure of damages, I do not remember that this was relied upon in the argument of the cause. That instruction was right. The stipulated price of property sold is certainly the proper measure of damages for the non-performance of the contract, if no evidence is offered to shew that under the circumstances, some other measure is more proper.

The judgment should be affirmed.

The other Judges concurred, and the judgment was affirmed.*

352 *Brockenbrough v. Ward's Administrator.

June, 1826.

Demurrer to Evidence—Joinder—When Not Compelled.†—The Court ought not to compel a plaintiff to join in a demurrer to evidence, if the evidence set forth in the demurrer shews that the plaintiff ought to recover.

Action for Money Had and Received.‡—In what cases an action for money had and received is the proper action.

Covenants—Dependent—Independent.—Covenants are dependent or independent, according to the intention and meaning of the parties, and the good sense of the case.

Action for Money—Case at Bar.—When a day is appointed for the payment of money, and the day is

*THE PRESIDENT absent.

†**Demurrer to Evidence—Joinder—When Compelled.**—See monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364. The principal case is cited on this subject in *Boyd v. City Savings Bank*, 15 Gratt. 503.

‡**Assumpsit—When it Lies—Money Paid on Contract.**—Where a contract for the sale of land is not by deed, and no conveyance has been made, the vendee can recover back in an action of *assumpsit* what he has paid on the contract, when the consideration has failed, or the contract has been rescinded, or the vendor refuses to comply with his part of the contract. *Bler v. Smith*, 25 W. Va. 832, citing principal case as authority. See principal case also cited in *Boisseau v. Bass*, 100 Va. 211, 40 S. E. Rep. 649. See also, monographic note on "Assumpsit" appended to *Kennard v. Jones*, 9 Gratt. 183.

§**Covenants—Dependent—Independent.**—In *B. & O. R. Co. v. McCullough*, 12 Gratt. 597, it is said: "Stipulations in a covenant or other contract are to be regarded as dependent or independent, according to

to happen after the thing, which is the consideration of the money, is to be performed, no action can be maintained for the money before performance.

An appeal from the Superior Court of Law for Essex county.

The administrator of Joshua Ward brought an action of assumpsit for money had and received, against Austin Brockenbrough. The defendant pleaded non assumpsit; and issue joined. At the trial, the defendant tendered a demurrer to the plaintiff's evidence, and moved the Court to compel the plaintiff to join therein; but the Court overruled the motion, and the defendant excepted. The evidence set forth in the demurrer is fully stated in the following opinion.

Stanard, for the appellant.

No Counsel, for the appellee.

June 9. JUDGE CABELL delivered the opinion of the Court. ||

This was an action on the case, for money had and received by Brockenbrough, the defendant, for the use of Ward's intestate, the plaintiff in the Court below. On the trial, the defendant, Brockenbrough, tendered a demurrer to the testimony, and moved the Court to compel the plaintiff to join therein, which motion was over-
353 ruled *by the Court; to which opinion, the defendant excepted. There was a verdict and judgment in favor of the plaintiff for \$2,698, from which Brockenbrough appealed to this Court.

It was very fairly and properly admitted by the counsel for the appellant, that if the evidence set forth in the demurrer shews that the plaintiff was entitled to recover in this action, the judgment of the Superior Court must be affirmed.

The case made in the demurrer is substantially this: On the 16th of January, 1810, Austin Brockenbrough, the appellant, and Joshua Ward, the intestate of the appellee, entered into articles of agreement, under their hands and seals, by which Brockenbrough agreed to sell to Ward a tract of land to which he was entitled in right of his wife, for the price of 1,236l. which price, Ward agreed to pay, with interest from the date of the agreement, at two instalments, the first of which was to become due on the 1st of January, 1811. It was stipulated that Ward should assign to Brockenbrough, on demand, a good bond for 60l. and also three other bonds executed by one Cotterell, due in 1816, 1817 and 1818; which bonds were

the intention and meaning of the parties, and the good sense of the case. *Hotham v. East India Company*, 1 T. R. 638; *Porter v. Sheppard*, 6 T. R. 665; *Campbell v. Jones*, 6 T. R. 570; *Morton v. Lamb*, 7 T. R. 125. And where an act is to be done by one party by way of condition precedent to his right to claim performance on the part of the other, he cannot claim such performance without averring the doing of such act or his readiness and offer to do it. *Thorpe v. Thorpe*, Lord Raym. 662; *Collins v. Gibbs*, 2 Burr. 899; *Brockenbrough v. Ward*, 4 Rand. 352."

To the point that covenants are dependent or independent according to the intention and meaning of the parties and the good sense of the case, and that technical words should give way to such intention, the principal case is cited in *Snodgrass v. Wolf*, 11 W. Va. 165; *Weaver v. Burr*, 31 W. Va. 780, 8 S. E. Rep. 766. See the principal case also cited in *Metropolitan L. Ins. Co. v. Rutherford*, 95 Va. 779, 30 S. E. Rep. 383.

See further, monographic notes on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

[The PRESIDENT and JUDGE COALTER absent.]

to be assigned to Brockenbrough as a security for the purchase money of the land: that Brockenbrough and wife were to make Ward a deed for the land, in a convenient time, and Ward was to make Brockenbrough a mortgage on the land, to secure the payment of the purchase money, with the interest thereon. Brockenbrough, moreover, agreed to take slaves at valuation, in payment of the purchase money, as it should become due. Ward was to take immediate possession of the land, and hold it under the agreement. He took possession accordingly; but he left the country in 1811, and has not since been heard of. Brockenbrough re-possessed himself of the land, (at what particular time is not stated,) and sold and conveyed in fee simple to one Healey, at the price of five dollars per acre, being the best price which could then be had for the same; and the
354 wife of Brockenbrough, (who *was the owner of the fee,) joined in the conveyance, and has since died. Brockenbrough received the money due on Cotterell's bonds, and on being applied to by Ward's representative some time in 1818, to pay the same, said he would pay it after deducting the loss he had sustained in the second sale, which was three dollars per acre.

The question is, whether Ward's representative is entitled to recover, under the circumstances above stated, the money received by Brockenbrough on account of Cotterell's bonds.

Cotterell's bonds were assigned to Brockenbrough, not in payment for the land, but merely as a security for the payment of the purchase money. So long, therefore, as Brockenbrough had a right to demand the purchase money of the land, he had a right to retain in his hands Cotterell's bonds, or so much of the money received therefor, as should not exceed the purchase money and interest. But, so soon as the purchase money, with the interest, should be paid, or the purchaser should be forever discharged from the liability to pay it, it would be manifestly unjust for the vendor to retain what he had received merely as a pledge or security for the purchase money. He became bound, *ex oequo et bono*, to restore it; and the action of assumpsit for money had and received, is the proper action to compel him to do so.

It becomes necessary, therefore, to enquire into the character of the covenants between the parties in this case. If they were independent, it would be no objection to an action brought by Brockenbrough for the purchase money, that he had not complied with the covenant on his part. But, if the covenants were dependent; if the covenant, on the part of Brockenbrough to convey the land, was a condition precedent to the obligation on the part of the purchaser to pay the purchase money, without alleging a conveyance, or a tender to convey; he could maintain no action for the purchase money, without alleging a conveyance or a tender to convey.

355 *Covenants are to be considered to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good

sense of the case, and technical words should give way to such intention." *Pordage v. Cole*, 1 Saund. 319, note 4. *Hotham v. East India Company*, 6 Term Rep. 571. *Porter v. Sheppard*, Ib. 668. *Campbell v. Jones*, Ib. 571. *Moreton v. Lamb*, 7 Term Rep. 130. Here *Brockenbrough* was to convey in convenient time; but that stipulation is limited and explained by the subsequent stipulation that *Ward* was to give a mortgage to secure the purchase money, the first instalment of which was to fall due on the 1st of January, 1811. This clearly and incontestably proves, that the parties intended that *Brockenbrough* should convey the land, before the purchase money was payable. Now, it is settled law, that when a day is appointed for the payment of money, and the day is to happen after the thing, which is the consideration of the money is to be performed, no action can be maintained for the money, before performance. *Thorpe v. Thorpe*, 1 Salk. 171, 2d resolution. *Pordage v. Cole*, 1 Saund. 319, note 4. *Brockenbrough's* covenant was, therefore, a condition precedent to his right to demand the purchase money; and as his conveyance of the land to another, has forever put it out of his power to comply with that condition precedent, it follows, that *Ward's* representatives can never be under any obligation to pay the purchase money, and consequently, that *Brockenbrough* is bound, *ex æquo et bono*, to restore what he had received merely as a pledge to secure its payment.

The judgment is affirmed.

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**Stokes v. Perkins.*

June, 1826.

Execution—Service of.—An execution issued upon a judgment by a justice of the peace, from the Court of a county or corporation, cannot be served by a constable, except in the city of Richmond.

Perkins brought a suit in the name of the Governor, in the Superior Court of Petersburg, against *Stokes*, as surety for *Hawks*, a constable of the said town, in his official bond. The breach assigned is, that judgments were obtained from a magistrate of the said town, in favor of the said *Perkins*: that executions of Ca. Sa. issued from the *Hustings* Court of Petersburg, and the defendant arrested; but the said *Hawks* negligently and voluntarily permitted the prisoner to escape and go at large, whereby an action accrued to demand and have of the said *Hawks* the amount of the said execution, &c. and of *Stokes* as his surety, &c.

The defendant pleaded conditions performed.

The jury found for the plaintiff, subject to the opinion of the Court, on the following facts: that two writs of Ca. Sa. in favor of *Perkins* against a certain *T. Richardson*, were put into the hands of *Hawks*, as constable, and by him returned: [These writs issued from the office of the Court of *Hustings*, with a return upon them by *Hawks*, "Executed and in custody, and was rescued from my custody by violence, &c."] that the said *Hawks* did not make

fresh pursuit on the escape of the said *Richardson*, &c.

The Court gave judgment for the plaintiff, and the defendant appealed.

Spooner, for the appellant.

Leigh, for the appellee.

357 *June 7. JUDGE GREEN.

This is an action upon the official bond of a constable, against one of his sureties, to recover the amount of two executions of Ca. Sa. issued from the *Hustings* Court of Petersburg, in favor of the relator, and directed to the constable, and by him executed. The defendant was rescued from the custody of the constable, who failed to make fresh pursuit. Several questions are raised. The first and principal, and indeed the only one, in which the parties seem to feel any interest, is, whether a Ca. Sa. or other execution issued upon a judgment by a magistrate, from the Court of the county or corporation, can be directed to, and executed by, a constable. If not, the serving of such an execution is no part of his duty as constable, and does not come within the terms of his official bond.

A careful attention to the history of our laws upon the subject of warrants for small debts, will, I think, solve this question without difficulty.

From the year 1748, to the present time, a provision has existed in our Statutes, prohibiting any magistrate from issuing a Ca. Sa. upon any judgment upon a warrant. The Act of 1806, directs that any justice of the peace shall have power to issue executions to be directed to the constable, or other officer, of any county or corporation, where the party resides, and that the constable, or other officer, to whom an execution shall be directed by a justice of the peace, shall, if he can find no property, make return thereof to the clerk of the county or corporation, who shall docket the same; and the party shall be entitled to such execution thereon, as if the judgment had been rendered in Court; and upon such executions the same proceedings shall be had as upon executions founded on judgments rendered in Court. Under this law, executions issuing from the clerk's office, on the judgment of a justice, could only be directed to the sheriff; for, executions upon judgments rendered in Court could only be directed to him.

358 *The Act of 1809, ch. 12, in the 1st section, directed that no sheriff or deputy sheriff should serve any warrant for small debts; but that such warrants should be directed to, and served by, some constable. The 3d section directed, that all executions awarded on any judgment rendered by any justice of the peace, should be directed to some constable of the county, who should levy and return the same, agreeably to the provisions of the Act of 1806.

The question is, whether the 3d section of the Act of 1809, extends to executions issued from the clerk's office, upon judgments given by a justice of the peace. I think not. The 3d section expressly directs, that the executions, which it provides shall be directed to a constable, shall be returned by him, as directed by

*See monographic note on "Executions" appended to *Paine v. Tutwiler*, 27 Gratt. 440.

the Act of 1806. That Act gives no direction for the return of an execution, except that the constable, or other officer, if he can find no property, shall return executions issued by a justice of the peace, to the clerk. It is to this return that the Act of 1809 refers; which is wholly inapplicable to executions issuing from the clerk's office, after such a return is made. Under the Act of 1806, warrants and executions might be directed to a sheriff, as well as to a constable. This encroached upon the profits of the constable's office; and I think the Act of 1809, was intended only to transfer to the constables exclusively, the profits of serving warrants and executions issued by justices of the peace, and that the first and third section were intended solely to effect that object.

This conclusion is fortified by other considerations. There is no fee allowed to the constable for serving a Ca. Sa. nor is any direction given as to the disposition of a prisoner arrested by a constable under a Ca. Sa. or in any other, except criminal cases. Nor is there any summary remedy given for money made by a constable by any execution, but upon such as are directed to him by a justice of the peace; nor any fine for failing to return an execution, except fines to be imposed by a justice of the peace. *Provisions on these subjects would probably have been thought indispensable, if the Act had contemplated that executions from the clerk's office, on a justice's judgment, could be directed to, and served by, a constable. I observe too, that there is a legislative exposition of the Statutes. They are incorporated in the Revision of 1819; and in 1820, a special Act passed, authorising executions of that description to be directed to, and served by, a constable, in the city of Richmond.

The judgment should be reversed, and final judgment given for the appellant.

The other Judges concurred, and the judgment was reversed.*

Porter v. Nekervis.

June, 1826.

Pleading and Practice—Action by Cashier of Bank.—An action brought in the name of A. B. Cashier of a certain Bank, is an action brought by A. B. individually, and the phrase Cashier, &c. is mere surplusage.

Same—How Corporation Can Sue.—A corporation can only sue in the name and style given to it by law.

*THE PRESIDENT and JUDGE COALTER absent.
Nonnegotiable Paper—Who May Maintain Suit on.—In *Sangston v. Gordon*, 22 Gratt. 755, the suit had relation to bonds made payable to "L. Sangston, secretary of the Baltimore Agricultural Aid Society." At page 764, the court said: "This form of security was no doubt adopted to enable him to sue for and collect the debts due the society, without the expense and inconvenience of his bringing before the courts the numerous parties interested in the proceeds of sale. It is clear that the legal interest in these bonds is vested in Sangston alone. Upon well-settled principles the descriptive words used in the instruments may be rejected, and suits at law or in equity may be maintained thereon in his name, without the addition of other parties. *Porter v. Nekervis*, 4 Rand. 359; *Clarkson v. Doddridge*, 14 Gratt. 42; *Coffman v. Sangston*, 21 Gratt. 263."
Corporations—Suits by and against.—It is true that corporations are mere legal creatures, and must sue and be sued in their true names. *First Nat. Bank v. Distilling Co.*, 41 W. Va. 534, 23 S. E. Rep. 794, citing principal case as authority. To the same point the principal case is cited in *Stewart v. Thornton*, 75 Va. 217.

Set-Off—Joint and Separate Demands—Partnership and Separate Demands.—Joint and separate demands cannot be set-off against each other; nor can partnership and separate demands be set-off against each other.

This was an appeal from the Superior Court of Henrico county. It was an action of debt brought on a promissory note made by Edwin Porter to John Adams, endorsed by the latter to Samuel G. Adams, and by him endorsed to "William Nekervis, Cashier of the Farmers' Bank of Virginia." Nekervis declared, by the style above-mentioned, against Porter, the maker 360 of the note. The declaration alleges that "the said plaintiff, on behalf of the president, directors and company of the Farmers' Bank of Virginia, caused notice thereof (i. e. of the time of payment having elapsed) to be given, and payment to be demanded of said note from said defendant," &c.

The defendant pleaded nil debet, and demurred generally.

The Court gave judgment for the plaintiff on the demurrer; and the jury rendered a verdict for the plaintiff on the plea. Judgment for the plaintiff.

At the trial, the defendant filed a bill of exceptions to an opinion of the Court, stating, that he offered in evidence certain paper writings, as set-offs against the plaintiff's demand, which were excluded by the Court. These papers consisted of negotiable notes, executed by James Jenkins and John Adams (one of the endorsers of the note on which this suit was brought) to J. & S. Cosby, and endorsed by the latter in blank. The defendant offered evidence to prove, that the said notes were assigned to him, before notice of the assignment of the note in the declaration mentioned, was given to the defendant. But the court excluded this evidence, on the ground that they were evidences of joint, and not of separate, or joint and separate debts, and therefore were not mutual in relation to the plaintiff's demand.

The defendant appealed.

Daniel, for the appellant.

Scott and Nicholas, for the appellee.

June 10. JUDGE CARR.

Two points were made by the appellants in this cause: 1st, On the demurrer to the declaration: 2d, On the question of set-off. The writ is to answer W. Nekervis, cashier, endorsee of S. G. Adams, 361 who was endorsee of John *Adams.

The declaration counts thus: "William Nekervis, cashier of the Farmers' Bank of Virginia, endorsee of Sam'l. G. Adams, who was endorsee of John Adams."

Set-Off—Joint and Separate Demands.—In *Christian v. Miller*, 3 Leigh 82, it is said: "The action was a joint action against two, and the set-off attempted was the individual demand of one of the defendants against the obligee. It is vain and useless to speculate now upon the reasonableness of permitting or refusing such a set-off: it has been too frequently settled by the practice of the courts, that such a set-off is not allowable, for the court now to act upon a different principle. *Ritchie v. Moore*, 5 Munf. 388; *Porter v. Nekervis*, 4 Rand. 450." To the point that joint and separate demands cannot be set off against each other, the principal case is also cited in *Gilliat v. Lynch*, 2 Leigh 506; *Green v. Buckner*, 6 Leigh 84; *Choen v. Guthrie*, 15 W. Va. 102; *Elliott v. Bell*, 37 W. Va. 835, 17 S. E. Rep. 899.

Partnership.—See monographic note on "Partnership" appended to *Scott v. Trent*, 1 Wash. 77.

The plaintiff complains of E. Porter, &c. The declaration then describes the note and its different endorsements, the last of which is thus described: "And the said S. G. Adams, afterwards, to wit, at the said county, by endorsement on said note, transferred the same for value received, to the said plaintiff." It then states, that the note becoming due, "the plaintiff, on behalf of the president, directors and company, of the Farmers' Bank of Virginia, caused notice to be given, payment demanded," &c. and concludes thus; "by reason whereof, an action hath accrued to the plaintiff, cashier as aforesaid," &c. The note is a simple promissory note, not negotiable and payable at any Bank; and must, therefore, stand on the general ground of such paper. The demurrer is general, that the declaration and matters therein contained, are not sufficient in law for the said W. Nekervis, as cashier of the Farmers' Bank of Virginia, to have and maintain his action thereof against the defendant. The sole question is, can W. Nekervis, cashier, &c. maintain the action on the note?

By our Act of Assembly, assignments of all bonds, bills, promissory notes, &c. shall be valid, and the assignee may maintain any action in his own name, which the obligee or payee might have brought. Who is the assignee of this note? W. Nekervis, cashier. If the endorsement had been to W. Nekervis, without the addition of cashier, there could be no doubt, I presume, that he would have had the legal right to sue in his own name. Can the addition of cashier, or cashier of the Farmers' Bank of Virginia, prevent that right from vesting? If so, it must be because it transfers the right to some other person or body; and that other, can only be the Bank. Is this an assignment to the Farmers' Bank of Virginia? In the argument, it was said, and truly, that corporations were mere legal creations, and

could have no name, no existence,
362 no attributes, *but those imparted to them by the law. The law creating this Bank, enacts, that it shall be a corporation and body politic, in law and in fact, by the name and style of the president, directors and company, of the Farmers' Bank of Virginia; and by the name and style aforesaid, are hereby made able and capable in law, to have, purchase, receive, possess and enjoy, goods, chattels, &c. to sue and be sued, implead and be impleaded, &c. Suppose the president, directors and company of the Farmers' Bank, had sued on this note, and described it as assigned to them; and in support of their action, had produced the note as it is. Would it not have been objected at once, that the note was not properly described, and could not go to the jury: that the Bank could only take by their corporate style: that an endorsement to W. Nekervis, cashier, was not an endorsement to the president, directors and company of the Farmers' Bank? Yes; and it seems to me, that this objection, would have been fatal: that the endorsement to W. Nekervis, cashier, transferred to the Bank, no legal right to sue in its corporate character. It follows,

I think, that the assignment vested in Nekervis himself, the legal right to sue; for that would seem a strange construction, which would allow neither to Nekervis nor the Bank, the right to sue.

It was contended, that the declaration bears on the face of it, that it was brought in right of the Bank, and for their benefit; and that this is a sort of paper, in which, by its charter, the Bank is forbidden to deal; and in which, it can therefore hold neither a legal nor equitable interest. It would be necessary to decide, whether the Bank could, under any circumstances, deal in such paper, if the declaration did really aver that the suit was prosecuted in right of the Bank and for its use; but I cannot understand it to make such averment. The plaintiff styles himself cashier, and says, the action hath accrued, "to the plaintiff, cashier aforesaid;" but surely, this is not stating, that the right, either legal or equitable, is in the Bank. It was

363 *urged, that the declaration stated, that the notice was given, and the protest made, in behalf of the Bank. This is true; but I consider this as no part of the claim, or description of the claim, of the plaintiff. It is in truth, mere surplusage; there being no need whatever, to state in the declaration, the protest of the note. Nor indeed, was there any use or necessity to protect the note at all, it being a common note, and not negotiable paper. The statement then, that it was protested in behalf of the Bank, (a thing in pais) does not make it a declaration in right of the Bank, or for its benefit. The true mode in which to have put this matter in issue, would have been to have pleaded it. But, upon a demurrer to this declaration, the question cannot arise. Upon the whole, I think the demurrer was properly over-ruled.

The second point is, did the Judge err in refusing to permit the joint notes of Jenkins and Adams, to be set-off against the note executed to Adams singly?

I had considered this question settled. Numerous cases might be cited from the English books, from the decisions of our sister States, and from the Federal Court, concurring una voce, in declaring that joint and separate demands, cannot be set-off against each other; and the decisions in our own Court, have been uniform and strong to the same point. *Scott v. Trent*; *Armistead v. Butler*; *Ritchie and Wales v. Moor*. Surely, these cases ought to be considered as leaving this point no longer open to question. The last case cited, was very elaborately argued, and, I have no doubt, carefully examined by the Court. The opening counsel, though contending very ably against the general doctrine, admitted, that "if one plaintiff sue for a debt due to him individually, the defendant cannot set-off a debt due him from the plaintiff, and another jointly." This is the very case before the Court; and Judge Roane, delivering the opinion of the Court, says in the close of his remarks, "This view of the case is decisive of the question, unless in this action against a com-

364 pany, we are *authorised to allow a set-off of a debt due to an individual partner. The law is too strongly settled in

the negative, and has been too often recognised by this Court, to authorise us to do it, admitting that as an original question, it ought to have been settled otherwise, which the Court is by no means prepared to admit."

A distinction was attempted in the argument, between joint debts, and partnership debts. But, as none of the cases acknowledge such distinction; as no authority, or dictum even, was cited in support of it; and as I can see no difference in reason between the two cases; I am for abiding by the decisions; being always unwilling *quieta movere*.

I think the judgment should be affirmed.

The other Judges concurred, and the judgment was affirmed.*

365 *Nichols and Others v. Covey, &c.

June, 1828.

Patent—Prior Claim Included in Its Courses—What Passes.—Where a patent is issued in pursuance of the Act of 1788, (2 Rev. Code, 434,) which includes in its general courses, a prior claim it does not pass to the patentee the title of the Commonwealth in and to the lands covered by such prior claim, subject only to the title, whatever it may be, in the prior claimant; but, if that title is only a prior entry, and becomes vacated by neglect to survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated lands.

Commonwealth's Warrant—Purchase of.—The purchase of a warrant from the Commonwealth, and an entry in consequence thereof, is not a purchase of the land itself, until the entry is carried into grant.

This was an appeal from the Superior Court of Law for Montgomery county, where Nichols and others brought ejectment against Covey and others, for a message and five hundred acres of land. Issue being joined, the jury found a special verdict to the following effect: that a grant issued to Nichols on the 28th day of March, 1796, for 45,000 acres, by a survey dated 12th of June, 1795, with this exception, that "the survey, upon which this grant is founded, includes 6,800 acres of prior claims (exclusive of 45,000 acres) which, having a preference by law to the warrant and right upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same, as before mentioned and reserved, with the appurtenances;" that on the 18th of April, 1789, Hall and Graison made an entry in the surveyor's office of Montgomery county, for 100 acres of land, and the grant issued to Nichols above mentioned includes within its boundaries the land contained in the aforesaid entry: that Hall, one of the persons mentioned in the entry aforesaid, withdrew the said entry, and made an entry to include the said land, in his own name: that there was no survey made on the first entry aforesaid in the name of Hall and Graison: that on the 10th of February, 1809, a survey was made on the en-

try made in the name of Hall: 366 *that on the 10th of April, 1815, a grant issued to Godby, to whom Hall had assigned his entry: that the land contained in the last mentioned grant lies within the boundary of the grant issued to Nichols, the lessor of the plaintiff, and is the land in controversy: that Godby and Covey were in possession of the land contained in the grant issued to the said Godby, on the 19th day of November, 1819: that the surveyor of Montgomery county, in platting out the 6,800 acres of prior claims mentioned in the first mentioned grant, took into estimation the claim of the said Hall and Graison to the land in their entry as aforesaid contained: that the 500 acres of land, in the declaration mentioned, is part of the land contained in the grant aforesaid to Nichols, and includes the land in controversy, &c.

The Court gave judgment for the defendants, and the plaintiffs appealed.

Leigh, for the appellant.

No Counsel, for the appellee.

June 13. JUDGE COALTER delivered his opinion.

The question in this case is, whether a patent, issued in pursuance of the Act of 1788, (2 Rev. Code, 434,) which includes in its general courses a prior claim, is to be considered as passing to the patentee, the title of the Commonwealth in and to the lands covered by such prior claim, subject only to the title, whatever it may be in the prior claimant; so that if that title, as in the case before us, is only a prior entry, subject to be vacated by neglect to survey, and return the plat, as is also this case, no one can enter therefor, as in other cases of lands so becoming vacant and subject to future entry and patent; but, that the patentee of the inclusive survey, is to hold the same against all the world, save the prior claimant, and the particular right under which he held.

367 *In the case before us, the prior claimant forfeited the right he then claimed by, and again re-entered, surveyed, and obtained a patent for the same land, for which the inclusive patentee has brought his ejectment, claiming to recover the land under his patent issued as aforesaid. If any other person had a right to enter for this land, after the original claim became vacated as aforesaid, it was equally competent for the original claimant, as it was for the patentee of the inclusive grant, to do so.

The Commonwealth, although she has sold and received payment for the warrant, by which an entry is made, has never sold the land which is covered by it, until the entry is carried into grant. The warrant may, at any time, be withdrawn, either before or after the entry becomes vacant as aforesaid, and may be again applied, either in the purchase of that, or any other vacant and unappropriated land. No taxes can be charged for such land, until it is granted to some one by patent. Why is it then, that the Commonwealth shall not be at liberty to sell, and receive payment for, and collect taxes on, lands included within the bounds of such patent, but reserved out of the grant, remaining unpaid for by the

*The PRESIDENT and JUDGE CABELL, absent.

†See principal case cited in Carter v. Hagan, 75 Va. 560; Harman v. Stearns, 95 Va. 69, 70, 27 S. E. Rep. 601; Patrick v. Dryden, 10 W. Va. 416; Bryan v. Willard, 21 W. Va. 72; Stockton v. Morris, 39 W. Va. 447, 19 S. E. Rep. 535.

inclusive patentee, and for which he is in no wise chargeable for taxes? It cannot arise from any equity in the Statute in his favor. He says he will not pay for it, or subject himself to pay taxes for it, because the Commonwealth cannot grant it to him; and therefore he desires that it may be reserved out of his grant, and that he may pay only for the residue, and be taxed accordingly. The law in relation to surplus lands applies to cases where the patent has issued for the whole tract, and can only be extended to this case, on the postulate that the whole passed; but, that is the question first to be decided. There may be no mistake or fraud in the surveyor in this case; no surplus land, if this prior claim is excluded; and that remedy on behalf of the Commonwealth, can only be applied within a given time, and under particular circumstances. The law, too, under which this patent issued, 368 *was soon found to be productive of frauds and mischiefs, and was consequently repealed; so that I think a very liberal, or what might be called an equitable construction, ought not to be given to it. The party gets all the land he paid for, or for which he is chargeable for taxes, and ought to be satisfied.

I think, therefore, that the judgment should be affirmed.

The other Judges concurred, and the judgment was affirmed.*

Starke's Executors v. Littlepage.

June, 1826.

Evidence under Seal—Impeachment by Parol Evidence.

Parol evidence is admissible to impeach evidence under seal, on the ground of fraud.

In Pari Delicto—Application of Rule.—The rule in *pari delicto* potior est conditio defendentis, does not apply, where the policy of the law requires that a fraudulent or vicious conveyance should be enforced, and therefore—

Fraudulent Conveyance—Enforcement by Grantee.

Where a debtor makes a fraudulent conveyance of his property, for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance in a Court of Law, and the debtor will not be allowed to defeat the claim, by proving the fraud. Decided by two Judges out of three.

This was an appeal from the Superior Court of Hanover, where the executors of Starke brought an action of detinue against Littlepage, to recover certain

slaves. Issue was joined, on the plea of non detinet; and the jury found a verdict for the defendant. At the trial, the plaintiffs filed a bill of exceptions to the introduction of evidence on the part of the defendant, to prove that the alleged sale, from the latter to the former, was a fraudulent transaction; but the Court suffered the evidence to go to the jury. The 369 whole *case is so fully stated in the opinions which follow, that a reference to them will be sufficient.

Stanard, for the appellants.

Daniel and Leigh, for the appellee.

June 13. JUDGE GREEN.

This was an action by the appellants against the appellee, for sundry slaves. Upon the trial of the issue of non detinet, the plaintiffs gave in evidence an execution of Fi. Fa. in the name of Mary Norvell against John C. Littlepage, (the defendant in this cause,) Thomas Starke, (the testator of the plaintiffs in this cause,) and John Starke, on which the sheriff returned on the 15th of December, 1798, "made on this execution by the sale of negro Judy and her two children, Nancy and Maria, purchased by Thomas Starke, forty-five pounds." They also produced several papers in the hand-writing of the defendant, and signed by him, one dated April 2, 1804, in these words: "I do hereby certify, that Judy and her family, that are now in my possession, (and were some years ago purchased by Major Thomas Starke, at a sheriff's sale,) are held by me on the same terms that they have been for some years past; and I consider myself bound to Major Starke for the hire agreed upon between us for them." Another, dated the 20th of March, 1809, in these words: "I do hereby certify, that Judy and her family are now in my possession, and were purchased some years ago at a sheriff's sale, by Major Thomas Starke; are held by me on the same terms that they have been for some years past; that is to say, I am to pay hire for them;" and on the back of the last one, in these words: "I do hereby acknowledge and renew the within writing or agreement, between Major Thomas

neither party could be heard, and that they should be left by the courts where they had placed themselves. The principle was reaffirmed in *James v. Bird*, 8 Leigh 510, and in *Terrell v. Imboden*, 10 Leigh 821." On the same subject the principal case is cited in *Terrell v. Imboden*, 10 Leigh 329, and *foot-note*: *James v. Bird*, 8 Leigh 512, 513; *Harris v. Harris*, 23 Gratt. 756, 758, 759, 763, 768, 770, 771, and *foot-note*; *note* to *Montgomery v. Rose*, 1 Pat. & H. 9; *Smith v. Elliott*, 1 Pat. & H. 329, 345; *Didler v. Patterson*, 93 Va. 536, 35 S. E. Rep. 661; *Jones v. Comer*, 5 Leigh 353, 357; *Kyger v. Depue*, 6 W. Va. 299; *McClintock v. Loiseau*, 31 W. Va. 871, 8 S. E. Rep. 612. And in *Thornburg v. Bowen*, 37 W. Va. 544, 16 S. E. Rep. 827, it is said: "It is equally well settled that although such conveyances are fraudulent, and therefore void, they are not absolute nullities, but are only voidable; that they are good between the parties; and that the grantee, though a participant in the grantor's fraud, can convey a good title to another. See *Fox v. Willis*, 1 Mich. 321; *Starke v. Littlepage*, 4 Rand. (Va.) 366; *James v. Bird*, 8 Leigh 510; *Terrell v. Imboden*, 10 Leigh 321; *Owen v. Sharp*, 12 Leigh 427. This results from the language of the statute itself. Section 1, c. 74, Code. See *Freeland v. Freeland*, 102 Mass. 475, 477 (1860); *Osborne v. Moss*, 7 Johns. 161, and cases cited; *Stewart v. Kearney*, 6 Watts. 453, 31 Am. Dec. 482, and *notes*; *Smith v. Grim*, 26 Pa. St. 95, 67 Am. Dec. 400, *notes*; *Thomas v. Soper*, 5 Munf. 28, 8 Am. & Eng. Enc. Law, 771, and cases cited."

*The PRESIDENT absent.

†*In Pari Delicto—Application of Rule.*—See principal case cited on this subject in *Cardwell v. Kelly*, 95 Va. 574, 28 S. E. Rep. 963; *Tate v. Building Ass'n*, 97 Va. 79, 33 S. E. Rep. 382; *Horn v. Star Foundry Co.*, 33 W. Va. 536.

‡*Fraudulent Conveyance—Effect between Parties.*—In *Owen v. Sharp*, 12 Leigh 429, it is said: "A fraudulent conveyance, though void as to creditors, is good between the parties. Being valid between the parties, it follows, that the fraudulent grantor cannot be permitted to allege his fraud to avoid his deed. Accordingly, this principle was settled as early as the case of *Hawes v. Leader*, Cro. Jac. 270, and authority cited and relied upon in *Starke v. Littlepage*, 4 Rand. 368, as being founded on sound principles of law and policy. The case of *Starke v. Littlepage* furnishes a striking illustration of the rule. The suit was brought by the representatives of the fraudulent grantee, to enforce the fraudulent conveyance; the debtor had continued in possession of the property, and he was not permitted to protect that possession, by showing that his deed was fraudulent. JUDGE CALVERT, who dissented from the majority of the court, did not controvert the general principle; he only differed as to the mode of its application; in his opinion, the parties were *in pari delicto*; he thought, that

Starke and myself. Given under my hand and seal, this 27th day of November, 1813;"

and another at the foot of the last mentioned writing, in "these words: 370 "I do hereby renew and re-acknowledge the above and within writing. Given under my hand and seal, this 4th day of November, 1818." These two last were signed and sealed by the defendant. The suit was instituted, March 24th, 1819.

To repel this evidence of title offered by the plaintiffs, the defendant offered to introduce the parol acknowledgment of Thomas Starke, made contemporaneously and subsequently to the sale, and other parol evidence, for the purpose of proving, that the purchase by the plaintiff's testator of the slaves in the sheriff's return mentioned, at the said sheriff's sale, was not a real and bona fide purchase of the same, but was made with the defendant's money, and was intended by the said plaintiff's testator and the defendant, as a cover to protect the said defendant's property from execution by the other creditors of the said defendant. This evidence was objected to as incompetent by the plaintiffs; but the Court over-ruled the objection, the evidence was given to the jury, and they found for the defendant.

The evidence offered by the defendant, is objected to on two grounds; first, that it was not competent to the party to give parol evidence to impeach his acknowledgment of the plaintiff's title, under his hand and seal; and secondly, that he could not give in evidence his and Starke's fraud upon his creditors, to impeach Starke's title, under the acknowledged sale to him by the sheriff under the execution.

The first objection is well founded as a general rule; but has no effect in this case. If the defence, grounded upon the alleged fraud, was admissible, then the evidence to prove the fraud was also admissible; so that the last objection to the admission of the evidence, is the only real question in the cause.

This objection, I think, should prevail. The proof of the sale offered by the plaintiffs is complete, and acknowledged by the defendant. The Statute of Frauds

371 avoids "fraudulent transfers of property only against creditors or subsequent purchasers, leaving them to operate as between the parties, as they operated at the common law; and it has been determined both at law and in equity, that a combination between the plaintiff and defendant to defraud creditors, does not invalidate the legal effect which the transaction would have, as between the parties, if there had been no fraud. The maxim, *nemo allegans suam turpitudinem est audiendus*, once applied to a different purpose, seems to be justly applicable to a case like this.

In the case of *Hawes v. Leader*, Cro. James, 270, (reported also in *Yelv.* 196, and *Brownlow*, 112,) this point has been decided at law, and has never since been questioned, but uniformly recognised as good law, as in *Orlbar v. Harrison*, Cumb. 348, by Holt, Chief Justice. In that case, the intestate of the defendant granted by deed to the plaintiff, all his goods con-

tained in a schedule, and covenanted to deliver them quietly to the plaintiff. After the death of the grantor, the grantee brought an action of debt against his administrator, for the goods mentioned in the schedule. The defendant pleaded, that his intestate was largely indebted, specifying the debts, and that the deed was made by fraud and covin between his intestate and the plaintiff, to deceive those creditors, and that his intestate, notwithstanding the deed, used and occupied the goods during his life-time. To this plea, the plaintiff demurred, and had judgment upon the merits.

There is no case in equity, where relief has been given to the fraudulent grantor in such a case, except in that of *Austin v. Winston*, 1 Hen. & Munf. 33, decided by a divided Court. The relief given in that case, was founded upon the fact, that the grantee, a creditor, the debtor being in distressed circumstances, had availed himself of his power over him, to induce the debtor to unite in the fraud; the creditor having proposed and urged the execution of the scheme, which was adopted for that purpose. No circumstance of that sort is suggested in this case. The general 372 "rule, that a Court of Equity will give no relief to the fraudulent grantor in such case, is affirmed in Cary's Rep. 18, in which it is said to be a maxim, that, *Frans non est fullere fallentem*, and by the decision of this Court in *Bishop v. Estes*, (not reported.)

It is a general rule that "*in pari delicto potior est conditio defendentis*;" and this was the principle of the civil law. "*Porro autem, si et dantis et excipientis turpia causa sit, possessorem potiorum esse, et ideo repetitionem cessare.*" Dig. Lib. 12, tit. 5, (b) 8. But, this rule operates only in cases, where the refusal of the Courts to aid either party, frustrates the object of the transaction, and takes away the temptation to engage in contracts contra bonos mores, or violating the policy of the laws. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are in *pari delicto*. The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions. Thus, if a man be bound upon condition to commit a crime, the contract may be avoided by the defendant. But, if a feoffment be made on the same condition, it is good and unavoidable. Co. Litt. 206. (b.) One of two joint wrong-doers cannot claim contribution against the other, at law or in equity; and a bond given for past cohabitation will not be relieved against in equity. But, a bond given for future cohabitation is void at law, (*Wallace v. Perkins*, 3 Burr. 1508,) and would in general be relieved against in equity. A bond or contract, in consideration of the sale of an office, even when not avoided by Stat-

ute, will be relieved against in equity. In these, and many other cases, collected in the notes to Fonblanque's Equity, ch. 4, sec. 4, the contract is enforced or avoided, both at law and in equity, as may best answer the purpose of discouraging the fraud, or contract against the policy of the law; and it is for this purpose, and not because the defendant is, in such cases, strictly entitled on his own account to be discharged from his contract, that the rule is established, that in *pari delicto potior est conditio defendentis*; a rule which, in general, discourages vicious contracts, but which is not enforced, when it would counteract this policy of the law.

The cases of *Montefiori v. Montefiori*, 1 Black. 363, and *Gay v. Wendon*, 2 Freem. Rep. 101, afford a good illustration of these propositions. In the first case, a note was given by A. to this brother, who was absent to be married, to give him the appearance of being in better circumstances than he was. After the marriage, A. reclaimed this note, and arbitrators awarded it to be given up. The award was set aside as palpably against law; the Court holding that when upon proposals of marriage, third persons represent any thing material in a light different from the truth, even though by collusion with the husband, they shall make it good in the manner in which they represented it.

In the other case, a brother gave to his sister, upon her marriage, 150l. and she gave her bond to him privately, before the marriage, to return it. The husband died without issue; and the brother sued upon the bond at law. She filed a bill to be relieved, on the ground of the fraud. It was argued for the brother, that although the husband or his issue might, with good reason, claim relief in equity, yet there was no reason why she, who was *particeps fraudis*, should be relieved. But, the plaintiff was relieved, notwithstanding it was her own fraud.

The *particeps fraudis*, in the first case, recovered at law, and, in the second, was relieved in equity, because otherwise, the fraudulent arrangement would, in both cases, have had its intended effect, and served as an encouragement to the practice of similar frauds. To prevent this effect,

it was necessary in both cases to reverse the general rule, that in *pari delicto potior est conditio defendentis*. The circumstance that third persons were interested had no influence upon these decisions; certainly not on the last; for, no person was or could be interested, but she who was a participator in the fraud.

The case of *Law v. Law*, 3 P. Wms. 391, proceeds upon the same principle. In that case, the transaction was not intended to injure or defraud any third person, nor was it against the provisions of any Statute, but was contrary to the policy of the common law. Nor was there any advantage taken of the circumstances of the one party by the other; nor was it a case in which the policy of the violated law was to protect one party against the other; nor was there the slightest inequality in the demerits of the parties; so that the relief given in Chancery to the complainant,

could have been founded on no other reason, than that to vacate such contracts by the active interference of the Court, was the only effectual means of discouraging such contracts. If the maxim that "*in pari delicto potior est conditio defendentis*," had been considered as inflexible, or only yielding when the law violated was intended to protect one of the parties against the other, or where a fraud was practised on third persons; no relief could have been given to the plaintiff in that case, which was this: A. by his interest with the commissioners of the excise, procured for his brother B. a supervisor's place in that office, and in consideration thereof, B. gave a bond for the payment to 10l. per annum to A. as long as B. should continue in office. B. died, having for some years omitted the payment of the 10l. A. sued on the bond against the executrix of B. who filed her bill to be relieved against the bond; and it was decreed to be delivered up as a fraud upon the public; not because it took any thing from the public, but because it was against the policy of the law.

To this principle too, must be referred the jurisdiction of a Court of Equity, to compel the surrender of securities given for money won at unlawful gaming.

In such cases, the turpitude of the parties is precisely equal, and there is no other foundation for the jurisdiction of the Court interfering actively in favor of the plaintiff, but that such interference promotes effectually the policy of the law.

To allow a fraudulent debtor conveying his property to another, with intent to defraud his creditors, to allege that fraud for the purpose of avoiding the transfer, would be using the maxim of the law to frustrate the policy of that very maxim, by giving full effect to the fraudulent contrivance of the parties, according to their intent; and indeed, rather to enforce, than to frustrate, the fraudulent contract; and debtors might, with perfect impunity, practise frauds upon their creditors. I think, that the case of *Hawes v. Leader*, Cro. James, 270, is founded on sound principles of law and policy; that the judgment in this case ought to be reversed; and a new trial had, in which the evidence of the fraud, allowed to be given at the former trial, should not be admitted.

JUDGE COALTER.

The testator of the appellants, purchased the slaves in question, or their progenitors, at a sheriff's sale, under an execution against the appellee, about twenty years before the institution of this suit, with the money of the appellee, and under a fraudulent agreement between them, that the appellee should continue to hold the possession, acknowledging every five years that he so held under an agreement of some kind or other, and that he was to pay hires, in order to cover the property from the creditors of the appellee; when in reality, the property never was to be claimed by the testator, nor any hires to be paid.

In this situation, the property has remained as aforesaid for 20 years, and until the death of the testator. His executors, however, finding the written acknowledgments aforesaid, amongst his papers,

have thought it their duty to
376 *sue for and recover the slaves, now
amounting, men, women and chil-
dren, to ten or twelve.

The fact of this combination, was strongly inferrible from the long possession of the appellee, as exhibited in the proof adduced by the appellants, under mere written acknowledgments of possession, under some undefined contract, and some agreement for hires, without specifying to what amount; but full proof of the whole was offered by the appellee, and admitted by the Court; and the question is, whether it was correctly admitted.

Let us suppose, that this claim was set up by the testator himself: that in addition to the fraud he had been aiding in as to creditors, he was seeking to violate his faith with the appellee, and recover the slaves; and that all this had appeared from his own shewing. Would it be a case a Court of Justice ought to lend him their aid? On the other hand, suppose he had gotten possession, and the appellee had come in upon the same evidence to regain it. Would he be heard? It seems to me, that this is one of those cases, in which the Courts ought to leave the parties where they leave themselves. They ought not to countenance or aid in such a scandalous transaction, and although there may not be strictly *par delictum*, (for I am not prepared to say, that a man who, under the guise of friendship, will take another's money and purchase in property for him, under circumstances of concealment, &c. by which a falling man seeks to postpone his creditors, and who shall violate that confidence and take the property to himself, is not guilty of a blacker crime than his necessitous and confiding neighbour,) yet it must be admitted, that in point of law, they are to be considered in *pari delicto*.

But, it is said, that we must aid even in a case as scandalous as this, by way of punishment on the fraudulent debtor, and as a salutary means of enforcing the law, and preventing such combinations. As to punishment, if that could be inflicted with some regard to the degree of the offence, and without benefiting him without

377 whose co-operation *it could not have been committed, and whose acquiescence and countenance may have been a strong temptation to carry it into effect, I would have no objection to see an adequate punishment imposed. But, the *particeps criminis*, who ought also to share in the punishment, is not a proper party to ask, or for whose benefit to inflict it. As it regards the good of society, I much doubt whether the example of a Court, sustaining and enforcing such a flagitious claim, thereby shielding it as it were, by the cloak of the law, is not calculated to do more harm than good. No man could, for a moment, sustain the claim of the testator to these slaves, on the score of morality or common honesty. But, let the Courts say, that he ought to punish the party in this way, for his attempt to defraud his creditors, and would not this at once hold out a temptation to the wicked and guileful, to tamper with necessitous and falling men;

gain their confidence, and by entering into their schemes of this kind, get a fraudulent claim on their property, and recover it for themselves? They would be assured, if not entitled to praise and credit for thus punishing him by taking his property, that they would at least have the countenance of a Court in doing so.

Two cases that have been before this Court, *Austin v. Winston*, 1 Hen. & Munf. 33, and *Bishop v. Estes*, (not reported,) are sufficient proofs to me, that no temptation of this kind ought to be held out to designing men to entrap the necessitous and unwary.

On the other hand it may be said, that unless he can do so, the debtor may enter into combinations of this kind, with impunity, &c. But, this will not be so in general, because, as most frequently happens, his confederate must be put in possession; for, except where the property has been changed, as in this case, by a seizure and sale of a sheriff, or something of that kind, a pretended sale, the seller still remaining in possession, will not do. The fraudulent debtor frequently, and most generally, has to trust entirely to the good

faith of his confederate; and I think
378 *it comports most with the dignity of the law, and of the Courts of Justice, to say to these parties, "You have no business here. You shall not call on a Court of Law, to enforce a contract that is contrary to law."

This was said in *Collins v. Blanton*, 2 Wils. 307, and it seems to me, is the better course, as well for public example, as to preserve that purity which belongs to the ermine of a Court of Justice, and which no polluted hand shall be permitted to soil. In the case of *Austin v. Winston*, 1 Hen. & Munf. 33, the fraudulent debtor came in to be relieved against the fraudulent purchaser, who had, partly by force and violence, and partly otherwise, gotten possession.

The maxim, "*in pari delicto potior est conditio defendentis*," was admitted and applied by Judge Tucker to that case, who says, that without undertaking to balance the guilt of the parties, both appear so culpable, that had Austin been the plaintiff and Winston the defendant, he should have held him as little entitled to the aid of the Court as Winston. The other Judges, and particularly Judge Roane, did no consider it a case of *par delictum*, but that Winston had been seduced into the measure by Austin. But for this circumstance, I take it, they would have concurred throughout with Mr. Tucker.

The maxims, "*volenti non fit injuria*," and "*in pari delicto, &c.*" have been sometimes applied to cases to which they do not belong; as in *Tomkins v. Bernet*, 1 Saik. 22, and so it was attempted to be applied in *Clarke v. Shee*, Cowp. 200; in *Browning v. Morris*, Ib. 790, and in *Smith v. Bromley*, Doug. 670, in a note. But, in these cases, there was not *par delictum*, and so the maxim was held not to apply.

There is another class of cases, too, in which it does not apply; as where third parties will be defrauded, or public policy evaded, in case the party who comes in

shall not be sustained. Thus, it is of great consequence to the public, that marriages should be fairly and freely contracted; and so *marriage brokerage bonds, and cases where a bond is given, or money advanced, to induce one contracting party to believe that the other is in better circumstances, though there is a secret contract to cancel the bond, or return the money. All these cases are properly held not to be within the influence of the maxim; and it is remarked by Judge Roane, in *Austin v. Winston*, "that these agreements in fraud of marriage, must bind, on the ground that you cannot put the wife in statu quo, or unmarried the parties; and marriage is so much favoured in equity, that we are told, 3 P. Wms. 66, that it is a case, and perhaps the only case, in equity, in which a particeps criminis is permitted to avoid his own acts; so highly favoured is the consideration of marriage."

The doctrine he subscribes to, he says, is this: "That in cases of equal frauds committed against third persons, (when the parties thereto are equally guilty, although such frauds operate no injury to the rights of such third persons, and create no rights in favor of the parties thereto, yet in that case possession stands for the right, and one volunteer in such fraud may, as against his equally guilty companion, retain any advantage he has gained. But, right is out of the question; and if the turpitude of his adversary is done away, his possession, or his advantage cannot avail him. He does not stand on any merit of his own, but merely on the ground of the incompetency of his adversary to be received or countenanced in a Court of Justice, to set up a scandalous pretension, in which he is equally particeps criminis." Again, he says: "It is on all hands admitted, as a general, perhaps universal proposition, that in *pari delicto potior est conditio defendentis*; but, in the application of this rule, some important distinctions have been solemnly and ably settled. It is said in them, that the prohibitions enacted by positive law, in respect to contracts, are of two kinds; 1st, to prevent weak and necessitous men from being over-reached, defrauded or oppressed; 2d, those prohibitions which are founded in reasons *of public expedience;" and he refers to *Clarke v. Shee*, *Browning v. Morris*, and *Smith v. Bromley*. Thus it would seem, that but for the circumstances in that case, which were deemed by him, and a majority of the Court, sufficient to take it out of the influence of the maxim, they would have permitted possession, however acquired, to stand for right, and would not have heard the party. But here, the possession never was disturbed, never was intended to be disturbed, and never can be disturbed, except by the aid of a Court of Justice.

The case of *Law v. Law*, 3 P. Wms. 391, where a bond was given to one for his influence in obtaining a place in the excise, was not within the influence of the maxim, because of the great interest of the public in such appointments, and that they should not be influenced, and those having the

appointments deceived, by recommendations arising from interested motives. So too, in cases where relief is given against gaming debts. It greatly interests the public to suppress gaming. The parties coming for relief in such cases, though parties in guilt with those they come against, nevertheless represent, as it were, the interest of the Commonwealth; and such cases fall within the reason of the cases, where a fraud has been attempted on a third person, and which must be consummated but for the aid which will be extended to the particeps criminis. In such cases, if the maxim were to apply, the fraud would take effect on the innocent, or the public policy would be defeated. But in this case whoever holds or recovers the property, the rights of the creditors are equally unaffected. Indeed, the continued possession of Littlepage, covered with the veil of guaze, used in this case, was much less calculated to deceive creditors, than if the possession had remained all this time with Starke, he secretly paying over a reasonable hire, and finally lifting the veil by devising the property to him, as he probably would have done under these circumstances. But, he has departed this life, without taking the precaution to destroy the papers, and a *possession which he never was to take, and never intended to take, is to be obtained in behalf of his estate, by the aid of a Court of Justice.

I have placed this case on the ground of a suit by him, and in which the whole case is made out by the evidence on the part of the plaintiff; for, if the recovery can be had in the case before us, I take it that the agreement equally proves that it could be had in that case.

The case of *Hawes v. Leader*, Cro. James, 270, is the only case I can find, which seems in conflict with the view I have taken. There the fraudulent grantee paid 20l. for goods worth 80l. with intent between the seller and purchaser, to defraud the creditors of the vendor. The vendor gave his obligation safely to keep and quietly to deliver them to the vendee, and bound himself in 40l. to do so. He died, and suit was brought for them against his executor. The plea set out the fraud &c. and that there were debts to pay, &c. and to this the plaintiff demurred, and it was adjudged for him. That case differs somewhat from this. In that, a consideration, though an inadequate one, was given, and there was a covenant to deliver. Now it has frequently happened, that a sale, though for value, is nevertheless fraudulent and void as to creditors, in construction and operation of law. Several causes of demurrer were assigned; but on which of them it was decided, is not stated; though I admit there can be little doubt, that it was decided on the fifth, viz: that the defendant is not such a person as is enabled to plead that plea. For, the Statute makes the deed void as to creditors, but not against the party himself, &c.

There seemed to be doubts, whether the executor, in favor of creditors, was not entitled to set aside the deed; a doubt which was settled in the case of *Orlabar v. —*,

Cumb. 348, and which seems to have been a suit in Chancery brought by an executor to set aside a sale of that kind, in which an issue was directed to try whether two bills of sale were fraudulent. Holt said, there was no doubt that 382 "an executor or administrator as such, shall not avoid a fraudulent bill of sale; but, when he is a principal creditor, as seemed to be that case, then it may be doubtful. But, however, that will be considered in equity, not here. By this, I understand that an executor, as such, cannot bring a suit to set aside a fraudulent bill of sale; and so it has been uniformly held. The creditor has a right to go against the goods directly, not through the executor or administrator. But, if the goods came to the possession of the executor or administrator, they are subject to the executor of the creditor; and this case in Cro. James, above cited, is the only one I can find, which justifies the recovery of them from the executor or administrator. The question, whether either a Court of Law or Equity ought to aid in that recovery, or leave the parties where they find them, is one which was not made, and seems not to have been considered, in that case; and it seems to me, that the principles of the late decisions are better calculated to preserve the purity of justice, and that there are few cases in which it would be more proper to apply the maxim than in this.

In this, I feel confirmed by the opinions of the Judges of this Court in the case above cited, and which I do not understand is at all opposed by the late case of Bishop v. Estes, (not reported) in which the fraudulent vendor came in on the ground taken in Austin v. Winston, but failed in making out his case. Indeed, I do not well see when it can be applied, if not in such a case as this. A bond is given for the purpose of procuring witnesses not to attend on a criminal prosecution. This consideration was held, in Collins v. Blanton, to be a good plea in bar to a suit on the bond, on the ground that the party coming into Court on such a contract, will not be aided. Had the money been paid, the other party could not have come in. Would not the recovery in such case more effectually punish and prevent the offence than the refusal? The refusal of the recovery deprives the plaintiff of nothing, takes no money from him, for which he has given any value, and so punishment 383 "falls on no one; not even on him, who, by a promised bribe, caused the offence to be committed. But, a recovery would have punished him, who was the tempter to the wicked act. It is then laid down, that whether the contract is void by the Statute, or by common law, makes no difference. Courts of Justice go on the principle of enforcing contracts not injurious to society; and would be absurd to say they shall enforce those that are. It is on these great and leading principles that I rely. I wish to protect the Courts from hearing, much less from adjudging, in favor of, or enforcing, such contracts; to scout all such parties from our presence, as without the pale of the law, and not en-

titled to the least consideration. Such a course, it seems to me, is best calculated to reprobate the offence, and prevent its commission.

For these reasons, though I confess not without some doubts, I am for affirming the judgment.

JUDGE CABELL concurred with JUDGE GREEN, and the judgment was reversed.*

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*Eppes v. Thurman.

June, 1826.

Injunction—Dissolution—Appeal—Bond—Amount.—When a party has obtained an injunction from the Court of Chancery to a judgment at law, which is afterwards dissolved, and he appeals to the Court of Appeals, he cannot be required to give security for the amount of the judgment enjoined, but only for such costs as may be awarded against him by the Court of Appeals.

Appeal from the Lynchburg Chancery Court. Eppes obtained an injunction to a judgment on a forthcoming bond, obtained by Thurman, which injunction was afterwards dissolved; and Eppes was allowed by the Court of Chancery to appeal, upon giving security in the amount of 200 dollars.

Jonhson, for the appellee, obtained a rule on Eppes, to shew cause why he should not give other security for the payment of the judgment enjoined; and Leigh, on behalf of the appellant, having shewn cause, the question was argued, and the following opinion of the Court was given.

June 15. JUDGE CABELL delivered the opinion of the Court.

Thurman having obtained a judgment on a forfeited forthcoming bond against Hartwell Eppes and Samuel Jordan, Eppes obtained an injunction thereto from the Chancellor of the Lynchburg District. The injunction was dissolved and the bill dismissed. Eppes was allowed by the Court of Chancery an appeal to this Court, on his executing an appeal bond in the penalty of 200 dollars, with Samuel Jordan as his surety. The condition of the appeal bond, after reciting the decree, the appeal, &c. is as follows: "Now, if the said Hartwell Eppes shall prosecute the said appeal with effect, or shall perform the same, and well and truly pay all such damages and costs as shall be awarded against him by the Court of Appeals, in case the said decree shall be affirmed, then the above obligation to be void, or else to remain in full force and virtue."

385 "A rule has been given by Thurman to Eppes to shew cause why he should not give other security for prosecuting the appeal; and it is contended that such security ought to be given on two grounds; 1st, that in a case like this, (an appeal from the dissolution of an injunction, and dismission of the bill,) security should be given for payment of the judgment enjoined; and 2d, that the surety to the appeal bond in this case is insufficient.

The first question depends on the sound

*The PRESIDENT and JUDGE CARR absent.

†See monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518; monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

The principal case is cited in Jeter v. Langhorne, 5 Gratt. 200, 207.

construction of the 50th and 51st sections of the 66th chapter of the 1st vol. of the Revised Code, page 206. The 51st section directs, that appeals from the Courts of Chancery to the Court of Appeals, shall be granted in like manner, and under like regulations, as appeals are granted from the County Courts to the Court of Chancery, by the 50th section. That 50th section prescribes, that in case of appeals from the County Courts, bonds shall be given "in a reasonable penalty, with condition to satisfy and pay the amount recovered in the County Court aforesaid, and all costs, and to perform in all things the said decree, or final order, in case the same shall be affirmed." The bond thus to be given, is to have respect to what the appellant was bound to do, or what was recovered from him, by the decree of the Court appealed from.

In the case before us, there was nothing in the decree of the Chancellor which bound the appellant to pay the judgment at law. There was nothing recovered from him but costs. The appellant had a right to appeal, on the terms which are prescribed by law. The Court of Chancery could not add to those terms; and much less can this Court, after an appeal has been regularly allowed, destroy the right thus perfected by exacting terms unknown to the law. We cannot, therefore, require the appellant to give security to pay the judgment at law that was enjoined in this case.

But, the Court is of opinion that Samuel Jordan is not a sufficient surety, and that the appeal should be dismissed, unless some other sufficient security be given.

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*Jones v. Raine.

July, 1826.

Appellate Practice—Judgment Twice Reversed.*—

Where a judgment of a County Court is appealed from, and reversed and sent back for a new trial, by the Superior Court, from which judgment of reversal, there is an appeal to the Court of Appeals; and before bond and security are given on this appeal, the cause goes back to the County Court, is again reversed by the Superior Court, and a second appeal taken to the Court of Appeals: on this last appeal, it is competent for this Court to enquire into the propriety of the first judgment.

Same—Joint Judgment—Reversal.—A joint judgment cannot be reversed as to one defendant, and affirmed as to the other.

Bonds—Action on—Witnesses—Obligors.—The principal obligor in a bond cannot be a witness for his surety jointly bound with him, because the latter would have recourse against the former for the whole recovery against him, including all subsequent costs expended by him.

Evidence—Witnesses—Release of Interest.—An inter-

*Appellate Practice—Judgment Twice Reversed.—See *foot-note* to *Biggers v. Alderson*, 1 Hen. & Munf. 54; *monographic note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; *monographic note* on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 233.

Same—Joint Judgment—Reversal.—To the point that a joint judgment or decree cannot be reversed as to some of the parties and affirmed as to others, the principal case is cited in *Hall v. Bank of Virginia*, 14 W. Va. 618; *Vance Shoe Co. v. Haight*, 41 W. Va. 282, 23 S. E. Rep. 556; *National Exchange Bank v. McElfresh Clay Mfg. Co.*, 48 W. Va. 406, 37 S. E. Rep. 442.

Evidence—Witnesses—Interest.—See *monographic note* on "Witnesses" appended to *Clairborne v. Parrish*, 2 Wash. 146. See the principal case cited on this subject in *Brown v. Johnson*, 13 Gratt. 647.

Sheriff's Return—Conclusiveness of.—In *Adler v. Green*, 18 W. Va. 208, it is said: "The uniform practice in Virginia has been to contradict the sheriff's

ested witness, who has been examined on a former trial without being released, may be rendered competent on a subsequent trial, by a release. The objection will only go to his credit.

This was an appeal from the Superior Court of Cumberland county. The case is fully stated in the following opinion.

Call, for the appellant.

S. Taylor, for the appellee.

July 19. JUDGE COALTER delivered his opinion, in which the other Judges concurred. §

Jones moved in the County Court against Blake B. Woodson and John Raine, for an award of execution on a delivery bond. Notice to both was proved; but Woodson did not appear. Raine appeared, and pleaded non est factum, and a jury were instantan sworn. Henry A. Ligon was the deputy sheriff who took the bond, and was examined by the plaintiff as a witness. After he was examined, he was objected to on the score of interest; and thereupon both he and the sheriff were released

387 by the "plaintiff, as the record says, and then the witness was again examined. The jury found a verdict for the plaintiff, if the witness was legally received by the Court, if not, for the defendant. The judgment is then entered, either against both defendants, or against the defendant Raine alone. Both defendants apply for a supersedeas to the Superior Court of Law, alleging that a judgment was obtained against both, which was awarded; and the cause coming on to be heard, the Superior Court was of opinion, that the verdict of the jury, and proceedings set out in the bill of exceptions, did not contain sufficient certainty to enable the Court to ascertain whether judgment ought to be given for the plaintiff, or the defendant John Raine. The judgment as to Raine was therefore reversed, and the cause remanded to the County Court for a new trial as to him; and being of opinion that there was no error in the judgment as to Woodson, affirmed it as to him, with damages and costs, and gave judgment for Raine for his costs in prosecuting the supersedeas.

To this judgment Jones obtained a supersedeas from this Court, but not until the 22d of December, 1822. He gave bond on the 6th of January, 1823. The first judgment in the County Court was on the 25th of December, 1820; that of the Superior Court, on the 4th of October, 1821. There is an appeal also depending, the record in which copies the same proceedings, with some slight, and others important variations, down to the judgment of the Superior Court above mentioned; and then it proceeds to state, that at a quarterly

return of 'forfeited' upon forthcoming bonds, as illustrated in a number of cases in the Virginia reports, without even a suggestion being made in any of those cases, that the sheriff's return was conclusive of the forfeiture. *McKinster v. Garrott*, 3 Rand. 554; *Bernard v. Scott*, 3 Rand. 582; *Pleasants v. Lewis*, 1 Wash. 273; *Nicolas v. Fletcher*, 1 Wash. 380; *Burke v. Levy's Ex'r*, 1 Rand. 1; *Jones v. Raine*, 4 Rand. 386; *Cole v. Fenwick*, Gilm. 134. I am of opinion therefore, that a sheriff's return upon a forthcoming bond is not conclusive but only *prima facie*."

See further, *monographic note* on "Sheriffs and Constables" appended to *Goode v. Galt*, Gilm. 152. §The PRESIDENT and JUDGE CABELL absent.

Court continued and held for Cumberland county, on the 22d day of October, 1821, this cause came back from the Superior Court, with the instructions of the Judge, &c. and the defendant moved the Court for a continuance, which was over-ruled, and a bill of exceptions taken.

The exceptions state, that the defendant Raine moved for a continuance, on an affidavit, that Blake B. Woodson was a material witness for him, had been duly summoned, &c. but was absent, &c.

388 but it appearing to the Court that *he was the same Blake B. Woodson, who was a co-obligor with the defendant in the bond, the motion was over-ruled. There was a jury sworn to try the issue; and thereupon the plaintiff released Ligon and the high sheriff, and then introduced Ligon as a witness to prove the acknowledgment of Raine to the bond, which was objected to, but the objection was over-ruled, and an exception taken. The objection was, that he had been examined on the first trial, before he was released, &c.

The jury returned a verdict for the plaintiff, and judgment thereupon was entered against the defendant Raine; a motion for a new trial being over-ruled, as well as several objections taken to the form of the bond, the execution and sheriff's return.

To this judgment, another supersedeas was obtained from the Superior Court; which coming on to be heard, on the 1st of October, 1822, that Court over-ruled the objections taken to the bond, return, &c. But, being of opinion, that Ligon was an incompetent witness, and that Woodson, though a co-obligor, yet, there being a judgment against him, as he could not therefore be made better or worse by the proceeding as to Raine, was a competent witness for him; and so the Court erred in not granting a continuance. The judgment of the County Court, on these grounds, was reversed, &c. and sent back for a new trial, with directions, that the testimony of Ligon was not to be heard, but that of Blake B. Woodson may, unless objected to for some legal cause not now appearing. From this judgment an appeal was prayed to this Court by Jones, and allowed.

The record in this appeal, as sent to this Court, shews that the first judgment was against Raine only. This is probably a mistake on the record; not only because other trivial variances appear, but because both parties admit in their first petition, that the first judgment was against both, (though from the record in the supersedeas, that seems doubtful,) but, because in

389 both records, the judgments of *the Superior Court, speak of the first judgment being against both. At present, I will take it to be so.

Thus it seems, as far as the first judgment of reversal goes, that case is before the Court, as well on the appeal taken as last mentioned, as by a writ of supersedeas to the first judgment of reversal, obtained since the appeal. This is surely irregular. Had this supersedeas been obtained before the second trial in the County Court, it would have stopped the proceedings there, until the decision here upon that supersedeas. But, that is obtained after the

appeal from the second judgment of the Superior Court, reversing the second judgment of the County Court, is taken, and which brought up the whole case. The first judgment of reversal was acquiesced in, until after the second trial in the County Court; and a novel case would have been presented, had the second verdict been for the defendant.

But, can a party, after so far submitting to a judgment of reversal, which does not finally end the controversy, but orders a new trial, bring up the first judgment of reversal, so as to have it reversed, and judgment for the plaintiff, without connecting with it the after-proceedings? It would seem to me, that he could not, unless it was brought here before the trial, and verdict had in pursuance of the reversing judgment, and which would supersede and stop those proceedings. After that, it must stand in the whole proceedings, to be brought up by appeal or supersedeas.

It results, then, that the supersedeas must be quashed, as improvidently issued, and at the costs of the plaintiff.

The case then rests on the record in the appeal. But, that record presents another singular case. The first judgment of the County Court, (as is now supposed,) was against Woodson, the principal in the delivery bond, by default, and against Raine his surety, after defence on a plea of non est factum. This judgment was brought before the Superior Court on a supersedeas, at the instance of both the defendants. It was affirmed as to Woodson, with damages and costs, but reversed as to Raine, 390 and costs *given to him. This was clearly erroneous. The judgment

was joint and an entire thing, and could not be reversed as to one, and affirmed as to the other. But, can we look to this error now, it not being brought before us until after the second trial in the County Court? It seems to me that we must do so, otherwise, there may be two distinct judgments, and for different amounts, against two parties to a joint suit. But, it seems fully settled by this Court in various cases, that we can and must enquire into the propriety of the first judgment of reversal. *Knox v. Garland*, 2 Call, 242. *Robinson v. Gaines*, 3 Call, 243. *Biggers v. Alderson*, 1 Hen. & Munf. 54. *Fisher v. Duncan*, 1 Hen. & Munf. 563. *Lyons v. Gregory*, 3 Hen. & Munf. 237. There the point was expressly made, "that it was too late to affirm the first judgment of the County Court," &c. This objection was over-ruled, and the first judgment of the County Court was affirmed, with damages from the date of the first writ of supersedeas. This was the first case in which the question as to the damages, seems to have been expressly decided. The case of *Horrel v. M'Alexander*, 3 Rand. 94, was also decided on the same ground. Had the judgment been reversed as to both, then Woodson would have been a party to the suit which went back and was tried, at the second trial, and on no account could have been a witness. But, this must be taken to have been his situation in point of law. The only doubt as to his competency, arises from the severance of the parties by the reversing judgment,

leaving Woodson indifferent, and not interested, as is supposed, even as to the costs accruing in the suit subsequent to the affirmation against him. But, even if this improper severance must remain uncorrected, because that judgment was not brought here until after the second trial in the County Court, is it true, that Raine, if he should be finally cast, would not have recourse against his principal for the whole recovery against him, including as well all subsequent costs recovered against, as all expended by, him? I think he would; *and therefore, in this view, Woodson would be interested to the extent of those costs, which is a sufficient interest to exclude him as a witness.

I am also of opinion, as well on the authority of the case of Callow v. Mime, 2 Vern. 1472, as other cases, that although the circumstance, that Ligon was interested, and an incompetent witness when he was first examined, ought to go very strongly to his credit, on his second examination after the release in the proceedings mentioned, that yet that release restored him to his competency, and he was then properly examined.

As to the first judgment of the County Court, if that was a joint judgment against Woodson and Raine, I think there was no error in it, and that the verdict and proceedings justified such judgment; and that, consequently, according to the cases above cited, both judgments of the Superior Court, and all the proceedings subsequent to the first judgment of the County Court, ought to be reversed and set aside, and that the first judgment of the County Court ought to be affirmed, with damage from the date of the first supersedeas, and costs; in which, it seems to me, all the costs of the appellant in the County Court, subsequent to the first judgment, ought to be taxed.

But if, as the record now before us purports, the first judgment was against Raine only, and not against Woodson also, then I think that judgment was erroneous for that cause; and therefore, as was done in the case of Fisher v. Duncan, 1 Hen. & Munf. 563, above cited, that judgment ought also to be reversed, with costs to the appellee Raine, and judgment entered for the appellant on the bond, as it ought to have been, against both Woodson and Raine.

The parties must, by consent or otherwise, ascertain the fact, whether the first judgment was joint against both, or only against Raine, in order to enable us to enter either the one or the other of the judgments above, as that fact shall turn out.

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*Moseley v. Boush, &c.

July, 1826.

Statute—Assessment for Paving Streets—Effect.—The Act authorising an assessment for paving the streets of Norfolk, does not impose a lien upon the lots in the borough, for the payment of the assessment, but gives a personal remedy only, against the freeholders in possession, and not against reversioners and remaindermen.

Payment of Money for Another.—Where one man pays money for another at his request, the latter cannot resist the repayment of it on the ground that the original debt was not legally due.

Chose in Action—Assignment—Equity Jurisdiction.—

The assignee of a chose in action, has not a right, in all cases, to come into a Court of Equity, upon the mere ground that he cannot sue in his own name, at law; but it must appear that he is prevented from suing at law in the name of the assignor, or that the assignor himself would have had a right, if he had not assigned, to go into a Court of Equity. Per GREEN, Judge.

Appeal from the Chancery Court of Williamsburg. The following opinion is a sufficient report of the case.

Leigh, for the appellant.

Scott, for the appellee.

July 21. JUDGE GREEN.

The appellant filed his bill and amended bill, in the Williamsburg Chancery, stating that he was the sergeant of the borough of Norfolk, and as such authorized and bound to collect the sums assessed upon the land-holders of Norfolk, for the paving of the streets, under an Act of Assembly: that Wilson Boush, the holder of 72 feet of land on Church street, had been duly assessed under that Act, to the payment of \$187 92: that this sum, with others assessed upon other persons, was directed by the proper authority to be collected and paid to Elzey Burroughs, who had paved the street: that at the request of Boush, and upon his promise to re-pay him, he had paid the said sum of money to Burroughs, who thereupon assigned his claim to the complainant: that he instituted a suit at law against Boush, and upon the trial, offered evidence tending to prove Boush's request to him to pay the money; whereupon, the Court de-

cided, *that Boush was not liable to pay the assessment, because it appeared that he had but a life-estate in the lot, in respect of which the assessment was made; the reversion in fee being in his daughter Frances Maria: that he has no means, at law, to assert his claim, either against Boush or his daughter, who are, in equity, either separately or jointly, in proportion to their respective interests in the lot, benefited by the paving of the street, liable to pay the amount of the demand. He makes Boush, his daughter, Burroughs, and the borough of Norfolk, defendants, and prays general relief. The case came on as to Boush and his daughter, upon the bill taken pro confesso for want of appearance. The Act of Assembly, the assessment, and order of Court authorising it, and the petition of sundry persons, of whom Boush was one, to the Mayor, Recorder and Aldermen of the borough of Norfolk, praying for an order to pave the street in question, in pursuance of the Act of Assembly, are exhibits in the cause.

The first section of the Act empowers the Court of Norfolk borough to cause any street, or part of a street, in Norfolk, to be paved, whenever they may deem it proper, or whenever the owners of lots, or a majority of them, on such street, or part of a street, shall petition them to do so. The 4th section provides for apportioning the expense of paving, between the individual proprietors of the lots on the street so paved. The 5th section directs the col-

*See monographic note on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409: monographic note on "Jurisdiction" appended to Philpenn v. Durham, 8 Gratt. 457.

lector of the taxes of the corporation, so soon as the paving is begun, to levy by distress and sale, as in case of public taxes, on each owner of a lot on the street to be paved, one dollar per foot front of the lot which he or she may hold; and if the sum so levied be not sufficient to complete the paving, the Court may, upon the application of a majority of the landholders, make such addition to the expense, as may appear just and reasonable; and so soon as the pavement is completed, and the committee have apportioned the expense, the collector is directed to proceed, in like manner, to collect from each lot-holder the balance due from him.

394 *The 6th section provides, that if the owner of any lot shall reside out of the corporation, or the lot be not in the occupation of the proprietor, the tenant in possession shall be answerable for the expense aforesaid, to be deduced from the next rent, if he be tenant from year to year; or if he be tenant for a term of years, from the rent to become due for the last year of the term. The 7th section provides, that if the lot be vacant, and the proprietor has no property within the corporation subject to distress, the collector may, upon motion in the name of the corporation, recover the amount assessed against him.

One of the grounds upon which the appellant insists that a Court of Equity has jurisdiction in this case, is, that the Act imposes a lien upon the lot itself, for the payment of the assessment; and that this creates an equity between the tenant for life and remainder-man, to contribute rateably to the discharge of this lien. If this were true, the Court would have an unquestionable jurisdiction to enforce the lien, and to compel contribution. There is not, however, a single provision of the Act, which countenances the idea that it was intended to subject the lot itself to a lien for the payment of the assessment. On the contrary, all the provisions of the Act shew that it was intended to impose nothing but a personal liability upon the person, whoever it might be, liable to the payment of the sum assessed. It subjects his property to distress and sale, as for public taxes. This extends only to personal property; and if he has no property liable to distress, then it subjects him to a personal judgment on motion; and these are the only remedies provided by the Act. There was, therefore, no lien on the lot; nor could any moral or equitable obligation, upon any party, arise out of this Act. It is a matter of strict law. The party liable, whether the tenant for life, or the reversioner, or both, was liable only by virtue of the Act, and as the Act prescribed; that is, personally.

There is some difficulty in ascertaining what description of persons was intended to be responsible for the expenses

395 *of paving. The Act describes the persons intended to be made so liable, by various terms, "owners of lots," "individual proprietors of lots," "landholders," "lot-holders," "the proprietors." These terms are used as synonymous through the Act; and upon the

whole, I think there is enough in the Act to shew, that freeholders in possession, whether seised in fee simple, or of a lesser estate, were intended to be subjected to the payment of the expense of paving. The Act distinguishes between the proprietor and the tenant in possession, from year to year or for a term of years; making the former personally liable in all cases, unless there be such a tenant in possession; in which case, the latter is made personally liable in the first instance, with a right to retain against the landlord out of the rents. The Act, by various synonymous terms used to describe the person intended to be liable to assessment, meant any one seised of the land, or having any title thereto, other than as a tenant for years. Boush was, therefore, liable on this ground; his property might have been distrained; and it is not alleged that he had none liable to distress; or a judgment might have been had against him, upon motion, in the name of the corporation; or if not, then Moseley had a clear remedy against him at law, upon the ground that he had paid money at his request, and upon his promise to re-pay it. This promise was obligatory, whether Boush was bound or not bound, originally, to pay the assessment.

The plaintiff, therefore, having various perfect and unembarrassed remedies at law, having failed in one of them, by the error of the Court of Law, applies to a Court of Equity to correct that error, without alleging any one circumstance upon which to found the jurisdiction of that Court; no fraud, no accident, no mistake, no trust.

If my construction of the Act of Assembly is wrong, and the Act is supposed in this case to have imposed no obligation upon either the tenant for life or reversioner, then a Court of Equity can
396 raise no obligation not imposed *by the Statute; or if both the tenant for life and reversioner were bound, or the reversioner only was bound, the legal remedies prescribed by the Act, by distress and motion, were open to the complainant, and there was no occasion for the assistance of a Court of Equity.

It is said, that Boush, or Boush and his daughter were debtors to Burroughs, who had assigned this debt to the plaintiff; and that a Court of Equity has jurisdiction to entertain the suit of an assignee of a chose in action against the debtor, in all cases, upon the mere ground that the plaintiff cannot sue in his own name, at law. I cannot, for myself, accede to this proposition. If it were so, a very large portion of the proper business of the Courts of Law might be transferred to the Courts of Equity, and the debtor deprived of his right to his trial at law, and by a jury, without his consent or default. To give such a jurisdiction, it ought to appear that the plaintiff is prevented from recovering at law, in the name of the assignor, by collusion between the debtor and assignee; or that, from the nature of the claim, or the circumstances of the case, the assignor himself would have had a right, if he had not assigned, to claim the aid of a Court of Equity.

This question, however, does not arise in this case. Burroughs had no claim upon the owner of the lot. His claim was against the corporation, who had contracted with him; and the owner of the lot was a debtor to the corporation, who might, by their officer, have distrained or obtained a judgment on motion against him.

The decree should be affirmed.

The other Judges concurred, and the decree was affirmed.*

397 *Dandridge, &c. v. Minge.

July, 1826.

Executors—Application of Assets—Payment of Mortgage.—It is the duty of an executor or administrator to apply the assets of the estate, not necessary for the payment of debts, to the exoneration of the real estate of his testator or intestate, which may be under mortgage.

Equitable Conversion—Election by Husband.—A husband cannot rightfully elect that his wife's property should be real or personal, at his pleasure.

Husband and Wife—Rights of Wife—Protection by Court.—When the rights of a wife appear clearly in the record, it is the duty of the Court ex-officio to protect her against any injurious effects arising from the acts or admissions of her husband, whether the point was made in the pleadings or not.

Same—Bill by—Effect.—A bill by husband and wife is the husband's suit only, and the wife is joined for conformity, to be bound only so far as in justice she ought to be bound.

This was an appeal from the Richmond Chancery Court. The case was submitted without argument in this Court; and the following opinion gives a complete history of it.

July 27. JUDGE GREEN delivered the opinion of the Court.†

John Dandridge died early in 1799, intestate, leaving a widow Rebecca, and two infant children John and Lucy. His widow administered on his estate in May, 1799; John Minge her brother being her surety. In 1802, she intermarried with George Cocke. In 1804 or 1805, her letters of administration were revoked, and administration de bonis non of the estate of Dandridge was committed to Minge. In March, 1806, Cocke and wife instituted a suit in Prince George County Court against Minge the administrator de bonis non, and John and Lucy, the infant children of J. Dandridge, for a settlement of Mrs. Cocke's administration account, the assignment of her dower in the land, and her portion of the personal estate. This being a friendly bill, the object of it was immediately effected by a division, assignment of dower, and settlement of accounts, the report of which was not signed by the

*JUDGE COALTER absent.

†**Executors—Application of Assets.**—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

‡**Equitable Conversion.**—See monographic note on "Conversion and Reconversion" appended to Vaughan v. Jones, 23 Gratt. 444.

§**Husband and Wife.**—See monographic note on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

¶**Same—Bill by—Effect.**—It is well settled that every bill by husband and wife, jointly claiming in right of the wife, is the act of the husband, though in right of his wife. She is, however, joined for conformity. Harrison v. Gibson, 23 Gratt. 224, citing principal case as its authority. To the same effect the principal case is cited in Dimmey v. Railroad Co., 27 W. Va. 35.

¶The President and Judge COALTER absent.

398 commissioners *until January, 1807, nor returned to the Court until January, 1810, when it was confirmed. Late in 1812, Lucy, then an infant, intermarried with J. W. Murdaugh, and shortly afterwards, Mrs. Cocke died.

In October, 1813, John Minge served a declaration in ejectment on George Cocke, for the recovery of the land on which John Dandridge had resided, and in which dower had been assigned to his deceased wife, the widow of Dandridge, and in September, 1814, he recovered a judgment in that suit.

The bill in this case was filed by John Dandridge and Murdaugh and wife, as heirs and distributees of J. Dandridge deceased, against Minge, for an injunction to the execution of that judgment. The bill charges, that in 1795 or thereabouts, J. Dandridge purchased about 800 acres of land from Minge, who delivered to him the deeds, and put him in possession of the land, and took his bonds for the purchase money: that in part payment of the purchase, Dandridge assigned to Minge, on the back of one of the bonds, his wife's interest in her father's estate, of which Minge was the executor; and that a large part of the purchase money has been paid in cash, and one of the bonds taken in: that Dandridge died in 1798, leaving a large estate; and Rebecca, his widow, administered on it, and Minge was her surety: that afterwards, Minge administered on the estate of Dandridge, unadministered by the former administratrix: that the estate has been wasted, both by the administratrix and the administrator de bonis non; and that Minge is also indebted to the estate of Dandridge, and that his responsibilities on these various accounts are more than sufficient to discharge the balance of the purchase money of the land unpaid.

The answer of Minge admits the sale of the land to Dandridge, and states that he conveyed the land to Dandridge, and took from him his bonds and a mortgage upon the land, to secure the purchase money; admits that the legacy given to Mrs.

Dandridge by her father, was to be 399 credited *on the first bond, which was done upon a settlement between him and Dandridge, as to the amount of the legacy; and the balance of the first bond was paid to him; admits that after the estate of Dandridge was taken out of the hands of Rebecca Dandridge, then Rebecca Cocke, he qualified as administrator of J. Dandridge, but that he sold no part of the estate at that time, except an old and useless chariot: that the whole of it remained on the land for the support of the children of Mrs. Dandridge, and in possession of Mr. George Cocke, and the said Rebecca; and that since her death, which happened some time past, the real and personal estate of every kind was taken possession of by the complainant J. W. Murdaugh, and was then in his possession, or the possession of those claiming under him, except the cattle, sheep, hogs, and some household furniture, which the defendant sold for the benefit of the estate, rather than see the whole go to ruin and

starve: that he is administrator of D. Minge, the father of himself and Rebecca Dandridge; but, that the plaintiffs have no claim against him on that account, nor is he indebted to Dandridge's estate on any other account; and prays a decree for the sale of the mortgaged premises.

In the progress of the cause, accounts were ordered of J. Minge's administration of the estate of D. Minge, Rebecca Dandridge's administration, and John Minge's administration of J. Dandridge's estate, and between J. Dandridge and J. Minge.

From the reports of the commissioners and other documents in the cause, it appears, that Dandridge purchased the land from Minge, on the 23d of March, 1796, for 2400l. payable in equal instalments of 800l. on the 1st of October in the years 1798, 1800 and 1802; for which Dandridge gave his bonds. On the first bond was a memorandum, that David Minge's legacy to his daughter Rebecca, should be credited on that bond, when ascertained. This appears to have been done, and the balance of that bond paid, in part by J. Dandridge, and in part by his administratrix;

400 "and the bond given up to the latter. The commissioners' reports shew, that a balance was due to the administratrix on her account of the administration of the estate, and a balance of \$32 32, due from Minge, on his account of the administration of Dandridge. The Court decreed a sale of the land, to pay the two remaining bonds for the purchase of the land, and interest, after deducting this balance of \$32 32; from which an appeal was taken. J. Dandridge renounces this appeal, declaring that Murdaugh used his name in taking the appeal, without authority.

From these reports and documents, it appears, that the personal estate of Dandridge, including 19 slaves, was valued at 1700l. 3 4: that there were large debts due to him, collected by his administratrix and administrator de bonis non: that from the death of Dandridge, early in 1799, to the death of his widow in 1813 or 1814, the whole estate real and personal of Dandridge, remained in her hands and in those of Cocke her second husband, without any account rendered, either by her or the administrator de bonis non, who qualified in 1804 or 1805, either for the rents of the land, or the profits of the personal estate, except, that the administrator de bonis non accounts for the hires of the two negroes, from the year 1807 to 1813 inclusive, and for the perishable property sold after her death. The children were not wholly supported out of the profits of the property retained by their mother and second husband; for, there are large charges in the administration account of Minge, for advances made for their maintenance.

It appears, that the debts due to Dandridge were more than sufficient to pay all his debts, except the two last bonds due to Minge, and that the personal property inventoried was more than sufficient to pay those bonds.

It was the duty of the administratrix and administrator de bonis non, to apply these

funds to the payment of those bonds; so as to exonerate the land for the benefit 401 of the infant *heirs. The maintenance of the children, (saying nothing of the support of the widow and her second husband) was no excuse for the failure in this duty. Their interests cannot be so sacrificed by their guardian, or any one dealing with their affairs as guardian. Whilst the whole fruits of the real and personal property were thus enjoyed by the widow and her second husband, without account, the interest on the large debts due to Minge, was allowed to accumulate, so as to swallow up the whole of the real estate; and this, with the concurrence of Minge, after he had administered on Dandridge's estate. There is in the record, an account between John Minge, administrator of Dandridge, and George Cocke, exhibited by Minge, as a voucher for a charge against the estate, for 18l. 11 6, the balance of that account paid by him to Cocke; from which it appears, that after the assignment of dower in the land and slaves to the widow in 1800, in a suit in which Minge was a party, Cocke gives credit to Minge for 4l. 19 1/2, annually for the taxes paid on the land; by which it appears, that Minge, acting for the children, agreed that Cocke should have their lands, only for paying the taxes. The only other credit in that account to Minge as administrator, is, for the hire of Billy, from 1807 to 1812, both years included, at 15l. per annum, which is balanced by an equivalent charge of an equal sum for the board of Lucy Dandridge.

Under these circumstances, the administratrix and her sureties, and the administrator de bonis non, are respectively liable for all the profits of the slaves and other personal property, during the periods of their respective administrations; and the latter, for the value of the slaves and other personal property, to the extent of what may be necessary to satisfy the debts due to Minge, if they be sufficient for that purpose, unless the acts or admissions of the parties, having a right to enforce this responsibility, have precluded them from claiming. This seems to be the case as to

John Dandridge, who has assented 402 to the settlement *of the accounts as made in this cause, and acquiesced in the decree, (but on this point no decision is intended to be made;) and this might be the case as to Murdaugh and wife, if he actually, as is alleged, took possession of the whole property after Mrs. Cocke's death, (an allegation not proved;) and if also Mrs. Murdaugh (he being dead) is bound by his acts or admissions made in the course of this cause.

This, as a general question, is highly important; and in forming an opinion on it, I have had but little assistance from the books to which I have had access. Mrs. Murdaugh, as heir and distributee of her father, was entitled to a part of his real estate, subject to a mortgage, and of his personal estate after the payment of his debts. If the personal estate was delivered over to her husband, she lost her real estate unless he chose to pay the debt; and her husband would hold the personal property

exclusive of the rights of her and her heirs. If the personal estate was duly applied to the payment of the debts, the land would be secured to her and her heirs; and the husband would have had no interest in the subject, except his marital right during the coverture, and the possibility, if he survived her, of being tenant by the curtesy. In this case, could the husband rightfully elect that his wife's property should be real or personal, at his pleasure, with or without the concurrence of the personal representative? I think not. This would be to give the husband virtually, under such circumstances, an absolute right to the wife's real estate. The wife not only has the legal right, but the strongest equity in such a case against the husband, to have the personal property applied to the exoneration of the real; rights, which she could not be deprived of without her privy examination, by any act of her husband, either with or without the concurrence of the personal representative. If Minge consented to Murdaugh's taking possession of the personal property, he practised a fraud in collusion with him, upon the rights of his wife. If Murdaugh took it *without his consent, he was a wrong-doer, and responsible to the administrator.

This point was not insisted on in the pleadings or proceedings in the cause, but it appears palpably in the record; and it was the duty of the Court *ex officio*, when the right of the wife, legal or equitable, against the husband, appeared clearly, to protect her from any injurious effects arising from the acts or admissions of her husband. And although she was a joint plaintiff with her husband, she was not bound by any proceedings or admissions in the cause by her husband, especially affecting her inheritance. A bill by husband and wife, is the husband's suit only, and the wife is joined for conformity, to be bound only so far, as in justice she ought to be bound.

These views are supported by what fell from Lord Hardwicke, in *Pawlett v. Delaval*, 2 Vez. 663. He states, that "a bill filed in the name of husband and wife, claiming in right of the wife, is the bill of the husband." After stating the case of the Court's refusing, upon the bill of a husband and wife, to decree even the personal property of the wife to the husband, unless with her consent, given in Court upon a privy examination, or unless an adequate settlement be made, upon the ground, that in such cases, the wife has, in respect to such property, an equity against the husband, he observes, "But that is" (the refusal to decree the property to the husband) "because all suits or defences in this Court, by husband and wife jointly, when there is no appearance by guardian, for the wife, are considered as suits and defences of the husband, and therefore, will not suffer the money to be paid to the husband, on the prayer of his counsel; because the Court knows those instructions to counsel come from the husband, who has the power of the suit and defence; and therefore, the Court expects

the wife to attend in Court, to give her consent." The Lord Chancellor applied these principles to the case under consideration, under the following circumstances. By a marriage settlement, 404 it was agreed that 23,000l. *should be settled to the separate use of the wife. They had a daughter, and the husband died. There were some transactions between the husband and wife, in his lifetime, from which it was inferred, that she had surrendered this fund to her husband for his own use. The widow married again; and some transactions between her second husband and herself, shewed that the 23,000l. was then considered as a part of the first husband's estate. The daughter claimed this fund as a part of her father's assets. The second husband and wife filed a bill, claiming it as still belonging to the wife, under the original settlement, and to set aside the subsequent transactions, from which her surrender of this fund to her first husband was inferred, as founded in mistake. The Lord Chancellor said, "another consideration very material is, that this is the bill of the husband. It might have been something of a different question, if the bill had been by Lady Isabella herself, or by her prochein amy, claiming her separate property; not that it would turn the question; but every bill by husband and wife, jointly claiming in right of the wife, is the act of the husband, and the claim is by the husband, though in right of his wife, though she joined for conformity. Consider what would be the consequence of giving relief. It is impossible to conceive, supposing Lady Isabella mistaken in what she did, that she meant to give Mr. De'aval, (her second husband,) so large a sum, without mentioning it. Is he, then, to be taken in this Court, not only against Miss Pawlett, (the daughter,) but against her, to have a right to this large sum, under an *et cætera*?" and he decreed for the daughter.

In the case of *Evans v. Cogan*, 2 P. Wms. 451, it is said, that "a feme covert cannot bind herself as to her inheritance by her answer;" and much less can her husband bind her. As to her personal property, the answer of husband and wife, and depositions taken in the cause, bind her after the husband's death, but not as to her inheritance, *Shelberry v. Briggs*, 2 Vern. 249; and when *husband and wife sue, and the husband dies, the wife is not bound by the proceedings in the cause, but may bring a new bill for the same matter. 2 Vern. 197, anonymous. And in the case of *Sperling v. Rochfort*, 8 Ves. 164, the circumstance of the wife joining the husband in a bill for transferring to him a trust fund settled on her, though not for her separate use, is treated as amounting to nothing, and as not affecting her interests.

In this case, the inheritance of Mrs. Murdaugh is affected by these proceedings, erroneous as to her, and she is not bound by them. The decree must therefore be reversed as to her, and the cause remanded to be further proceeded in, according to the foregoing views.

406 *Childers v. Deane and Page.

July, 1826.

Demurrer to Evidence—What It Should Contain.—A demurrer to evidence should contain the evidence on both sides.

Compound Interest—When Allowed.—Compound interest will not be allowed, except under special circumstances. An agreement at the time of the loan, that at the end of the year, interest shall become principal, or after interest has become due, an agreement that it shall bear interest previous to such agreement, will not be permitted, as tending to usury. But, where a settlement of accounts takes place, after interest has become due, and an agreement then is made, that interest due, shall thereafter carry interest; or, the principal and interest are computed in a master's report, and the same confirmed; in these cases, compound interest is lawful.

Usury—What Necessary to Constitute.—To constitute usury, there must be an intention to take more than legal interest.

Same—What Constitutes—Mistake of Scrivener.—The mistake of a scrivener in putting one sum for another, will not charge a party with usury.

Same—Same—Mode of Calculating Interest.—If a mode of calculating interest, which gives to the creditor more than legal interest, is adopted, and the creditor knows it will have that effect, he is guilty of usury, although he may not suspect that he is violating the law.

This was an appeal from the Superior Court of Buckingham.

Deane and Page brought an action of debt against Childers, on a note under seal, for \$279 56, payable on demand. The defendant pleaded payment, and issue was joined. The defendant afterwards pleaded a special plea, setting out the various considerations on which the note was given, the mode of calculating interest, and concluding with an averment, that the transaction was usurious. The plaintiff replied, denying the several allegations of the plea, and issue was joined.

At the trial, the defendant filed a demurrer to evidence, setting forth the note on which the action was founded; three accounts of articles purchased of the plaintiffs by the defendant, and interest charged at different times; and the evidence of John Walke, stating that the reason why the bond was for more than the balance of the account, (the former being for \$279 56,

and the latter amounting only to \$270 11,) was, that interest was added to the amount of the account, from the 30th of June, 1818, to the 8th of February following: that at the time the defendant executed the bond, it was agreed, that if anything was wrong, it should be rectified: that the witness was witness to the bond, and the agent of the plaintiffs: that at the time of taking the bond, nothing was said as to the interest: that it was not the intention of the witness to have included usurious interest, &c. The plaintiffs joined in the demurrer to evidence, the jury rendered a conditional verdict for the plaintiffs, and the Court gave judgment for them.

The defendant appealed.

Johnson, for the appellant.

Attorney General, for the appellees.

July 31. JUDGE CARR.

This is an action of debt on a penal bill. The defendant pleaded payment and a special plea of usury, setting out at length, the several sums on which the usury is alleged to have been taken for forbearance, and the amount of the sums so charged to have been taken. Issue was joined on both pleas, and a jury sworn. At the trial, the defendant rendered a demurrer to the evidence, which was joined by the plaintiff. The jury found a verdict, subject to the judgment of the Court on the demurrer. The Court decided, that the evidence was sufficient in law to maintain the issues joined on the part of the plaintiff, and tendered judgment accordingly. The defendant appealed.

The first objection taken for the appellant, is, that the tender and joining in demurrer, were erroneous, the evidence being all on the side of the demurrant. But, this does not consist with the record; for the demurrer commences by stating, that the plaintiff introduced, to support his action, a bond in these words and figures; and goes on to set out at large the

***Demurrer to Evidence—What It Should Contain.**—

A demurrer to evidence should contain the evidence on both sides. *Adkins v. Fry*, 38 W. Va. 556, 18 S. E. Rep. 740, citing the principal case as so holding. In this case, it was decided that, in a demurrer to evidence, it is not necessary to state on the face of the record that the evidence set forth is all the evidence that was offered, but it is necessary that the whole evidence should be set out.

On the subject of demurrer to evidence, the principal case is also cited in *Merchants, etc., Bank v. Evans & Dorsey*, 9 W. Va. 383.

For further information on this subject, see monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

***Compound Interest—When Allowed.**—It is definitely settled in Virginia and West Virginia, that an agreement to pay interest upon interest is valid if made after the interest which is to bear interest has become due. To this effect, the principal case is cited in *Craig v. McCulloch*, 20 W. Va. 154; *Stansbury v. Stansbury*, 24 W. Va. 638; *Garrett v. Carr*, 1 Rob. 212, 214. But an agreement made at the time of the loan, that at the end of the year interest shall become principal, will not be allowed; not that it is usury and will be under the contract illegal and void; but because the chancery court considers it hard and oppressive, and tending to usury. *Genl. v. Ingersoll*, 11 W. Va. 558, quoting from the principal case. To the same effect, the principal case is cited in *Fultz v. Davis*, 26 Gratt. 911; *Jarrett v. Nickell*, 9 W. Va. 351.

See further, monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541.

***Same—What Constitutes.**—In *Feistler v. Wheeling, etc., Association*, 19 W. Va. 718, it is said: "But it may be said, that intent is of the very es-

sence of usury; and it is certainly true, that all the authorities do hold, that if the lender does not intend to take more on a loan than legal interest, the transaction cannot be held to be usurious. See *Childers v. Deane*, 4 Rand. 406; *Bush v. Buckingham*, 2 Vent. 83; *Gibson v. Stearns*, 3 N. H. 185, 187; *Nevison v. Whitley*, Cro. Car. 501; *Levy v. Gadsby*, 3 Cranch 180; *Heath v. Cook*, 7 Allen 59, 60; *N. Y. Fireman's Insurance Co. v. Sturges*, 2 Cow. 664; *Marvine v. Hymers*, 12 N. Y. 223, 231, 236. Some of the decisions have gone even further and hold, that a transaction cannot be held to be usurious, unless the borrower intended to pay more than the legal rate of interest, even though the lender did intend to take more, and that there can be no usury, where either of the parties is ignorant, that more than legal interest has been received. See *Condit v. Baldwin*, 21 N. Y. 219; *Aldrich v. Reynolds*, 1 Barb. Ch. 43, 44; *Haywood v. Le Baron*, 4 Fla. 404. But on the other hand the authorities all show, that if more than the legal rate of interest was intended by the parties to be received and was in point of fact received, the transaction will be held to be usurious, though neither of the parties intended to violate the statutes against usury. See *Maine Bank v. Butts*, 9 Mass. 55; *Childers v. Deane*, 4 Rand. 406; *Levy v. Gadsby*, 3 Cranch 180."

A miscalculation will never charge a party with usury, but whenever the intention of the party is to take more than legal interest, he is chargeable with usury, although he may never have heard that such was the law, and may not have known that he was violating it. *Grigsby v. Weaver*, 5 Leigh 214, citing principal case to sustain the proposition. To the same effect, the principal case is cited in *Crump v. Trytitle*, 5 Leigh 237.

penal bill, which is the foundation of the action.

408 *After stating the plaintiff's evidence, the demurrer states that of the defendant, consisting of several accounts, and the evidence of a witness. This was proper, as this Court has often decided, that a demurrer to evidence should contain the evidence on both sides. If the plaintiff's counsel had considered the demurrer frivolous, he would have refused to join in it; and the Court, if they had agreed with him in opinion, would not have compelled him to join. In that event, the defendant would have excepted to the opinion of the Court, and brought up the case in that shape. The plaintiff's counsel, however, did not refuse, but joined in demurrer; and, if in this he erred in judgment, it was an error of which his client might have cause to complain, but I cannot see how the adversary could take exception to it. It was placing the cause on the very ground he wished.

It is next contended, that the evidence supports the plea of usury, upon two grounds: 1st, Because, in the annual settlements, interest is added to the principal, and this balance is made an interest-bearing fund from that time forward, thus taking compound interest. 2d, Because, in the calculations of interest, a larger sum, in some instances, is taken, than the interest at 6 per cent. would amount to.

With respect to compound interest, there has been considerable difference of opinion and of practice in the English Chancery. Some of the early cases allowed it; but the general rule, as settled by the latter cases, is, that it shall not be allowed. There are still some special circumstances, under which compound interest is allowed; as where a settlement of accounts takes place, after interest has become due, and an agreement is then made that the interest due shall thereafter carry interest; or the principal and interest are computed in a master's report, and the same confirmed; for, after confirmation, it is considered as a judgment. But, an agreement made at the time of the loan, that at the end of the year interest shall become principal, will

not be allowed; not that it is usury 409 and will *render the contract illegal and void, but because the Chancery considers it hard and oppressive and tending to usury. The agreement that interest become due, shall carry interest, must be prospective only. To give it a retrospective effect; to say that interest due, shall bear interest from a time previous to the agreement; is equally objectionable, as an original agreement that interest when due, shall become principal. Perhaps it is more mischievous; for, at the original agreement, the parties are independent of each other, and free to contract or not. Subsequently, they meet on different and unequal terms, as debtor and creditor, the one probably distressed, and unable to pay; the other, in a situation to take advantage of this distress, and exact oppressive stipulations. It is said by Chancellor Kent, *Vanbenshooten v. Lawson*, 6 Johns. Rep. 319, that the agreement, though made after the interest be due, and to operate pro-

spectively only, must also be in writing; and for this, he refers to the case of *Thornhill v. Evans*, 2 Atk. 330, where he says, Lord Hardwicke directed the master, in taking an account of what was due for principal and interest on the mortgage, to enquire what arrears of interest were, from time to time, agreed in writing, to be turned into principal after such arrears became due, and such arrears to be considered principal from the respective times of such agreement. I have examined the case in *Atkyns*, and I can find not a word (in my edition) either in the case, or the Chancellor's directions, about the agreements being in writing. Perhaps, however, it is not amiss that the general position should be thus modified. The case in *Atkyns* was one of great oppression, and practised by counsel on his client; which was properly considered as rendering it more aggravated. Lord Hardwicke seems to admit there, that if a mortgagor does not pay the interest regularly, the mortgagee may, upon agreement, turn the interest into principal; but then he adds, it must be done fairly, and is generally upon the advance of fresh money, and even

410 then, it is *reckoned a hardship upon a mortgagor, and an act of oppression. In *Chambers v. Goldwin*, 9 Ves. 254, Lord Eldon says, that there is nothing unfair, nor perhaps illegal, in taking a covenant originally, that if interest is not paid at the end of the year, it shall be converted into principal; but this Court will not permit that as tending to usury, though it is not usury. In an earlier case, *Waring v. Cunliff*, 1 Ves. junr. 99, Lord Thurlow had said, "my opinion is in favor of interest upon interest, because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But (he adds) I have found the Court in a constant habit of thinking the contrary; and I must overturn all the proceedings of the Court if I give it." In *ex parte Bevan*, 9 Ves. 203, Lord Eldon remarks, "as to the question of compound interest, it is clear you cannot a priori agree to let a man have money for twelve months, settling the balance at the end of six months; that is, you cannot contract for more than 5 per cent. agreeing to forbear for six months; but if, at the end of six months, you agree to settle accounts (that not being a part of the prior contract) and then stipulate that you will forbear for six months, upon those terms, that is legal." Many other cases might be cited to support the positions I have taken; but I will content myself with referring to *Connecticut v. Jackson*, 1 Johns. Ch. Rep. 13. *Vanbenshooten v. Lawson*, 6 Johns. Ch. Rep. 319, where the Chancellor has collected the cases, and treated the subject with his usual care and ability.

The next objection taken is, that too much interest is taken; as the accounts *A. B. & C.* will shew. I have examined the calculations. Some of them are correct; some incorrect; some take too much, some too little interest. Upon the whole, I am inclined to think there is less interest included, than upon the strictest principles the party was entitled to. To constitute

usury, there must be an intention to take more than legal interest. Wherever
 411 *such intention appears in the taking more than legal interest, it is evidence of the corrupt agreement required by the statute; though the party may never have heard of the law, or may think that he is steering quite clear of it. Ignorance or mistake of the law excuses no man; but a mistake of fact does excuse. A miscalculation innocently committed, or the mistake of a scrivener in putting one sum for another, will never charge a party with usury. The errors in the account seem to be the effect of pure mistake. This is an inference which a jury could hardly fail to draw from an inspection of the account; and which the Court might well draw upon the demurrer, if it were necessary. But it is not; for, the witness who made the calculations and took the bond, swears, that he had no intention of taking usurious interest, and that there was an agreement to correct all mistakes.

I am clear that there is no usury proved, and that the judgment must be affirmed.

JUDGE GREEN.

There are many cases in which the taking of compound interest is lawful, as in the cases mentioned by Judge Carr. But I should incline to think, that the taking it might, under circumstances, be usurious; as, if upon a debt of long standing, for the sake of getting further forbearance, the debtor, instead of giving a new security for the principal and simple interest, incurred upon the debt, were to agree to make annual rests, and to compound the interest for the time already past, and give a new security for the principal and interest so compounded, the whole to carry interest. Such an accumulation of the debt, arising from the compounding of the interest, might be considered as a premium for the further forbearance. The case at bar has no such features. The balance upon the accounts up to May 1, 1816, due to the plaintiffs, was \$102 08 cts. Before striking this balance, no interest was charged.

412 *From that time until the 24th of September, 1817, no payment whatever was made by the defendant. On the 30th of June, 1817, the account is again balanced, and interest charged up to that time, from the 1st of May, 1816, on the balance then due, and upon the cash advances made to the defendant up to that time, from the dates of the advances. In adjusting the accounts up to the 30th of June, 1818, \$13 80 cts. are charged for interest, and no more. This is charged at 5 months interest on the aggregate balance of the 30th of June, 1817, composed of principal and interest. This is clearly a mistake in some way or other; and the plea alleges that this interest, \$13 80, was agreed to be allowed from the 30th of June, 1817, to the 30th of June, 1818. Upon adjusting the account on the strictest principles, in regard to stating interest, the plaintiffs, instead of \$13 80, were entitled to \$17 84, for interest on the principal sum due, between those periods; and the balance due them on the 30th of June, 1818, was \$274 12, instead of \$270 11, as shewn by the accounts; and the interest on so

much of that balance as was principal, up to February 8, 1819, when the bond was given, was \$9 71, instead of \$9 45, as included in the bond. The parties, therefore, have not stipulated for more than legal interest. If a mode of calculating interest, which gives to the creditor more than legal interest, is adopted, and the creditor knows it will have that effect, he is guilty of usury, although he may not suspect that he is violating the law. But no miscalculations, nor mistakes of the scrivener in dates, sums or otherwise, can make the transactions usurious. The bond taken in this case does not secure to the plaintiffs as much interest as they were entitled to; and it is impossible to believe that in taking it, they intended to secure usurious interest. The judgment should be affirmed.

JUDGE CABELL concurred, and the judgment was affirmed.*

413 *Nadenbush and Others v. Lane.

July, 1826.

Bond with Condition—Bail.—It is error to require bail in an action on a bond with a collateral condition.

Judgment by Default—Record—Writ.—In cases of judgments by default for want of appearance, the writ, with the endorsement, is a necessary part of the record.

Appeal from the Superior Court of Berkeley county; where Lane brought an action of debt on a bond against Nadenbush and Harrison. The declaration is in the simple form of a declaration on a bond for the payment of money, without any breaches assigned. An office judgment was obtained for want of appearance, and a writ of enquiry executed; on which the jury found a verdict for the plaintiff. The Court rendered judgment against the defendants and their appearance bail.

The record contains a bond, filed with the declaration, which is an appeal bond. The writ has an endorsement in these words: "Debt on an appeal bond. Bail is required."

The defendants Nadenbush, Harrison, and their appearance bail, obtained a supersedeas.

Johnson, for the appellants, contended: 1. That bail was improperly demanded in this case, it being an action of debt on a bond with collateral condition. For this, he referred to 1 Rev. Code, 499, ch. 128, § 42, 43. Ruffin v. Call, 2 Wash. 181. Henderson v. Hepburn, 2 Call, 238, 239. Metcalfe v. Battaile, Gilm. 191. The judg-

*The PRESIDENT and JUDGE COALTER absent.

Bond with Condition—Action on.—There are two modes of declaring on a bond with a collateral condition, one by declaring upon it as a single bond without noticing the condition, in which case the defendant craves over of the condition and pleads performance, and the plaintiff replies by assigning breaches. The other is to set out the condition in the declaration and assign the breaches in it. Reynolds v. Hurst, 18 W. Va. 650, citing principal case. See further, monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

Judgment by Default—Reversal—Defective Service.—For defective service, a judgment by default at common law is reversible by writ of error, and not by motion, and the writ and return are part of the record. Adkins v. Globe F. Ins. Co., 45 W. Va. 391, 32 S. E. Rep. 197. The principal case is also cited in Bargamin v. Pottiaux, 4 Leigh 422. See further, monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

ment may be set aside for this cause, as is proved by cases before cited.

2. No breaches are assigned in this case, which is erroneous, according to the established principles of law. 1 Rev. Code, ch. 128, § 82. 2 Chitt. Pl. 153. Hardy v. Bern, 5 Term. Rep. 636. Ward & al. v. Fairfax Justices, 4 Munf. 494.

Leigh, for the appellee, contended, that the facts on which the objections were founded, did not appear judicially
414 *to the Court, as the bond was not a part of the record; and for this he cited the case of Craghill v. Page, 2 Hen. & Munf. 446.

July 31. JUDGE GREEN.

It is admitted that there is error in this case, in requiring bail, and entering judgment against him, and failing to suggest breaches of the condition of the bond, if the Court can ascertain from the record, that the bond sued upon was really a bond with a collateral condition. But, it is suggested, that in a case like this, when the declaration states the obligation, without intimating that there was any condition; and when there was a writ of enquiry, the bond, although copied into the record, is not properly a part of it. If this were so, still this would appear to be a suit upon a bond with a collateral condition, from the plaintiff's endorsement on the writ, which is a part of the record. In all cases of a judgment by default for want of appearance, the writ with the endorsement is a necessary part of the record, that it may be seen whether there was a proper foundation for the judgment, both as to the defendant and the bail; and the fact of there having been a writ of enquiry, is a proof that the bond had a condition, and that it was collateral. If it was a single bill, or a bond with a condition to pay money, no writ of enquiry could have been awarded; but final judgment should have been entered for principal and interest by the clerk.

The judgment must, therefore, be reversed; and as the Court below ought to have dismissed the suit, instead of executing the writ of enquiry, this Court, giving such judgment as the Court below ought to have given, should dismiss the suit.

The other Judges concurred, and the suit was dismissed.*

415 *Young v. Scott, &c.

August, 1826.

Equitable Relief—Usurious Contract—Measure of Relief.—In all cases where a party applies to a Court of Equity for relief against an usurious contract,

*The PRESIDENT and JUDGE COALTER absent.

†**Equitable Relief—Usurious Contracts—Measure of Relief.**—This subject has already been so thoroughly discussed in this series of reports that further comment here is unnecessary. It will only be attempted at this place to point out the cases citing the principal case on the subject and refer to the notes already written for further information.

See principal case cited in Fitzhugh v. Gordon, 3 Leigh 626; Spengler v. Snapp, 5 Leigh 499, 501, 508; Turpin v. Povall, 8 Leigh 104, 108; Munford v. McVeigh, 92 Va. 467, 28 S. E. Rep. 857; Greer v. Hale, 95 Va. 534, 28 S. E. Rep. 873; Davis v. Demming, 12 W. Va. 262, 269, 271, 276, 277, 289, 290.

See foot-note to Spengler v. Snapp, 5 Leigh 478; foot-note to Turpin v. Povall, 8 Leigh 98; foot-note to Bell v. Calhoun, 8 Gratt. 22; foot-note to Marks v. Morris, 3 Munf. 407; monographic note on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

whether he alleges in his bill, that he is able to prove the usury without the defendant's confession, or not, he can only be relieved upon payment of principal, without interest, under the third section of our Act of Assembly. Decided by two Judges out of three.

This was an appeal from the Richmond Chancery Court.

Scott had obtained a judgment at law against Young, for 750 dollars, with interest and costs, as endorser of a negotiable note, executed by Dabney. A forth-coming bond was given, and forfeited, and judgment obtained on it. Young then filed a bill in Chancery to injoin this judgment, on the ground of usury.

The bill states, that the complainant became the endorser of Dabney on a note for 750 dollars, payable at the expiration of fifty days, which was delivered to Scott for the consideration of 712 dollars and 50 cents, which Dabney had borrowed of Scott: that this note was renewed several times, and on every renewal usurious interest was charged: that the usurious interest paid by him amounted to 168 dollars and 75 cents, which, deducted from the sum of 712 dollars and 50 cents, the principal money borrowed, would leave the sum of 543 dollars and 75 cents; which is all that the complainant is bound to pay, and which he is ready and willing to pay. He therefore prays, that the judgment for the whole amount, exceeding 543 dollars and 75 cents, may be enjoined. The bill calls upon Scott and Dabney to answer, on oath, all the allegations above set forth; but it does not allege, that the complainant is able to prove the usury by evidence independent of the defendants' answer.

Scott answered, denying that the sum originally borrowed was 712 dollars and 50 cents, but in fact 725 dollars: that on the several renewals of the note, two per cent. per month only was charged, but was never paid by the said Young; but, instead of payment, the said Young gave his promissory notes for the greater part of
416 the usurious interest *charged; and he has only paid 135 dollars, as interest, &c.

An injunction was awarded, on filing the bill, except as to the sum of 543 dollars and 75 cents; and on the coming in of the answer, a motion was made to dissolve; and the Chancellor referred the accounts to a Commissioner.

The Chancellor dissolved the injunction for the sum of 242 dollars and 8 cents, with interest, &c. and made it perpetual for the residue.

Young appealed.

Johnson, for the appellant.

Bacchus, for the appellees.

August 1. JUDGE CARR.

It is a fundamental principle with Courts of Equity, that no man shall be forced to accuse himself; nemo tenetur prodere seipsum. In conformity with this maxim, those Courts have constantly held that a defendant may demur to a bill, calling on him to answer any matter which may subject him to fine, forfeiture, pains or penalties. Where the forfeiture or penalty is entirely in the power of the plaintiff, if in his bill he waives it, the defendant cannot demur, but must answer. The English

Statute of Usury subjected the usurious lender of money, &c. to the loss of the sum lent. This, so far as it relates to principal and legal interest, the Chancellors have considered a penalty. When, therefore, a bill in equity called on the defendant to answer as to an usurious transaction, unless it waived the penalties of the act, and offered to pay the principal with legal interest, the defendant might demur. This practice of the English Courts, our Legislature have taken as the basis of the third section of our Act against usury; changing it only so far, as to subject the lender to the loss of all interest, and the payment of the costs of the Chancery suit.

417 This *statute I have always considered as made merely to place that on the ground of law, which was before practice; not to narrow or widen that practice, nor to make any change, except that the lender shall lose all interest and pay costs. I consider every bill in equity, for relief against usury, a bill under this section; that no man can come into that forum for relief from the principal sum borrowed, as that would be calling on equity to enforce a penalty; nor is he obliged to state in his bill that he has no evidence at all, and depends wholly on the answer; and if the answer deny the usury, he may prove it aliunde, if in his power. But however he may succeed, whether by the confession of the answer or other proof, I think, that in the language of the law, "the lender shall be obliged to accept his principal money without any interest, and pay costs, but shall be discharged from all other penalties of the act."

My opinion, of course, is, that the decree be reversed, and entered according to the principles laid down.

JUDGE GREEN.

A bill was filed by the appellant against the appellee, to be relieved against a judgment at law, founded upon an usurious contract. The bill does not allege either that the plaintiff can or cannot prove the usury, without a discovery from the defendant; but, after stating minutely all the circumstances of the contract, and the subsequent transactions and payments, calls upon the defendant to answer many particular interrogations, affirmative answers to which would completely support the charges in the bill. There is no evidence of the usury, except the admissions of the answer, which are full.

The question is, as to the measure of relief; whether, under the provisions of our statute, the plaintiff is to be relieved, upon the payment of so much of the principal sum as remained after deducting the payments made; or, under the principles of a

Court of Equity, independent of
418 *the statute, upon the payment of the balance of principal and legal interest remaining due after crediting the payments. The Court of Chancery adopted the latter rule, and was probably led to it by the discussions in *Marks v. Morris*; *Stone v. Smith & Ware*, and *M'Pherrin v. King*; the bill not stating that the plaintiff could not prove the usury, but by the oath of the defendant, and not praying specific relief in the terms of the act, so as

to shew that he claimed the aid of the Court by virtue of the statute.

It will not be necessary to give any opinion as to the result to which the Court came in *Marks v. Morris*. Whenever that shall be necessary, it should be considered in a full Court. But, it is necessary to consider one of the propositions asserted in that case: that upon a bill to be relieved against an usurious contract, the Court must apply the rule existing in Courts of Equity before, and independent of, the statute, unless the plaintiff prays relief upon the distinct ground that he has no proof of the usury, independent of the defendant's oath, and shews otherwise, that he claims relief under the statute exclusively.

To understand the object of the third section of our statute, it is necessary to see what were the principles upon which Courts of Equity proceeded in giving relief against usurious contracts, independently of our statute.

A Court of Equity has no jurisdiction to enforce penalties; and it was held that the offence prohibited by the statutes of usury, was the taking of more than legal interest: that to take legal interest was not against the policy of the law: that the forfeiture of the whole of the money lent, and subjecting the usurer to the forfeiture of double the amount lent, in cases where he had received the usurious interest, (a forfeiture recoverable by any common informer,) were penalties provided to enforce this policy of the law: that, consequently, to declare the debt forfeited upon the application of the debtor, who was plaintiff, would be to enforce a penalty: but, to relieve against the usurious excess, would be to promote the policy of the law without

419 *enforcing a penalty, and was warranted by the general principles of equity, which relieve against unconscionable advantages taken of the necessitous circumstances of distressed persons. In all such cases, the Court, upon the maxim, that he who asks must do equity, relieves upon the condition that the plaintiff restore to the defendant what he has received from him. To effect these objects, it was necessary for the plaintiff, in a case of usury, expressly to waive the penalty of a forfeiture of the debt (which was in his power, no other being interested,) and to offer to pay the principal and legal interest.

It is also a rule of a Court of Equity, that a party cannot be compelled to answer any matter, if it might subject him to a penalty. His answer to a bill charging usury in the contract, even if the defendant had not received the usury, would subject him to the penalty of the loss of his whole debt, unless the penalty was waived; and therefore, it must be waived by the plaintiff, to entitle him to the defendant's answer. But, cases might occur, in which the defendant, by his answer, might subject himself to a penalty which the plaintiff could not waive; as, if the defendant had received the usurious interest, in which case he would be liable to a penalty recoverable by any informer. In such case, the defendant could not be compelled

to answer to the charge of usury. But, if the plaintiff waived the penalty which was in his power, and could prove the usury without a discovery from the defendant, upon an issue, he was entitled to relief. This relief, however, was measured by the same rule, whether the plaintiff had or had not the benefit of the defendant's answer, upon the payment of principal and legal interest; and this, because the Court would, in no case, enforce a penalty, and because the party who had asked equity was, as a condition of relief to him, required to do equity. The relief upon this condition, was not a reward to the defendant for making a discovery; the rule that a party should not be compelled to answer, so as to subject himself to a penalty, being applicable

420 *to the mode of proceeding in the cause, for the purpose of ascertaining the truth of the case, and having no influence upon the measure of relief, that being determined by the facts ascertained, no matter how; and upon the principles that a Court of Equity would not enforce a penalty, and that he who asks equity must do it. These principles run through all the cases in the English Courts upon the subject, and are elucidated by the cases of *Bosanquet v. Dashwood*, Cas. Temp. Talbot, 38. *Brownword v. Edwards*, 2 Ves. 243, 249, and *Scott v. Nesbitt*, 14 Ves. 442.

In this state of things, the Virginia Legislature enacted that the borrower might exhibit his bill against the lender, or a discovery relative to the loan, or the re-payment thereof; and "if thereupon it shall appear that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without any interest, and pay costs; but, shall be discharged from all other penalties of this act."

What was the object of this act, and what is its literal meaning? It applies to all cases, whether the money has been paid or not. The relief is to be given, if it shall appear that the contract was usurious, no matter how the fact may be made to appear. The sole object of the statute seems to be, to remove the difficulties before existing, to proceeding in Chancery, by abrogating by force of the statute, in case of an application to equity for relief, the penalty of total forfeiture, whether the plaintiff in express terms waives that penalty or not; and in case of a payment of the usury, to abolish the penalty recoverable by an informer; so, that in all cases, the defendant might be justly compelled to answer, and the cause might come to hearing in Chancery, upon the bill, answers and proofs, instead of driving the party in the latter case to a demurrer to the discovery, and the Court to investigate the charge of usury, by an issue. One other object of the act was, to prescribe as the measure of relief, the payment of the principal only, instead of the principal and interest, as was before practised.

421 *This obvious and literal construction cannot, I think, be controlled by the preamble to the original act of 1734. That preamble is now no part of the existing law. A preamble may be resorted to

for the purpose of aiding the construction of an enacting clause which is equivocal in its terms, but not to control the literal and unequivocal terms of the enactment; and if that preamble were now a part of the law, I should not think it had any effect upon the literal terms of the third section. The difficulty of proving usury, arising from the secrecy with which such contracts are usually made, might be a very sufficient reason for giving a Court of Equity jurisdiction, to give a general relief in all cases where usury appears, no matter in what way.

The consequence of the construction given to the statute in *Marks v. Morris* would be, that if the defendant admitted the usury, he would get back his principal without interest; but, if he denied it, and it was proved, one of these consequences would result; either the defendant would be entitled to his principal and legal interest, according to the principles of a Court of Equity existing before the statute, (in which case, he would receive a premium for falsehood and perjury;) or, the plaintiff would be relieved by the Court's declaring that the whole debt, principal and interest, was forfeited; in which case, the Court would act directly against its most ancient and best settled principles, applicable to all other analogous cases; or the plaintiff would be entitled to no relief whatever; in which case, the primary object of the Legislature, to benefit the borrower by facilitating his remedy in Chancery, and relieving him to a greater extent than he could have been relieved before, would be utterly frustrated in very many instances. I cannot believe that the Legislature intended to produce, by the act in question, any of these consequences; or if they did, that they would leave that object to be attained by doubtful constructions of the terms of the statute.

If they had intended either of these 422 consequences, *they would have expressed that intent in unequivocal terms.

Upon the whole, I conclude that in all cases where a party applies to a Court of Equity for relief against an usurious contract, if he is entitled to relief at all, he must be relieved upon the terms prescribed by the statute; and that this decree must be reversed, and the injunction perpetuated, except as to so much of the principal debt as remains unpaid.

JUDGE CABELL.

The bill in this case contains no allegation of the ability of the complainant to prove usury, otherwise than by the answer of the defendant. On the contrary, it merely alleges that the contract was usurious, and calls upon the defendant directly and expressly, to answer to the usury, and prays to be relieved against the judgment, except as to the principal sum due; which principal, the complainant expresses his readiness to pay. The answer acknowledges the usury.

As the bill seeks a discovery, and asks the precise measure of relief indicated by the third section of our act of Assembly against usury, (1 Rev. Code, 373,) I cannot consider it in any other light than as

a bill exhibited under that section, and I am consequently of opinion, that the Chancellor erred in not conforming his decree to that section.

As the present is a bare Court, as none of the Judges are now present who decided the case of Marks v. Morris, and as it is not at all necessary to the decision of this case, (according to the view that I have taken of it,) that we should discuss any of the principles settled in Marks v. Morris, I studiously forbear to express any opinion in relation thereto.

Decree reversed.*

423 *Easley v. Craddock, &c.†

August, 1836.

Apprenticeship—Liability of Master—Medical Services.

—The master of an apprentice is bound to pay for medical attendance on the apprentice, from the very nature of the relation between master and apprentice; and the father of the apprentice is only bound, when the services have been rendered at his instance.

Instructions.—Reversal.—The instruction of a Court will not be reversed, when it is right in principle, but the reason assigned is erroneous.

An action of assumpsit was brought in the County Court of Halifax, by Craddock and Tuck against Drury Easley, for medical attendance on the son of the defendant. Plea, non assumpsit, and issue. Verdict and judgment for the defendant.

At the trial, the defendant introduced evidence to prove that at the time the said medical assistance was rendered, the said William B. Easley (the son of the defendant,) was living at the house of a certain Samuel Williams, under an indenture of apprenticeship. This indenture (which was also set forth) contains a clause, that the said S. Williams shall "furnish for the said William B. Easley, good and wholesome diet and lodging, and also to clothe him the said Wm. Easley, with good and suitable apparel," "and in all things generally to do and perform whatsoever is just and right towards the said W. Easley, &c." The defendant moved the Court to instruct the jury, that by the said covenant and indenture, the said S. Williams was bound to provide medical assistance to the said W. B. Easley, and that, therefore, this action could not be maintained against the defendant; which instruction the Court gave, and the plaintiffs excepted.

The plaintiffs appealed to the Superior Court, who reversed the judgment of the County Court; and the defendant appealed to this Court.

Johnson, for the appellant, contended for the liability of the master, and relied upon the cases of Seaman v. Castel,

424 *1 Esp. N. P. Cas. 270. Wennell v. Abney, Bos. & Pull. 247. These cases go farther than the case at bar, because they relate to hired servants, and this is the case of an infant apprentice, who has no wages as a reward for his services like the former. He referred also to 4 Comyn's Dig. 857, in the Addenda, and

Rex v. Inhab. of Hales, 1 Stra. 99; in support of this doctrine. Medical assistance is provided for in the covenant under the head of "diet," and the clause to provide "all things necessary, &c."

But, if the County Court erred, the Circuit Court erred also. It was the duty of the Circuit Court to have said in what the County Court were wrong. If the County Court were right in saying that the master was liable for medical assistance afforded to his apprentice, and wrong in saying that the father was not liable, the Circuit Court ought to have discriminated between these two instructions, and not to have reversed the cause in toto, without pointing out the error into which the County Court had fallen.

Leigh, for the appellee, contended that a master is not bound for medical services to an hired servant, as is proved by the cases cited on the other side; and there is no distinction between the cases of apprentices and other servants.

As to the objection that the Circuit Court ought to have discriminated between the good and bad part of the instruction of the County Court, the appellant cannot make that complaint, because he moved for the instruction, and confounded the liability of the master and the non-liability of the father, in one motion. There can be no doubt that the father may be liable, under certain circumstances, as where the services were rendered at his instance. But the County Court have said that the father is not liable under any circumstances. The Court gave both instructions as asked for, and if any part is erroneous, the whole must be reversed.

425 *August 2. JUDGE GREEN delivered the opinion of the Court.‡

This was an action by a physician against the father, for the recovery of a compensation for medical attendance upon an infant son. After the plaintiff gave evidence of his attendance, without any proof, as far as appears, that the attendance was at the instance of the father, the defendant proved that his son was, at the time of the plaintiff's service rendered, an apprentice, and resided at his master's house; and produced the indentures of apprenticeship, by which the master covenanted "to furnish for the said William Easley, (the apprentice,) good and wholesome diet and lodging, and also to clothe him with good and suitable apparel; and furthermore, to use the said William Easley with as much moderation and lenity, as is consistent with the duties required of him, and in all things generally to do and perform whatsoever is just and right towards the said William Easley, so far as his the said Williams's capacity and ability will enable him;" and moved the Court to instruct the jury, that by the said covenant and indenture, the said S. B. Williams, the master, was bound to provide medical assistance to the said William B. Easley, and that therefore this action could not be maintained against the defendant: which instruction was given.

I incline to think that the terms of the

*The PRESIDENT and JUDGE COALTER absent.

†For monographic note on Apprentices, see end of case.

‡See monographic note on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

The principal case is cited with approval in Ballard v. Chewning, 49 W. Va. 506, 39 S. E. Rep. 172.

§The PRESIDENT and JUDGE COALTER absent.

covenant had not the effect attributed to them by the Court; certainly not, unless the duty to provide medical assistance for the apprentice, devolved by law upon the master, by virtue of the relation of master and apprentice; and if so, whether the performance of that duty was secured by the covenant or not, was unimportant in this cause. The duty, whether implied by law or stipulated by the contract, would have the same effect upon the rights of the parties in the suit. If, therefore, it was the duty of the master, resulting
 426 *from the relation of master and apprentice, to provide medical attendance, the instruction of the Court was substantially right, whether that duty was provided for in the covenant or not, so far as it went to affirm the existence of that obligation.

It seems to be settled in England, that the master is not bound to provide medical assistance for a hired servant, unless he stipulates for it in the contract of hiring; although the contrary was held by Lord Kenyon, *Seaman v. Castel*, 1 Esp. Ni. Pri. Cas. 270; *Wennell v. Abney*, 3 Bos. & Pull. 247; and this doctrine appears to be well founded. The wages paid by the master in such case, are the means of providing for the servant whatever he may want, which the master has not stipulated in terms to furnish; and if the servant should, during his service, acquire any thing by his labour for any other, the master would not be entitled to it. The only remedy of the master would be against the servant himself, if he had been injured by the servant's labouring for another, unless that other had seduced the servant from the master's service.

But, the case of an apprentice is different. He receives no compensation from the master, except his maintenance and education; and his whole labour and capacity belong so completely to the master, that any thing which he earns during his apprenticeship is due to the master directly, although the master is not privy or assenting to his earning it. As, if an apprentice runs away and joins a privateer; his share of prize money is due to the master. 3 Vin. Abr. 21, pl. 8. 15 Vin. Abr. 326, pl. 1. *Ib.* 327, pl. 4. *Meriton v. Hornsby*, 1 Ves. 48. *Hill v. Allen*, 1 Ves. 83. As to the maintenance and care of the infant apprentice, the master seems to be placed in loco parentis, and subject to the same obligations as a father. If the apprentice becomes disabled by an incurable disease, the master is still bound to maintain him. 1 Strange, 99. The assumpsit implied in this case, from the mere fact of rendering the medical service, rested upon the
 427 master, and not upon the *father.

But, if the service had been rendered at the instance of the father, and upon his credit, he would have been responsible to the plaintiff, notwithstanding the legal obligation of the master.

The Court was therefore right in instructing the jury, that the master was bound to provide medical assistance for the apprentice; but it did not follow, as they determined, that the action could not be maintained. The instruction should have

been, that it could not be maintained, unless the services were proved to have been rendered at the instance of the defendant. The judgment of the Superior Court, reversing that of the County Court, is therefore right, and to be affirmed.

APPRENTICES.

Who May Bind.—A father may bind his infant child apprentice by indentures to which the child is a party, but indentures of apprenticeship executed by the father, without the child's concurrence, are not only voidable, but void. *Pierce v. Massenburg*, 4 Leigh 498. See *State v. Renff*, 29 W. Va. 751, 2 S. E. Rep. 801.

And overseers of the poor, under a proper order of a county court, may bind out children within their jurisdiction. *Brewer v. Harris*, 5 Gratt. 285.

Proceedings—Requirements of Statute.—A minor can only be bound as an apprentice by his father, or, if none, by his guardian, or, if neither father nor guardian, by his mother with the consent, entered of record, of the county court of the county in which the minor resides; or, without such consent, if the minor being fourteen years of age agree in writing to be so bound, or unless such minor be found begging in such county, or is likely to become chargeable thereto, and, if not so bound, the indentures of the apprenticeship are void. *State v. Renff*, 29 W. Va. 751, 2 S. E. Rep. 801. See Code of Va., § 2581; Code of W. Va., p. 718.

Same—Under Order of Court—Appeal.—And, if infants are bound as apprentices pursuant to an order of the county court, no appeal lies from such order. *Cooper v. Saunders*, 1 Hen. & M. 418. See Code 1887, § 2581.

Same—Same—Certiorari.—But, where, pursuant to an order of the county court, infants are bound apprentices, though there be no appeal from such order, a writ of *certiorari* lies to bring up the record and correct the proceedings. *Cooper v. Saunders*, 1 Hen. & M. 418.

The Contract—Parties—Remedies.—Where the indentures of apprenticeship contain covenants by the master in favor of the mother of the apprentices, and also in favor of the apprentices, but the latter are not parties to it, it is valid, and the remedies will be adapted to the case. *Brewer v. Harris*, 5 Gratt. 285.

Same—Same—Sufficient Execution.—Where the order of court directs a child to be bound out by the overseers of the poor, and only one of the overseers executes the indenture it is sufficient. *Brewer v. Harris*, 5 Gratt. 285.

Same—Binding for Shorter Periods.—And, when the statute directs that apprentices shall be bound out till they are eighteen years of age, a binding out till the age of seventeen is valid. *Brewer v. Harris*, 5 Gratt. 285.

Rights and Liabilities—Medical Attendance.—A master of an apprentice is bound to pay for medical attendance on the apprentice, from the very nature of the relation between master and apprentice; and the father of the apprentice is only bound when the services have been rendered at his instance. *Easley v. Craddock*, 4 Rand. 423.

Same—Enticing Away.—Where a child is apprenticed without its concurrence, the contract being void, a party who entices the child away from its master is not liable in damages. *Pierce v. Massenburg*, 4 Leigh 498.

Actions—Proper Parties.—Covenant will not lie in the name of the apprentice on the indenture of apprenticeship entered into by the overseers of the poor without any previous order of court for bind-

ing out the apprentice. Such indenture is not a statutory deed, and, therefore, covenant can only be maintained on it in the name of the overseers who are parties to it. *Bullock v. Sebrell*, 6 Leigh 560. See *Poindexter v. Wilton*, 8 Munf. 183.

Same—Same.—An action in behalf of an apprentice, upon his indenture of apprenticeship, should not be brought in the name of the overseer of the poor, but in his own name. *Poindexter v. Wilton*, 8 Munf. 183. See *Bullock v. Sebrell*, 6 Leigh 560.

Quere—Removal—Legal Settlement.—If the apprentice is removed out of the county or corporation in which he was bound, can the court thereof direct the overseer of their poor to send for and bind him to another master; and whether an apprentice so moved obtains legal settlement in the county wherein he is moved by remaining there twelve months during his apprenticeship? *Cooper v. Saunders*, 1 Hen. & M. 413.

Hamilton v. Shrewsbury.

August, 1826.

Executions*—Proceedings Thereunder Void—Effect.—If the proceedings under an execution are wholly void, no title passes by the sale to the purchaser, and the defendant may have redress in an action of detinue, and a Court of Equity has no jurisdiction.

Same—Sale Thereunder Void—Misconduct of Sheriff—Equity Jurisdiction.—If the execution is valid so far as to bind the property, but the sale under it is void, on account of the interest or improper conduct of the sheriff, the Court, from which the execution issued, may correct the abuse of its own process, by quashing the execution, &c. and there is no ground for equity to interfere.

Same*—Improper Conduct of Sheriff—Effect on Purchaser without Notice.—A fair purchaser under a sheriff's sale, without knowledge of any improper conduct on the part of the officer, acquires a valid title to the property purchased, and the remedy of the party injured is, by action at law, for damages, against the sheriff. The same remedy applies where a sheriff has improperly refused a forthcoming bond, when he ought to have received it.

Appeal from the Chancery Court of Greenbrier.

Hamilton filed a bill against Reynolds, Waugh, and Donnally, to injoin a judgment obtained by Waugh against him. The bill states, that the complainant, with two

others, being appearance bail for 428 Stuart and Dennison, judgment *was rendered against them, for failing to enter special bail: that an execution having issued against Stuart and Dennison, and no property being found, the deputy sheriff, Reynolds, required the sureties to pay the money: that, accordingly, one of the bail paid his proportion, (one-third) and the complainant paid his proportion by an arrangement between him and the sheriff, which was fully satisfied: that the third person, who was appearance bail, also made an arrangement with the sheriff, by which his proportion was satisfied; so that the execution was completely discharged: that, notwithstanding these transactions, the said Reynolds returned the execution, allowing a credit only for a small part of the amount paid, and levied it on a slave of the complainant who had run-away: that these proceedings took place at the instance of Donnally, to whom, as was alleged, the benefit of the said execution had been transferred; that the complainant understands that it is the intention

of the said Reynolds to proceed to the sale of the said slave, &c. He therefore prays, that the proceedings on the said execution may be stayed, &c.

The injunction was granted.

The complainant afterwards filed an amended bill, stating, that the said Reynolds had sold the slave above mentioned under the execution, and Shrewsbury became the purchaser for \$525, although he was worth more than \$1000; that the slave was not present when sold, the said Reynolds having permitted him to elope; that previous to the day of sale the complainant had offered to execute a forthcoming bond, so as to leave the slave in the possession of the complainant; but the said Reynolds, after having at first consented to receive it, afterwards refused; that the said slave is now in the possession of Shrewsbury, who receives his services worth \$18 per month; that the complainant apprehends that the said Shrewsbury may remove him. He therefore prays, that Shrewsbury may

be made a defendant to the suit. 429 *The answer of Reynolds denies, that any credit ought to be allowed to the complainant, as stated in the bill, and enters into a detail of circumstances to establish his denial; that it was by the complainant's own act, that the credit was not allowed on the execution; that at one period, the execution was acquired by the respondent, but it was afterwards wholly transferred to the said Donnally; that the said Donnally sued out an execution, and placed it in the hands of the respondent, as deputy sheriff, and caused it to be levied on the said slave, who was duly advertised and sold for \$525 cash, and Shrewsbury became the purchaser; that previous to the sale, the brother of the complainant offered himself and another, as sureties in a forthcoming bond; but, the respondent refused to receive them, as being insufficient, which he believes to have been the fact; that he admits, that at the moment of the sale, the said slave was not present, but he had been within an hour or half an hour before; that just before the sale began, the boy absented himself, but without the knowledge nor even suspicion of the respondent, of his so doing or intending to do so; and he came in within a few hours after the sale was over; but, his absence did not occasion the smallest diminution in the price, for which he sold; that he was well known to all present, having been a servant in a tavern at Charleston for many years; that the sum of \$525 was the full value of the said slave, &c.

Depositions were taken, and the cause coming on to be heard, the Chancellor decreed that the bill should be dismissed as to the defendant Shrewsbury, and the cause retained in Court against the other defendants, for accounts, &c. From this decree, the plaintiff appealed, so far as it dismissed his bill as to Shrewsbury.

Leigh, for the appellant.

Johnson, for the appellee.

430 *The counsel for the appellant made three objections to the decree:

1. The sale was void, because the deputy sheriff had no right to sell the property, he being interested in the execution as the

*See monographic note on "Executions" appended to *Paine v. Tutwiler*, 27 Gratt. 440.

assignor of Donnally, and therefore responsible to him, if the execution proved fruitless.

2. The deputy sheriff acted improperly in refusing the security tendered on the forthcoming bond, who was amply sufficient, as the evidence proves. The sale was therefore void, and no title passed to Shrewsbury.

3. The slave was a run-away at the time of the sale. This was irregular. The property must be in the actual possession of the sheriff, and present at the sale. He is bound to keep the property securely. This circumstance rendered the slave much less productive than he would have been, if he had been present, as is proved by the evidence.

August 2. JUDGE CABELL delivered his opinion, in which the other Judges concurred.*

The sheriff of Kanawha county, by virtue of an execution against the goods and chattels of the appellant, sold a slave belonging to the appellant, at public sale, and the appellee became the purchaser thereof. The object of the bill, in this case, is to recover back the slave; and the question is, whether a Court of Equity ought to interfere for that purpose, under the circumstances attending the case.

The sale is objected to on three grounds:

1. That the deputy sheriff was so interested as to be incapable, in point of law, of acting as sheriff on this execution; he having once owned, and having assigned the judgment: 2. That the sheriff refused to receive from the appellant, a forthcoming bond with good security: and 3. That he sold the slave without having him present at the time and place of sale, the said slave having previously run-away.

431 *There is no allegation in the bill, of any fraud or collusion in the appellee, nor of any knowledge by him of any fraud or improper conduct on the part of the sheriff.

If the proceedings under the execution were wholly void, no title passed by the sale to the purchaser, and there was no impediment to an action of detinue in a Court of Law.

If, as was contended by the counsel for the appellant, the levying of the execution was so far valid as to bind the property, but the sale thereof was void on account of the interest or improper conduct of the sheriff who made the sale, still the appellant had complete redress at law. The Court, from which the execution had issued, would, on application, have corrected the abuse of its process, by quashing the execution, setting aside the sale, and restitution of the property might have been enforced at law.

In neither event, therefore, ought a Court of Equity to interfere.

But, I am clearly of opinion, that the title to the property passed by the sale to the appellee. He is a fair purchaser, without imputation of fraud or collusion, and without knowledge of any improper conduct on the part of the officer.

The mere circumstance of the sheriff

having sold the property without its being present at the time and place of sale, is not, of itself, sufficient to vacate the sale. Such sale may, under circumstances, be right and proper. There is no proof of such loss to the appellant, as would justify the Court of Equity to interfere, even if it had jurisdiction. If the sheriff has been guilty of improper conduct in this respect, or in refusing to receive a delivery bond when he ought to have received it, he is responsible for damages in an action at law, to those who may be injured.

This case is very different from that of Carter v. Harris, lately decided in this Court. In that case, the sheriff was the plaintiff in the judgment. He sold the property under the execution, and 432 became himself the purchaser, *after having fraudulently taken measures to prevent others from bidding, or giving a fair price for it. It was his own personal fraud that justified the interference of equity. There is no such ingredient in this case, and the decree ought to be affirmed.

Commonwealth v. Pierce's Administrator.

August, 1826.

Auditor—Power to Issue Warrants.—By the general law prescribing the duties of the Auditor, he is not authorised to issue a warrant for any claim, not arising under some law or resolution of the General Assembly: and, therefore, a claim under the act of January 8, 1814, for the passage of troops over a toll-bridge, who were in the service of the Commonwealth, but not taken into the service of the State by any law or resolution, cannot be sanctioned by the Auditor, but the redress of the claimant and by application to the Legislature.

Militia—Requisition of United States—Liability of Virginia for Expenses.—Expenses of the militia in time of war, under requisition of the United States, are properly payable by them; and if the State of Virginia consents to advance any portion of these expenses, she is under no legal or moral obligation to pay more.

Same—Same—Same.—If the payment of these expenses is left by law to the discretion of the Executive, a party cannot claim, as a matter of legal right, more than the Executive. In their discretion may choose to allow.

Same—Statute.—For What It Provides.—The act of January 8, 1814, only provides for expenses necessary to place the militia under requisition for the service of the United States, at the appointed place of rendezvous.

The administrator de bonis non of Thomas Pierce, deceased, presented to the Executive a demand of his intestate, for the liquidation and payment of a claim against the State, for the passage of certain companies of militia, during the late war, over a toll-bridge belonging to the intestate. The amount demanded was \$317 45 cents, being the sum due at the legal rate of tolls. The Executive referred these accounts to the military accountant, who rejected all but a balance of \$79 52 cents, for which the Governor gave an order to the Auditor of public accounts

433 *to issue a warrant on the Treasurer, and charge it to the United States. The claimant, refusing to accede to the abatement which had been made, demanded of the Auditor a warrant for the whole amount; which was refused, on the ground, that the Auditor had no discretion to depart from the direction of the Executive, and the law not having made any special provision for the payment of such claims.

*The PRESIDENT and JUDGE COALTER, absent.

The claimant appealed to the Superior Court of Henrico, where the decision of the Auditor was reversed, and the whole claim allowed; from which decision, an appeal was taken by the Commonwealth, with an agreement that the facts above stated, in substance, should be considered as a case agreed.

The Attorney General, for the appellant, contended, that neither the Auditor nor the Superior Court, had any jurisdiction to control the decision of the Executive in this case: that the subject of this claim was submitted by the acts of 1814, to the discretion of the Executive, and the military accountant was created only to obey their directions: that this case did not come under the general law authorising appeals from the Auditor. He referred to 1 Phill. Evid. 281, and Moody v. Thurston, 1 Stra. 481, to shew that in a case like the present, the decision of a board, created by statute, is conclusive.

M. Robinson, for the appellee, replied, that the acts of 1814, did not apply to this case: that the bridge was authorised by law, and the tolls then fixed were a contract with Pierce, and the Legislature had no power to alter those terms: that, to contend that the Executive had the power of deciding finally upon this claim, would be to give them judicial power, in opposition to the express provisions of the constitution.

434 *August 5. JUDGE GREEN delivered the opinion of the Court.*

From the case agreed, it appears that in 1813 and 1814, many companies of militia in the service of the Commonwealth passed over a bridge belonging to the intestate of the appellee, which was established, and the rates of toll fixed, by an act of Assembly. The tolls for the passage of these troops, at the legal rate, amounted to \$317 45 cents. The intestate, in 1816, applied to the Executive for the payment of this account. They referred the accounts to the military accountant, and he allowed only \$79 52 cents, as due upon them; for which the Governor gave an order to the Auditor to issue a warrant on the Treasurer, and charge it to the United States. The claimant refused to accept the smaller sum; and in 1825, the appellee, his administrator, claimed of the Auditor a warrant for the whole amount of \$317 45 cents, which he refused to issue. Thereupon, the appellee petitioned the Superior Court of Henrico for an appeal from the decision of the Auditor, which was allowed, and the decision reversed. The Superior Court directed a warrant to issue for the whole amount of the demand.

The propriety of this order depends upon several acts of Assembly, the general act prescribing the duty of the Auditor of Public Accounts, and the acts providing for the payment of certain military expenses and the appointment of a military accountant.

The first of these acts is a general and permanent law, and directs that the Auditor shall audit all accounts, claims and demands whatsoever, against the public,

arising under any law or resolution of the General Assembly, and grant to every public claimant authorised by law to demand the same, a warrant on the Treasurer for the sum due; and when he shall disallow or abate any article of demand
435 *against the Commonwealth, any person thinking himself aggrieved thereby may, by petition, appeal to the Superior Court of Chancery or Superior Court of Law held at Richmond, for redress, and such Court shall proceed to do right therein: and a like petition shall be allowed in all other cases to any other person, who is entitled to demand against the Commonwealth any right in law or equity.

The act of January 8, 1814, provided for a particular occasion. After reciting that it was the duty of the United States to defray all expenses incurred in the defence of the United States, and especially such as were necessary to give effect to the requisitions of militia called out by the President of the United States in the service thereof; but no provision having been made by the United States for certain expenses rendered necessary by the march of certain detachments of militia to Norfolk and elsewhere, it provides, that the Executive be authorised to cause to be paid any expenditures heretofore incurred or hereafter to be incurred, for the support, equipments and transportation of any part of the militia to the place of rendezvous, which in their discretion may be deemed just and necessary, and appropriated \$100,000 to the purposes of the act.

To enable the Executive to carry this act into effect, another act passed on the 1st of February, 1814, authorising the Executive to appoint a military accountant to perform such duties as they might assign to him, in the settlement of military claims and accounts.

The act of January 1814, provided for no other militia expenses than those necessary to place the militia under requisition for the service of the United States, at the appointed place of rendezvous; expenses which were properly payable by the United States, but which they had not provided for, as is expressly stated in the act. The moral obligation to pay those expenses devolved on them, and not on the State of Virginia; and without the provision made by the act of 1814, there would have been no legal or moral claim upon the State

436 of Virginia to pay any "part of those expenses. That this was the class of expenses intended to be provided for by the act, appears not only from the terms of the act, but by the circumstances that no provision was made for supporting or defraying the expenses of the militia after they reached the place of rendezvous, nor was there any law for employing any part of the militia in the service of the State, and paying their expenses. Both the claimant and the Executive understood that the troops, on account of which the charges in question were incurred, were troops in the service of the United States. The accounts were exhibited by the party as accounts against the United States; and

*The PRESIDENT and JUDGE COALTER, absent.

the portion directed to be paid by the Executive, was directed to be charged to the United States. The Legislature, providing for the payment of those expenses which were properly chargeable directly upon the United States, might justly limit the advances to be made, by any rule, according to their discretion. They accordingly limited the payments to be made by the Executive, to such as in their discretion might be deemed just and necessary. A party, claiming under this act, can claim as a matter of legal right, only so much as the Executive in their discretion choose to allow. The grounds upon which they disallowed the greater part of the claims in the case, do not appear; nor is it material that they should, since the subject was committed to their sound discretion. The Auditor had no authority to audit the accounts in question originally. His duty was, to issue his warrant for the sum directed by the Executive to be paid. He had no authority to control the judgment of the Executive in this particular, any more than he has to control the discretion of the Executive, the Courts of Justice, and other tribunals, to whose discretion is confided the making allowances to persons who render services to the public in many other instances, without any limit to that discretion. When there is such a limit fixed by law, it is the duty of the Auditor not to carry into effect any order transcending the legal limitation upon that discretion. In this case there was no such limit.

437 *We are not, however, at liberty to consider this as a case falling under the act of 1814. The case agreed expressly states, that the troops were in the service of the Commonwealth. By what authority they were so, is not stated. There was no law or resolution of the General Assembly, that authorised any militia to be employed in the service of the State, or providing for the payment of the expenses thereby incurred. In such a case, the Auditor could audit no account, nor issue any warrant, for such expenses. His power is to audit accounts and issue warrants to those authorised by law to demand the latter, for demands arising under some law or resolution of the General Assembly. If in a case of emergency, the Executive were to call the militia into service, the expenses incurred thereby could only be provided for by subsequent legislation. The pay and subsistence of the troops, and other expenses incident to their service, could not be adjusted by the Auditor and the Courts of Justice upon the principles of a quantum meruit or quantum valebat.

That part of the general law which authorises an original petition, upon which right is to be done to any person having any demand in law or equity against the Commonwealth, cannot apply to such a case as this. Such demand must be founded upon some existing law. No such demand can exist against the public upon the principles of implied assumpsits, unless it be founded upon some contract authorised by law, made by a public agent, or upon the payment to the Commonwealth, of money which she was not entitled to claim.

If any injustice was done to the complainant by the Executive, in rejecting the larger part of his claim, he can only be relieved by an application to the Legislature. The order must be reversed, and the petition dismissed.

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*Enders, &c. v. Brune.

August, 1826.

Principal and Surety—Substitution—Case at Bar.—Where A. gives his bond for duties on goods imported into the United States, for B. the importer, and B. is not bound in the bond; if A. discharges the bond, it seems that he cannot be placed in the condition of the United States, as to priority, in a claim against A. under the law of Congress.

Same—Same—Same.—But, upon general principles of equity, A. in such case, will be substituted in place of the creditor (the U. S.) and have every preference that the U. S. were entitled to.

Same—Same—Operation of Doctrine.—Equity does not regard form but substance; and therefore it does not require that a surety shall be bound in the same bond with his principal, in order to make the doctrine of substitution operate, but merely that having bound himself for the debt of the principal debtor, he should have paid it.

This was an appeal from the Richmond Chancery Court, where Brune (suing for the benefit of the house of Van Kapf & Brune) filed his bill against Shelton & Co. and Enders and Clarke, their trustees. The bill states, that Shelton & Co. imported in the ship Clara, certain goods and merchandize, from Bremen to Baltimore: that at the particular instance and request of the said Shelton & Co. and under the rule of the Custom House, requiring that the obligors in the duty bonds should reside in Baltimore, the complainant was induced to become bound in bonds for the duties on the goods so imported, to the United States, and procured two other persons to join in the said bonds: that the said bonds were fully paid to the United States by the complainant: that the said Shelton & Co. had assigned over all their effects to Enders and Clarke, for the benefit of certain cred-

***Subrogation—On What Doctrine Founded.**—The doctrine of subrogation cannot be perverted so as to work injustice. It is the creature of equity, and justice is its object. It is founded upon principles of equity and benevolence, and is only to be administered in a clear case, and never to the prejudice of the rights of others. *Miller v. Holland*, 84 Va. 669, 5 S. E. Rep. 701, citing the principal case as authority for the statement.

The doctrine of subrogation is the offspring of natural justice, and is not founded in contract. It is the creature of equity, and is so administered as to attain real essential justice without regard to form. "It has nothing of form, nothing of technicality about it, and he who, in administering it would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth." *Douglass v. Fagg*, 8 Leigh 598; *Hudson v. Dismukes*, 77 Va. 247; *Fidelity Ins. etc., Co. v. S. V. R. Co.*, 86 Va. 17, 9 S. E. Rep. 769; *Sands v. Durham*, 99 Va. 268, 38 S. E. Rep. 148; *Hawker v. Moore*, 40 W. Va. 61, 20 S. E. Rep. 849; *Myers v. Miller*, 45 W. Va. 617; 31 S. E. Rep. 981; *Pace v. Pace*, 85 Va. 793, 30 S. E. Rep. 361.

Again in *McNeill v. Miller*, 29 W. Va. 463, 2 S. E. Rep. 337, it is said: "The doctrine of subrogation is derived from the civil law, and has been adopted by our courts of equity. It is treated as a creature of equity, and administered so as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice

itors specified in the deed of assignment: that at the complainant having paid off the said duty bonds, conceives that he is entitled to be paid out of the effects of Shelton & Co. the amount of the said bonds, in preference to any other creditor, not only on the ground of the law relative to the collection of duties, but upon the general principles of equity. The bill prays that the said Shelton & Co., and Enders and Clarke may be made defendants: that the said trustees may be compelled to exhibit the deed of *trust aforesaid: 439 that they be decreed to pay the demand of the complainant out of the trust subject, &c.

The answer of Enders and Clarke admits the assignment of the co-partnership effects of Shelton & Co. to them as trustees: that they believe that each of the partners of the said firm, has made an assignment of his individual estate to trustees, since the assignment of their partnership funds; and they refer the complainant to their answer in another suit, for a similar demand, for their grounds of defence to the allegations of the plaintiff.

The plaintiff filed an amended bill, making Chamberlayne and Bacchus defendants, as the trustees of Walter Shelton (one of the firm of Shelton & Co.) alleging, that the said Walter had conveyed to them, for the benefit of certain creditors, a considerable property real and personal, other than that conveyed by the first deed: that the said Walter, at the time he executed the said second deed, was entirely insolvent, and had no other estate than that conveyed by the said deed: that the Sheltons have both taken the oath of insolvent debtors. The bill prays also, that the several creditors under the two deeds aforesaid may be made defendants.

Enders and Clarke answered the amended bill, suggesting that the second deed was not made to secure bona fide creditors; and that, therefore, if the plaintiff is entitled to the preference which he claims, his demand ought, in equity, to be paid out of that fund, rather than out of the prop-

erty conveyed to them, which was intended to satisfy real and bona fide debts.

The Chancellor decreed that the defendants Enders and Clarke should pay, out of the trust subject in their hands, the amount claimed by the plaintiff, with interest, &c.

Enders and Clarke appealed.

Scott, for the appellants.

Nicholas, for the appellee.

440 *The Attorney General, for the trustees of Walter Shelton.

The topics of argument are so fully stated in the following opinion, that it is unnecessary to insert them here.

August 7. JUDGE CARR delivered his opinion.

The case made by the bill is briefly this: that Shelton & Co. merchants of Richmond, imported some linens from Bremen to Baltimore; that they requested the plaintiffs to enter into bonds with the collector of the port, for the duties accruing to the United States on these goods; that in compliance with this request, the plaintiff, Brune, executed, with sureties, these bonds to the collector, which the plaintiffs have discharged; that by this payment, the plaintiffs have acquired the right, as well under the laws of Congress, as by the general principles of equity, to be placed in the shoes of the United States, and to enjoy the preference which is secured to them by law, over other creditors; that Shelton & Co. becoming insolvent subsequently, have conveyed all their property to trustees for the benefit of certain creditors. The prayer of the bill is, that the plaintiffs may be substituted to the United States, and that the trustees be decreed to pay first their debt, out of the trust subject.

Shelton & Co. have not answered, and the bill as to them is taken for confessed. The trustees answer, resisting the claim on various grounds.

The points taken by their counsel in the argument, were, 1. That there is no evidence, that Brune & Co. ever executed bonds for the duties: 2. No proof that they have discharged them: 3. That if executed and paid, the transaction does not present the case of principal and surety contemplated by the act of Congress: 4. That it is not a case for substitution: 5. That there is another fund, (the second deed of trust,) to which the plaintiffs ought to resort.

441 *1. In considering the first point, I will not stop to enquire, whether the affidavit of Brune is admissible, but will throw it out of the case, being satisfied that there is abundance of evidence without it. By the letter of Shelton & Co. dated Richmond, September 11, 1818, these defendants say to the plaintiffs, "The linens sent to your address you will please to bond, and ship them by the first vessel bound for this place. We have not as yet received the invoice and bill of lading; calculate on getting it tonight. We shall make the necessary entries at our custom-house, and transmit the same to your address."

It may not be amiss to remark, in passing, that this last sentence seemed to be considered in the argument, as rendering it probable that Shelton & Co. meant to pay the duties at the custom-house in Rich-

to the rights of others. *Clevinger v. Miller*, 27 Gratt. 740; *Enders v. Brune*, 4 Rand. 438; *Lewis v. Palmer*, 28 N. Y. 271; *Sheld. Subr.* §§1-3, and cases cited." The principal case is also cited with approval on the subject of substitution in *Ford v. Thornton*, 8 Leigh 700; *Powell v. White*, 11 Leigh 316, 325, 333; *foot-note* to *Buchanan v. Clark*, 10 Gratt. 164; *Jones v. Phelan*, 20 Gratt. 243; *Johnson v. Young*, 20 W. Va. 661; *Norris v. Woods*, 89 Va. 876, 17 S. E. Rep. 552. See further, on this subject, monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

Same-Sureties.—A principal for whom another, at his request, undertakes as security, although such principal's name does not appear in the obligation given by the surety, is as much bound to indemnify such surety for what he pays on the obligation as if his name appeared in it as principal, and the surety in such case is entitled by subrogation to enforce for his exoneration or indemnity all the rights, remedies and securities of the creditor against the principal debtor. *Harnsberger v. Yancey*, 33 Gratt. 539, saying that *Enders v. Brune* was decided upon this principle. To the same effect, the principal case was cited in *Sherman v. Shaver*, 75 Va. 11.

Same—Estate of Principal.—That the surety has the right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal, would seem to be settled in Virginia. *Robertson v. Trigg*, 32 Gratt. 85, referring especially to the principal case.

mond. But, that could not be done. The duties must be bonded and paid to the collector at the port of entry. Nor does the letter indicate such an idea. Shelton & Co. knew that the invoice, or evidence of it was necessary to the entry of the goods at Baltimore. They supposed that there was but one invoice; and expecting that it would come to them of course as owners of the goods, they meant to take the proper steps at the custom-house here, to enable them to send on the evidence. This is clear from the letter of the plaintiffs in reply to the above. Under date of September 14, 1818, they say, "The twelve bales of linen per Clara, having been shipped to our address, and being also furnished with a duplicate invoice, we have been enabled to enter them at our custom-house; consequently, you need not make any entry to be forwarded here. None of the said linens," (the letter adds,) "have been bonded. As soon as they are, we'll forward them to you, and advise you thereof."

It will be as well here, to dismiss with a passing remark, another point much relied on in the argument, to wit: that the bonds given to the collector could not have been executed under the authority of the
442 letter of Shelton & Co. *because the bonds and the letter both bore date on the 11th of September, 1818. But, it is clear to me, that the bonds, though dated the 11th, were not executed till afterwards. The letter just quoted is dated the 14th, and it states that the bonds were not then given. I understand it thus. By the act of Congress, the master must report his vessel to the proper officer within 24 hours after his arrival; and within 15 days thereafter, the goods must be entered with the collector. It is not required that immediately upon such entry, bonds should be given; but the goods cannot be landed until they are given. They are payable on goods of this description in 8, 10 and 12 months from the date of the entry; and, therefore, though executed after it, they bear equal date with it. Under date of September 24th, 1818, the plaintiffs write to the defendants, Shelton & Co., thus: "Your 12 bales linen per Clara, have been forwarded per schooner Varnat, capt. Banks, which sailed a couple of days since. We gave to capt. Banks the original invoice, certified at our custom-house, and the bill of lading signed by capt. Banks, both under cover to you. Annexed you'll find account of charges of said linens, amounting to \$383 26 cents, for which, if found correct, please give us credit," &c. The account here referred to, contains a particular statement of all the charges, freight, primage, drayage, &c. paid by the plaintiffs for Shelton & Co.; and also, of the three bonds entered into at the custom-house; and the letter states, that for that part of it which the plaintiffs advanced in cash, they had valued on Shelton & Co. in favor of Luke & Sizer. These accounts are received by Shelton & Co. without objection, retained by them, and now produced by the defendants as evidence. The answer which sets them out acknowledges, that the goods had been sent to Richmond. All this evidence, taken to-

gether with the law, (which forbids the landing of the goods until the bonds are given,) proves clearly to me, that the bonds were executed as charged in the bill.

443 *II. Have the plaintiffs discharged these bonds? The answer itself states that the respondents have been informed, and believe, that the plaintiffs did pay some money for duties upon goods imported by Shelton & Co. and refers to the account before mentioned to shew in what character they paid it. The money, thus admitted to be paid, could be no other than the duty bonds. But further and stronger! The plaintiffs produce these bonds, agreeing exactly in date and sum with those in the account. Brune makes a statement that these are the bonds given to the collector; that they have been paid off by his house, and are annexed to the statement; and to this statement the collector of the port sets his certificate, that it is correct, only as to a few groats in the amount; thereby admitting its correctness in every thing else. This, I think, is equal to a receipt in full of the bonds.

III. We come now to the only real question in the case. Have the plaintiffs a right to the priority they claim, 1. Under the laws of the United States: 2. Under the doctrine of substitution?

1. In the 3rd volume of the laws of the United States, (old edition,) p. 423, sec. 5, it is enacted, that where any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, &c. the debt of the United States shall be first paid; and he is declared insolvent by the act, who, not having enough to pay all his debts, shall voluntarily convey all his property away. (It was admitted on all hands, that Shelton & Co. were insolvent, and had made a general conveyance of their property.) 4th vol. L. U. S. (same edition) p. 386, sec. 65. If the principal in any bond given for duties on goods, &c. shall become insolvent, &c. and any surety in the bond &c. shall discharge it, such surety, &c. shall have and enjoy the like advantage, priority or preference, for the recovery of such monies, &c. as are reserved to the United States, and may maintain a suit in his own name, in

444 law or equity, for all *monies paid thereon. Is the case of the plaintiffs within this last act? I incline to think not. The law speaks of principal and surety in the bond. Although these bonds were executed by Brune, for the debt of Shelton & Co. and the plaintiffs, by discharging them, paid their debt; yet Shelton & Co. were not principals and the plaintiffs sureties in the bonds. They could hardly, it would seem, maintain an action on the bonds at law, against Shelton & Co. as principals; and I doubt whether equity could help them. The law was providing for a particular case. If ours be not that case, equity, no more than law, can make it so. Both Courts must construe the statute according to its true meaning; and that meaning is the same, whichever forum has to expound it.

2. Can the plaintiffs claim a preference

to the other creditors of Shelton & Co. on the doctrine of substitution? This doctrine, which was, I believe, borrowed from the civil law, has long been well known to the English Chancery, and constitutes one of the most beautiful features of the system. Pothier, in his *Treatise on Obligations* (the greatest portion of which, Sir William Jones says, is law at Westminster, as well as at Orleans, and which seems to be growing still more into use since his day,) Pothier says, Art. 6, No. 518, "It is to be holden as a principle, that all who are bound for a debt for others or with others, by whom they ought to be discharged, either for the whole or a part, have a right, in paying such debt, to require the cession of the actions of the creditor, against the other debtors who are liable for it." "This obligation of the creditor to cede his actions, is grounded, (he says,) on this rule of equity, that being commanded to love all men, we are bound to grant them every thing, which they have an interest in having, when we may do so without injuring ourselves." He adds, "a debtor in solidum having then a just interest in having the actions of the creditor, against his co-debtors, to make them pay their part of a debt which they owe as well as he, the creditor cannot refuse it. For the same reason he cannot refuse it to a surety, and generally to all those, who, being bound for the debt, have an interest in being discharged, in whole or in part, by those for or with whom they are debtors."

In enforcing these principles, Courts of Equity look not to the form, but to the essence, of the transactions. They consider the doctrine of substitution, not as one founded in contract, but the offspring of natural justice. Nor do they leave it to the creditor to cede his actions; but so soon as a third person, who has become bound with the debtor, pays his debt to the creditor, they substitute him to the creditor, giving him every right, every lien, every security, to which the creditor could resort; and if the creditor should, with bad faith, release any of those securities, it would be a bar pro tanto to his recovery against the surety. (See the cases on this subject, referred to in *Mitchell v. Thompkins*, 2 Rand. 428; *M'Mahon v. Fawcett*, Ib. 514.)

How does this doctrine apply to the case? Shelton & Co. were the importers. The duties on the goods were a debt accruing to the United States, from the time of the actual importation; and the importation was complete, as soon as the goods were brought within any port, with the intention of being unladen or sold there. *U. S. v. Vowell*, 5 Cranch, 368. *The Mary*, 1 Gall. 206; *U. S. v. Arnold*, 1 Gall. 348. *U. S. v. Prince*, 2 Gall. 204. Immediately, therefore, that these goods reached the port of Baltimore, Shelton & Co. owed a debt to the United States, which, independent of any security by bond, they had a right to enforce by action of debt on the principles of the common law. If Shelton & Co. had themselves executed a bond for the duties under the revenue act, it would not have extinguished the original debt

created by the act of importation; much less was that debt extinguished by the execution of such bond for them by the plaintiffs. From the time of the importation the United States has a lien on the goods.

This is collateral to the personal claim "on the importer. The law provides, that the importer, within 15 days after the arrival of the goods, may enter them, pay the duties at once, or give bond with sufficient sureties to secure the payment of them in future; or otherwise, that the goods be deposited in the public stores, as a security for such payment. If the importer gives bond with sureties for the duties, this security takes the place of the goods, and they are released; but in either case, whether the goods remain as a security, or the bond is given in their stead, the original debt remains. The act directing bond to be given, evidently intended to extinguish no debt, but to substitute one security for another; for throughout the act, the bond is called a bond to secure the duties, and not a bond in payment of the duties. For the positions here taken, I refer to the *United States v. Lyman*, 1 Mason, 482, where the whole subject is ably discussed, and many cases cited.

Here then, the plaintiffs, at the request of Shelton & Co. executed bonds to the collector for the payment of the duties on their goods, Shelton & Co. remaining bound to the United States to the full amount of those duties. The United States had their choice, either to sue Shelton & Co. on their original debt, or the plaintiffs on their bond. Shelton & Co. were the principal debtors; by which I mean, those who contracted the debt for their own benefit. The plaintiffs (call them sureties or what you will) were persons bound for the debt of another. The United States, if they had chosen to sue Shelton & Co. would unquestionably have had a preference over every creditor who claims under the deed of trust. But, instead of suing Shelton & Co. they collected their debt of the plaintiffs. Ought not the plaintiffs then, to succeed to the rights of the United States? To be substituted to their lien, their priority?

It is objected that this is not a case for substitution, because Shelton & Co. were not principals, and the plaintiffs sureties in the same bond; and we are told, that all

the cases in the English books are of this kind. I grant that when one man becomes bound for another, he generally takes care to have that other bound along with him; and, therefore, the cases for substitution are generally of this kind. I admit, also, that when a statute gives a particular remedy, (as the law before cited,) to a surety in a bond, for recovery of the debt paid for his principal, we may be bound to follow the strict letter of the law. But, the doctrine of substitution is governed by principles wholly different. It has nothing of form, nothing of technicality about it; and he who, in administering it, would "stick in the letter," forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object. All agree that where A.

is bound in a bond with B. for B.'s debt, the doctrine of substitution holds. Now, I ask, where is the difference in the eye of reason, whether A. is bound for the debt of B. jointly with B. or separately from him? He is still bound for the debt of B. As between him and B. he stands as much in the relation of a surety, as if they were jointly bound. So he does, as between him and the creditor, where the separate bond is taken as collateral security. Suppose A. owed B. a debt by simple contract or bond. C. at the request of A. executes his separate bond to B. as collateral security. After this, the creditor B. gets a mortgage from the debtor A. further to secure this debt. Would not C. upon discharging the debt, be substituted to this mortgage? Again. Suppose that C. when he executed his separate bond to pay the debt of A. to B. had taken a mortgage from A. for his security. I ask, would not the creditor B. have had a right to resort to this mortgage to satisfy his debt? These principles are the every day equity of the Court; and the case before us rests on precisely the same ground. The United States are the creditor; Shelton & Co. the debtors. At the request of these debtors, the plaintiffs execute their bond to the United States. The priority given by the law to the United States, is the mortgage taken by the creditor *of his debtor. The plaintiffs pay off the debt, and ask the Court to give them the benefit of the creditor's lien. Who can object to this? Who is injured by it? Not the United States; for, they have received their debt from the plaintiffs, and justice binds them to give the plaintiffs their vantage ground. Not Shelton & Co., for they have no interest in the matter. Not the creditors of Shelton & Co. under the trust; for, the United States had this priority. These creditors were but subsequent incumbrancers. The elder lien was upon the property; and whether enforced by the United States in their own name, or by the plaintiffs standing in their stead, could make little difference with these creditors.

There are some minor points that I do not notice, not because they have been overlooked, but because they do not seem to have any weight. Thinking the right of the plaintiffs clear, to come in under the first deed of trust, I have not thought it worth while to speak of the second.

I am clear that the decree be affirmed.

Franklin v. Cox.

August, 1836.

Pleading and Practice—Non Est Factum—When Received.—The plea of non est factum is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for.

Same—Same—Affidavit—Allegations of.—The affidavit filed with the plea need not allege that the defendant did not deliver the paper in question, as his deed, after the blank was filled up with the sum without his presence or knowledge.

This was an appeal from the Superior Court of Campbell county.

An action of debt was brought in the County Court of Campbell, by Cox

against Franklin and three others, on *a paper under seal, purporting to be a penal bill, and to be executed by the defendants. The defendants pleaded payment, and issue was joined. At a subsequent term, the defendant Franklin, offered an additional plea, which was a general plea of non est factum. This plea was rejected by the Court, and the defendant excepted.

The bill of exceptions sets out an affidavit which was offered with the plea, stating, that on the 11th day of November, 1823, the defendant subscribed his name and affixed his seal to a paper then in blank, for the purpose of becoming the surety of Campbell Franklin, (one of the obligors) in a bond to the plaintiff for a sum which was not to exceed \$600: that at the time he subscribed his name, no sum of money was expressed, and the bond was to have been filled up in a sum not exceeding \$600; which paper was afterwards filled up with the sum of \$1150, without his knowledge, and not in his presence: that on the morning of the second day of the Court, and before the first cause upon the docket had been called, the defendant offered the said plea, upon the following state of facts verified by affidavit, to wit: that when the office judgment was set aside, the defendant's counsel was directed to put in a plea of non est factum; but he was at that moment engaged, and put in the plea of payment, to prevent the confirmation of the office-judgment, intending afterwards and at the same time to add the plea of non est factum. He, however, forgot to do so; nor did it occur to him that he had nor done it, until the week before the present Court, and the cause never having been called.

The jury found a verdict for the plaintiff on the plea of payment, and the Court gave judgment accordingly.

The defendant appealed to the Superior Court, where the judgment of the County Court was affirmed; and the appellant appealed to this Court.

Stanard, for the appellant.

Johnson, for the appellee.

450 *August 9. JUDGE GREEN delivered his opinion, in which the other Judges concurred.

It does not appear upon the bill of exceptions, upon what ground the County Court refused leave to file the plea of non est factum, which was offered. If it was on the ground that it was offered at too late a period, I think the Court erred. It was a plea to the merits, and the delay in offering it was sufficiently accounted for. If the Court proceeded upon the idea, that the affidavit offered with the plea was insufficient, because it did not allege that he did not deliver the paper in question, as his deed, after the blank was filled up with the sum without his presence or knowledge, I think the Court erred in this point also. The declaration alleges a writing obligatory, perfected on the 23d July, 1817. The affidavit states that the defendant signed and sealed a blank paper on that day, which has been since filled up in his absence, and without his knowledge. If

*Absent the PRESIDENT and JUDGE COALTER.

this had been in the form of a special plea, concluding that it was therefore not his deed, it would have been good, without an averment that he had not delivered it after it was filled up; as, if an infant executes a deed, and confirms it by word or act after he comes of age, it is valid ab initio; yet in pleading his infancy, he is not bound to allege that he did not confirm it after he attained his age. The plaintiff must reply that he did confirm it. So in this case, if the plea had been special, and the defendant had really delivered the bond after it was filled up, the plaintiff should have replied that fact, if such a replication would not have been a departure from his declaration.

There is a manifest mistake in the affidavit, in respect to the date at which the defendant signed and sealed the paper; a mistake of the writer of the affidavit.

Both judgments should be reversed, and the verdict and judgment set aside, and the cause remanded, with directions
451 *to admit the plea of non est factum, upon the mistake in the affidavit, in respect to the date at which the defendant signed and sealed the paper in question, being corrected.

Clark v. Long.*

August, 1886.

Chancery Practice—Who Should Be Parties—Want of Parties—How Advantage Taken.—All persons materially interested in the subject in controversy ought to be made parties in equity; and if they are not, the defect may be taken advantage of, either by demurrer, or by the Court at the hearing.

Same—Bill to Redeem Mortgage—Necessary Parties.—Therefore, the purchaser of an equity of redemption, cannot file a bill to redeem against the mortgagee, without making the mortgagor a party.

Clark filed a bill in the Chancery Court of Lynchburg, against Long and Crews,

*For monographic note on Parties, see end of case.

Chancery Practice—Who Should Be Parties—Want of Parties—How Advantage Taken of.—It is a general rule that all parties interested in the subject matter of the suit must be made parties in equity, and this rule is founded on the reason, that courts of equity aim to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented. *James River & K. Co. v. Littlejohn*, 18 Gratt. 82, citing principal case as authority and in *Pappenheimer v. Roberts*, 24 W. Va. 708, it is said: "It is a general rule in equity that all persons interested in the subject matter, involved in the suit, who are to be affected by the proceedings and result of the suit, should be made parties however numerous they may be, and if they are not made parties, and their interest appears upon the face of the bill, the defect may be taken advantage of either by demurrer or upon the hearing; and if it appears on the face of the record that the proper parties are wanting, the decree will be reversed by the appellate court unless the objection was waived in the court below. *Hill v. Proctor*, 10 W. Va. 59; *Clark v. Long*, 4 Rand. 451; *Sheppard v. Starke*, 3 Munf. 29; *Barton's Ch. Pr. § 84*; *Story's Eq. Pl. § 76*."

To the same effect, the principal case is cited in *Buck v. Pennybacker*, 4 Leigh 11; *James River & K. Co. v. Littlejohn*, 18 Gratt. 84; *foot-note* to *Taylor v. Spindle*, 2 Gratt. 44; *foot-note* to *McDaniel v. Baskerville*, 13 Gratt. 228; *Richardson v. Davis*, 21 Gratt. 704, 709; *foot-note* to *Sexton v. Crockett*, 23 Gratt. 890; *Armistrot v. Gibbons*, 25 Gratt. 576; *Ragland v. Bradnax*, 29 Gratt. 429; *Echols v. Brennan*, 99 Va. 154, 7 S. E. Rep. 786; *Hill v. Proctor*, 10 W. Va. 78; *Sinder v. Brown*, 3 W. Va. 146; *Hinchman v. Ballard*, 7 W. Va. 187; *Boggs v. McCoy*, 15 W. Va. 847; *Burlew v. Quarrier*, 16 W. Va. 143; *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. Rep. 794.

stating, that the complainant, to save himself from heavy losses, from debts due to him from Penn, and from endorsements for the said Penn, took a conveyance of an estate, called the Grove, containing 1000 acres: that the complainant has paid the said Long, as executor of Penn, for the said land, leaving a large unsatisfied balance due to him: that at the time of the conveyance, Long, as executor of Brydie, had a claim for \$2000, according to his own mode of settlement, but, the complainant was assured, by the said Penn, that if the account was fairly settled, not one farthing would be due; and he also remarked, that this claim was, originally, an usurious one, and that some sort of lien had been given on the land; but no further information was given on this point. The complainant expressly charged usury in the transaction between Penn and Brydie: that he has paid the said Long \$1341 33 cents, on account of the said incumbrance, but declined paying more, until he could
452 be *furnished with a statement of the amount actually and bona fide due: that the land has been advertised for sale, under the deed of trust executed to Crews, for the benefit of the said Long, to secure the debt aforesaid: that the said deed was not recorded in proper time, &c. He, therefore, prayed that the sale might be enjoined, &c.

Long denied the usury, and entered into a detail of circumstances, to prove the legality of the contract with Penn, and of the conveyance of the land, to secure the said debt: that it is true that the said deed was not recorded in proper time; but, he submits it to the Court, whether it is not good against the complainant from the time it was recorded: that if he be mistaken in this, then, he conceives that the complainant admits that Penn gave him notice of the trust deed and bond, and he must, therefore, be considered as a purchaser with notice, &c.

The accounts were referred to a Commissioner, a report made, exceptions filed, and evidence taken.

The Chancellor decreed, that the injunction should be dissolved, as to a certain sum, and made perpetual, as to the residue. From this decree, the plaintiff appealed.

Leigh, for the appellant.

Johnson, for the appellee.

August 9. JUDGE CARR.

It is the constant object of Courts of Equity to do complete justice, by deciding and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of Court perfectly safe to all those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested ought to be parties, plaintiffs or defendants, however numerous they may be, that a complete decree may be made between them; *Mitf. Pl.*

144, 145; and though the defect
453 *of parties be a ground of demurrer, yet if the party fails to demur, the Court may take notice of the defect at the hearing. There are many cases where this Court have reversed the decree and sent the cause back for the want of proper parties.

In *Wilcox v. Calloway*, 1 Wash. 38, it is decided that where an attempt is made to subject land in the possession of a purchaser with notice, to an equitable lien, the person under whom such purchaser claims, or his legal representatives, ought to be made parties to the suit. In *Duval v. Bibb*, 4 Hen. & Munf. 113, it is said that the vendee or his legal representatives ought to be parties to a suit in Chancery, brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee. In *Lewis v. Madison*, 1 Munf. 303, it is laid down, that in a suit in Chancery to recover land, against a vendee, on the ground that the vendor had previously agreed to convey the same land, in a certain event, to the plaintiff, the vendor or his legal representatives ought to be made parties. Many more cases might be quoted. In *Shepherd's ex'r v. Starke, &c.* 3 Munf. 29, it is decided that if it appear on the face of the record that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the Court below.

In the case before us, it appears that J. Penn, being indebted to Long, executor of Brydie, executed to trustees a deed of trust conveying his tract of land called the Grove, to secure the payment of the said debt. The bill states, that Penn afterwards sold and conveyed this land, (or the equity of redemption, rather) to the plaintiff, Clark; but even of this, there is no evidence in the record. The deed, said to be executed to Clark, is not filed; nor is there any party before the Court, so authorized to waive the production of that deed, as to bind Penn by the waiver. But, taking it for granted, that the deed actually exists, the plaintiff is the purchaser of an equity of redemption, and files his bill to redeem, impeaching the consideration of the deed of trust, contesting the amount due under it, and calling for a settlement of all these points. Is not Penn interested in these questions? Suppose we were to decide that the contract was not usurious, and that there was a balance of \$2000 due on the deed of trust. Would this decree bind Penn? Suppose he were afterwards to shew, that there was no deed to Clark, or that the deed was naught. Could he not rip up all that we might do in this suit? Could he not try over again the question of usury with Long, and also, the question of the balance really due on the trust? I should think so.

I am, therefore, of opinion, that the decree should be reversed, and the cause sent back for proper parties.

The other Judges concurred, and the decree was reversed, and the cause sent back.*

PARTIES.

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 - (1) Ex Contractu.
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- a. In General.
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Cross References to Monographic Notes.

- Abatement, Pleas In, appended to Warren v. Saunders, 27 Gratt. 269.
- Agencies, appended to Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119.
- Amendments, appended to Snead v. Coleman, 7 Gratt. 300.
- Answers, in Equity Pleading, appended to Tate v. Vance, 27 Gratt. 571.
- Appeal and Error, appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.
- Assignments, appended to Ragsdale v. Hagy, 9 Gratt. 409.
- Assignments for the Benefit of Creditors, appended to French v. Townes, 10 Gratt. 512.
- Attachments, appended to Lancaster v. Wilson, 27 Gratt. 624.
- Bankruptcy and Insolvency, appended to Dillard v. Collins, 26 Gratt. 242.
- Banks and Banking, appended to Bank v. Marshall, 25 Gratt. 378.
- Bills, Notes and Checks, appended to Archer v. Ward, 9 Gratt. 623.
- Bills of Exceptions, appended to Stoneman v. Com., 25 Gratt. 387.
- Bills of Review, appended to Campbell v. Campbell, 22 Gratt. 649.
- Consideration, appended to Jones v. Obenchain, 10 Gratt. 259.
- Continuances, appended to Harman v. Howe, 27 Gratt. 676.
- Contracts, appended to Enders v. Board of Public Works, 1 Gratt. 364.
- Conversion and Reconversion, appended to Vaughan v. Jones, 28 Gratt. 444.
- Covenant, The Action of, appended to Lee v. Cooke, 1 Wash. 306.
- Creditors' Bills, appended to Suckley v. Rotchford, 12 Gratt. 60.
- Death by Wrongful Act, appended to De Ende v. Wilkinson, 2 Pat. & H. 663.
- Debts of Decedents, appended to Shores v. Wares, 1 Rob. 1.
- Debt, The Action of, appended to Davis v. Mead, 13 Gratt. 118.
- Deeds of Trust, appended to Cadwallader v. Mason, Wythe 188.
- Demurrers, appended to Com. v. Jackson, 2 Va. Cas. 501.
- Descent and Distribution, appended to Liggon v. Fuqua, 6 Munf. 281.
- Ejectment, appended to Tapscott v. Cobbs, 11 Gratt. 172.
- Executions, appended to Paine v. Tutwiler, 27 Gratt. 440.
- Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.
- Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 343.

- Husband and Wife, appended to Cleland v. Watson, 10 Gratt. 159.
- Infants, appended to Caperton v. Gregory, 11 Gratt. 505.
- Judgments, appended to Smith v. Charlton, 7 Gratt. 425.
- Jurisdiction, appended to Philppen v. Durham, 8 Gratt. 437.
- Landlord and Tenant, appended to Mason v. Moyers, 2 Rob. 606.
- Marshalling Assets, appended to Carrington v. Dilder, 8 Gratt. 200.
- Multifariousness (in Equity), appended to Sheldon v. Armstead, 7 Gratt. 264.
- Nuisances, appended to Dimmett v. Eskridge, 6 Munf. 308.
- Partnership, appended to Scott v. Trent, 1 Wash. 77.
- Parent and Child, appended to Armstrong v. Stone, 9 Gratt. 102.
- Receivers, appended to Gibson v. Randolph, 2 Munf. 310.
- Revival of Suits and Actions.
- Seduction, appended to Parker v. Elliott, 6 Munf. 587.
- Specific Performance, appended to Hanna v. Wilson, 8 Gratt. 243.
- Stock and Stockholders, appended to Osborne v. Osborne, 24 Gratt. 392.
- Trusts and Trustees, appended to Lee v. Randolph, 2 Hen. & M. 12.
- Wills, appended to Hughes v. Hughes, 2 Munf. 209.

I. SCOPE OF NOTE.

Parties to particular actions will be found fully treated in the specific titles, throughout this work. See the table of cross references *supra* and the monographic notes referred to throughout this article. The treatment in this note includes simply such principles of law as are of general applicability to all classes of parties, together with selected cases illustrating these principles.

II. AT LAW.

A. RULES OF GENERAL APPLICATION.

1. **NECESSITY OF MAKING PARTIES.**—It is a conceded principle accepted everywhere, that no one is bound by the judgment of a court in a case in which he is not a party. Powell v. Gilbert, 1 Va. Dec. 318; Bland v. Wyatt, 1 Hen. & M. 543; Baylor v. Dejarnette, 13 Gratt. 164; Armstrong v. County Court, 15 W. Va. 190.

But where the person has a mere interest in the question arising out of a collateral liability, such interest does not render him a necessary, or proper party. Mitchell v. Chancellor, 14 W. Va. 22; Austin v. Richardson, 1 Gratt. 323.

2. SAME PERSON BOTH PLAINTIFF AND DEFENDANT.

In General.—A person, though acting in different capacities, cannot be both plaintiff and defendant in an action at law, though joined with others. The rule is otherwise in equity, which alone can afford a remedy in such cases. Cann v. Cann, 40 W. Va. 133, 20 S. E. Rep. 910; Sweetland v. Porter, 43 W. Va. 189, 27 S. E. Rep. 352; Swearingen v. Steers, 49 W. Va. 312, 38 S. E. Rep. 510.

Idem Sonans.—The identity of name of a plaintiff and a defendant, in the absence of proof to the contrary, is presumption of identity of person. Sweetland v. Porter, 43 W. Va. 189, 27 S. E. Rep. 352.

B. PLAINTIFFS.

1. RIGHT TO SUE FOR BENEFIT OF ANOTHER.

In General.—Sec. 2, ch. 71 of the Code means, as if written as follows, including the words in parenthesis: "If a covenant or promise be made for the sole benefit of a person with whom it is not made,

or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon, etc." *Johnson v. McClung*, 26 W. Va. 659. And see § 2880. Code of Va.; *Tyler v. Ricamore*, 87 Va. 468, 13 S. E. Rep. 799; *Porter v. Nekervis*, 4 Rand. 859; monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 213.

Should Be Set Out in Declaration.—The party with whom a contract is made may maintain an action at law thereon in his own name, and if the recovery be for the benefit of another, that fact may be set out in the declaration, or endorsed on the writ or the declaration, but the statement or endorsement is unnecessary, and is no part of the record, and the fact that the contract sued on is set forth in the declaration and does not disclose the beneficial interest of the party for whose benefit the action is brought does not show a variance between the declaration and the contract, and is no ground for a demurrer. *Consumers Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. Rep. 879.

It is usual, though not necessary, when an action at common law is brought for the benefit of another, to state the fact in the body of the declaration, or to indorse it on the declaration, or the writ. But such statement is no material part of the pleadings. The beneficial plaintiff is not party on the record, and hence does not come within the provisions of the act of February 29, 1888, extending the time within which certain actions must be brought. *Fadeley v. Williams*, 96 Va. 397, 31 S. E. Rep. 513.

The proposition laid down in *Clarksons v. Doddridge*, 14 Gratt. 42, that, though it is usual to state in the declaration or by endorsement thereon, or on the writ, that the action is brought for the benefit of the parties entitled, yet this is not essential, has been approved in *Hayes v. Va. Mut., etc. Assn.*, 76 Va. 223; *Triplett v. Goff*, 83 Va. 785, 3 S. E. Rep. 536; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 739, 23 S. E. Rep. 586. See also, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

Parol Contracts.—In actions upon parol contracts, the rule is well established, that the party may sue thereon with whom the contract is made, or who is beneficially interested in it. When a promise is made to a person indebted to another, to pay the debt to the creditor, and the latter is a stranger to the contract and to the consideration, the party to whom the promise is made alone has the right of action thereon. A modification of this rule is to be found in a class of cases which hold that where the debtor places money or property in the hands of a third person as a fund from which the creditor is to be paid, the latter may maintain an action against the holder of the fund. In such case a trust is created, and a promise inferred on the part of the holder, from his acceptance of the fund without objection, to pay the creditor. *Ross v. Milne*, 12 Leigh 204; *Jones v. Thomas*, 21 Gratt. 101.

In actions upon sealed instruments different principles apply. When a debt exists from one person to another, and an obligation or bond is given to the debtor to discharge such debt, he alone can maintain an action for the breach of such obligation." *Jones v. Thomas*, 21 Gratt. 101.

2. RIGHT TO SUE IN NAME OF ANOTHER.—It is a general rule, that an action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The legislature alone has power to make an exception to this rule. An exception is made by the Code, ch.

14, § 14, p. 583, which authorizes the assignee of any bond, note or writing not negotiable, to maintain thereupon any action in his own name which the original obligee or payee might have brought. The assignee acquires only an equitable right with a capacity, expressly given him by statute, to assert it at law in his own name. But the legal title still remaining in the obligee or payee, a right of action is incident thereto; and the assignee may, at his election, sue at law in his own name, or in that of the obligee or payee for his benefit. *Garland v. Richeson*, 4 Rand. 266. Another exception seems to be made by the Code, ch. 116, § 2, p. 500. *Clarksons v. Doddridge*, 14 Gratt. 44. See monographic note "Assignments" appended to *Ragsdale v. Hagy*, 6 Gratt. 400.

C. DEFENDANTS.—The defect of a misspelled name of a party defendant is cured by serving process upon the proper party, and by amending the bill by inserting the correct name. *Martin v. Martin*, 95 Va. 28, 37 S. E. Rep. 810.

It is no cause for demurrer, in an action of debt on a negotiable note, that a party defendant is described in the declaration as "H. D. McClintic." If there be any misnomer it should be pleaded in abatement, or the defendant on his own motion and affidavit should have the declaration amended by inserting the proper name. *Handley v. Ludington*, 4 W. Va. 53.

D. JOINDER.

1. OF PARTIES.

a. In General.—"In actions by and against several persons, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. Thus a plaintiff cannot, in a declaration against two defendants, state that one of them assaulted him, and in another part that the other assaulted him, or took his goods, for the trespasses are of several natures, and against several persons, and they cannot plead to this declaration." *McMullin v. Church*, 83 Va. 506; *Langhorne v. Richmond R. Co.*, 91 Va. 376, 23 S. E. Rep. 159.

b. Plaintiffs.

(1) Ex Contracts.

In General.—Two or more parties having distinct causes of action against the same defendant, cannot join in one suit to enforce their rights. To enable plaintiffs to join in one suit, they must have a community of interest; such as to establish a street, or to have obstructions in an existing street removed; or, as taxpayers, to restrain municipal corporations and their officers from transcending their powers in a way injurious to taxpayers. *Roper v. McWhorter*, 77 Ga. 314; *Norfolk & W. R. Co. v. Smoot*, 81 Va. 496.

Executor of Decedent.—Plaintiffs were sureties on a sheriff's bond, and as such took an indemnifying bond from defendants. Pending an action on such bond, certain of the plaintiffs died. *Held*, that such action could proceed in the name of the survivors, without joining therein the executors of the decedents. *Beckham v. Duncan*, 1 Va. Dec. 669.

Representative of Several Infants.—One person being personal representative of several of the children, he is but one plaintiff, and though one of his intestates dies after B. and he is described as the personal representative of each intestate, that is surplusage, and there is no misjoinder of plaintiffs. *Clarkson v. Booth*, 17 Gratt. 490.

(2) Ex Delicto.—Where a tort upon personalty effect both the estate of an agent and that of the reversioner or remainderman, each may sue separately. And, as damages are apportionable, recover the injury done to his estate. *Jordan v. Benwood*, 43 W. Va. 312, 36 S. E. Rep. 266.

c. Defendants.

(1) Ex Contractu.

In General.—If an action at law be brought against two or more persons, it must appear from the declaration that the contract or tort upon which it is brought is a joint contract, or a joint tort. *Langhorne v. Richmond R. Co.*, 91 Va. 376, 22 S. E. Rep. 519.

Action on Joint Bond.—A suit on a joint and several bond must be brought either against all the obligors jointly, or one of them singly, and not against any intermediate member; and if an error in this respect appears on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement. This proposition laid down in *Leftwich v. Berkeley*, 1 Hen. & M. 61, has met with approval in subsequent cases. See *Atwell v. Milton*, 4 Hen. & M. 257; *Moss v. Moss*, 4 Hen. & M. 304, 306; *Newell v. Wood*, 1 Munf. 556. And *Saunders v. Wood*, 1 Munf. 406, is reported in the following words: "This case depending upon the same principles as that of *Leftwich v. Berkeley*, 1 Hen. & M. 61, the judgment against the appellants was reversed by the whole court (consisting of all the judges), for the reasons given in that case." In *Chapman v. Chevis*, 9 Leigh 307, it is said: "It seem that from the case of *Leftwich v. Berkeley*, 1 Hen. & M. 61, and other cases in this court, that though the obligee in a joint and several bond cannot proceed against more than one obligor unless he proceeds against all, yet if one be dead, he may proceed jointly against all the survivors." The principal case was distinguished in *Winslow v. Com.*, 2 Hen. & M. 405, on the ground that in that case the omitted obligor was dead before the suit was brought. The principal case was also cited in *Meredith v. Duval*, 1 Munf. 79.

Surviving Obligors in Bond.—Where a bill seeks a personal decree against two surviving obligors in a bond, it is not necessary to make the personal representative of a deceased obligor a party to the bill, as no personal decree could be had against him. *Hunter v. Robinson*, 5 W. Va. 272.

The surviving obligor in a joint note is alone liable to an action at law on the note. *Chandler v. Hill*, 2 Hen. & M. 124. And see *Harrison v. Field*, 2 Wash. 180; *Richardson v. Johnston*, 2 Call 527; *Powell v. White*, 11 Leigh 809; *Somerville v. Grim*, 17 W. Va. 306. See also, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

In a joint action upon contract, the plaintiff must have judgment against all the defendants before the court, or he can have judgment against none. If one of the defendants, who had suffered judgment by default for want of appearance, could, notwithstanding a verdict against another defendant, allege errors in the proceedings, for arresting or reversing the judgment against him, which would have been cured by a verdict against him, it would have the effect of arresting or reversing the judgment as to the other party also, against whom there was a verdict. *Jenkins v. Hurt*, 2 Eand. 447.

(2) Ex Delicto.

In General.—The general rule is that any number of tortfeasors may be joined in the same action, where all are alleged to have participated in the wrong. They may be sued jointly or severally at the election of the plaintiff; and that is true notwithstanding there may exist a difference in the degree of liability, or the quantum of evidence necessary to establish such liability. *Riverside Cotton Mills v. Lanier (Va.)*, 45 S. E. Rep. 875.

Where the tort complained of, though it may have been participated in by both of the defendants, is treated by the law as the several act of each, and the plaintiff might have sued one only of them; but

he elected to sue them both jointly, and having so elected, he was bound to declare against them jointly in each count in the declaration. *McMullin v. Church*, 82 Va. 506.

Action for Malicious Prosecution.—For a malicious prosecution, two or more persons may be sued jointly in one action, or severally in separate actions. But counts against two or more cannot be joined in the same declaration with counts against each person severally. *McMullin v. Church*, 82 Va. 501.

Corporations.—Where a corporation liable for personal injuries inflicted by its agents, becomes merged into, or consolidated with another corporation, which by authority of law or act of the parties is responsible for such liability, an action at law may be maintained for such injuries against either of said corporations, but not as a joint action against both. They are not jointly liable. One is liable for committing the alleged tort, the other is liable by reason of the consolidation. In a joint action it must appear from the declaration that the contract or tort upon which the action is brought is a joint contract, or a joint tort; otherwise the declaration will be bad on demurrer for misjoined of causes of action and of parties. *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. Rep. 159. See monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 13 Gratt. 767.

2. OF TWO CAUSES OF ACTION.

In General.—The rule with respect to "the joinder of several rights of action, or liabilities," is that: "When the same form of action may be adopted for several distinct injuries, the plaintiff may, in general, proceed for all in one action, though the several rights effected were derived from different titles; but a person cannot, in the same action, join a demand in his own right, and a demand as representative of another, or *in autre droit*; nor demands against a person on his own liability, and on his liability in his representative capacity." And "in actions by and against several persons, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. Thus a plaintiff cannot, in a declaration against two defendants, state that one of them assaulted him, and in another part that the other assaulted him, or took his goods, for the trespasses are of several natures, and against several persons and they cannot plead to this declaration." *McMullin v. Church*, 82 Va. 504; *Clarkson v. Booth*, 17 Gratt. 497.

Consolidation.—When the plaintiff has two causes of action, which may be joined in one action, he ought to bring one action only; and if he commence two actions, he may be compelled to consolidate them, and to pay the costs of the application. "The joinder in action often depends on the form of the action, rather than on the subject matter or cause of action: thus, in an action against a carrier for the loss of goods, if the plaintiff declare *in assumpsit*, he cannot join a count in trover, as he may if he declare against him in case; for the joinder depends on the form of the action." Hence, the result of the authorities is stated to be, that "when the same plea may be pleaded, and the same judgment given on all the counts of the declaration; or whenever the counts are of the same nature, and the same judgment is to be given on them all though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined," and Mr. Chitty adds, "Perhaps the latter, that is, the nature of the causes of action, is the best test or criterion by which to decide as to the joinder of counts." 1 Chitty's Pl. 221, 222; *McMullin v. Church*, 82 Va. 505.

E. MISJOINDER.—By the express terms of the

act of assembly approved February 27, 1894, (Acts 1893-4, p. 489) as amended and re-enacted by act approved February 26, 1896 (Acts 1895-6, ch. 423, p. 453) it is provided that whenever it shall appear in any action at law or suit in equity, heretofore or hereafter instituted, by the pleadings or otherwise, that there has been a misjoinder of parties, plaintiff or defendant, the court may order the action or suit, to abate as to any party improperly joined, and to proceed by or against the others as if such misjoinder had not been made. The word may in a statute of this kind which is in furtherance of justice means the same as shall. *Potter's Dwarries on Statutes*, etc., p. 220. *Lee v. Mutual, etc., Life Ass'n*, 97 Va. 102, 33 S. E. Rep. 556; *Riverside Cotton Mills v. Lanier* (Va.), 45 S. E. Rep. 875.

Where a plaintiff has improperly joined innocent persons as defendants with his action, "in order to promote justice and avoid litigation," he undoubtedly has not only the right, but it is his duty, even without the consent of the defendants, to dismiss his action as to any of the defendants improperly joined in the action. By so doing it will leave the action, as if he had declared only against those defendants, as to whom he has not dismissed his action. *Carlon v. Ruffner*, 13 W. Va. 307.

F. NONJOINER.—Nonjoinder in *assumpsit*, as well as in debt and covenant, can only be taken advantage of by plea in abatement, save when it appears on the face of the declaration. *Prunty v. Mitchell*, 76 Va. 109; *Wilson v. McCormick*, 86 Va. 905, 11 S. E. Rep. 976.

In an action of *assumpsit* against a partnership, if the defendants claim that there was a nonjoinder of proper defendants, such matter can only be raised by plea in abatement and must be filed at rules, § 58, ch. 125 of the Code having no application to such a case. *Rutter v. Sullivan*, 25 W. Va. 427.

III. IN EQUITY.

A. RULES OF GENERAL APPLICATION.

1. PERSONS INTERESTED.—It is a general rule in equity that all persons interested in the subject matter of the bill, and who are involved in and will be affected by the proceedings and result of the suit, should be made parties, however numerous they may be. *Clark v. Long*, 4 Rand. 451; *Call v. Scott*, 4 Call 407; *Key v. Lambert*, 1 Hen. & M. 330; *Mayo v. Murchie*, 3 Munf. 358; *Ross v. Milne*, 12 Leigh 204; *Crawford v. McDaniel*, 1 Rob. 456; *Austin v. Richardson*, 1 Gratt. 325; *Hagan v. Wardens*, 3 Gratt. 315; *Ball v. Johnson*, 8 Gratt. 281; *Osborne v. Taylor*, 12 Gratt. 117; *Baylor v. DeJarnette*, 13 Gratt. 164; *Richardson v. Davis*, 21 Gratt. 710; *Armentrout v. Gibbons*, 25 Gratt. 375; *Dabney v. Preston*, 25 Gratt. 842; *Pairo v. Bethell*, 75 Va. 826; *Walters v. Farmers' Bank*, 76 Va. 12; *Stovall v. Border Grange Bank*, 78 Va. 198; *Major v. Ficklin*, 85 Va. 736, 8 S. E. Rep. 715; *Campbell v. Shipman*, 87 Va. 655, 13 S. E. Rep. 114; *Thornton v. Gaar*, 87 Va. 315, 12 S. E. Rep. 753; *Meek v. Spracher*, 87 Va. 167, 12 S. E. Rep. 397; *Castleman v. Berry*, 86 Va. 606, 10 S. E. Rep. 884; *Gentry v. Gentry*, 87 Va. 480, 12 S. E. Rep. 966; *Davis v. Henry*, 4 W. Va. 580; *Ralphsnyder v. Ralphsnyder*, 5 W. Va. 503; *Hill v. Proctor*, 10 W. Va. 60; *Magers v. Edwards*, 13 W. Va. 822; *Burlew v. Quarrier*, 16 W. Va. 108; *White v. Kennedy*, 23 W. Va. 231; *Norris v. Lemen*, 28 W. Va. 330; *Kellam v. Sayre*, 30 W. Va. 198, 8 S. E. Rep. 559; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 880.

Reason for the Rule.—It is necessity which lies at the foundation of the rule of equity, requiring all persons materially interested in the subject, or who will be directly affected by the decree, to be made parties in the cause. The jurisdiction of the

court could not, otherwise, be fully or safely exercised. And when it has once obtained possession of the subject and the parties, it will, when it conveniently can, without transcending its own principles, render complete justice, and prevent further litigation, by settling the whole controversy. *Austin v. Richardson*, 1 Gratt. 325.

2. NATURE OF INTEREST.

a. In General.—The general rule that all persons materially interested should be made parties, is too familiar to require authority to support it. And in regard to the nature of interest, it is wholly unimportant whether it be a legal or an equitable interest of the absent parties in the subject matter of the suit. *Story's Eq. Pleading* 137. This constitutes one of the leading distinctions between proceedings at law and in equity. A person with a mere equitable or remote interest cannot sue at law, and if he be improperly joined, the suit may fail. The analogies, therefore, derived from legal proceedings do not apply. *Crawford v. McDaniel*, 1 Rob. 456.

b. Persons Materially Interested.—It is also a general rule in equity (subject to certain exceptions) that all persons materially interested either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind all to it. *Jameson v. Deshields*, 3 Gratt. 13; *Crawford v. McDaniel*, 1 Rob. 456; *Armentrout v. Gibbons*, 25 Gratt. 371; *Dabney v. Preston*, 25 Gratt. 838; *Fitzgibbon v. Barry*, 78 Va. 755; *Yost v. Porter*, 80 Va. 859; *Norris v. Bean*, 17 W. Va. 661; *Rexroad v. McQuain*, 24 W. Va. 32; *Benson v. Snyder*, 42 W. Va. 223, 24 S. E. Rep. 880; *Marshall v. Hall*, 43 W. Va. 641, 26 S. E. Rep. 300; *Miller v. Morrison*, 47 W. Va. 664, 35 S. E. Rep. 905; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 380.

"In *Clark v. Long*, 4 Rand. 452, *CARR, J.*, delivering the opinion in which the other judges concurred, says: "It is the constant object of courts of equity to do complete justice by deciding and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to all those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested ought to be parties, plaintiffs or defendants, however numerous they may be, that a complete decree may be made between them." *Richardson v. Davis*, 21 Gratt. 710.

It is also a well-established rule of chancery practice, that a person, to be a party in interest, must be interested in the property involved in the issue. It is not sufficient that he may be interested in the question litigated, or that by the determination of the question litigated, he may be a party in interest to some other suit growing out of the decision of the question litigated. (See *Mayo v. Murchie*, 3 Munf. 401-2.) *Elcan v. Lancasterian School*, 2 Pat. & H. 69.

And where a person has a mere interest in the question involved in a suit in equity, arising out of collateral liability, though the decree may upon that question, be evidence for or against him in some future controversy, such interest does not render him a necessary or a proper party. *Austin v. Richardson*, 1 Gratt. 310.

c. Persons Beneficially Interested.

In General.—It is a well-settled principal, in equity, that the person having a beneficiary interest, is a necessary party, which illustrates "the ordinary doctrine that the real parties in equity shall be brought before the court whenever their interest

may be effected." *Davis v. Henry*, 4 W. Va. 580; *Ralphsnyder v. Ralphsnyder*, 5 W. Va. 503.

Applicable to Trustees.—All persons beneficially interested in the object of that suit, must, as a general rule, be made parties, and this rule applies to suits for the appointment of new trustees. But it is necessary in no case to make those persons parties who are entitled only to future and uncertain and contingent interests. *Fitzgibbon v. Barry*, 78 Va. 765.

The trustee holding the legal title must be made a party in a suit in equity concerning the trust subject; and the *cestui que trust* must generally be also made parties. *Fleming v. Holt*, 12 W. Va. 153.

In *Commonwealth v. Ricks*, 1 Gratt. 416, decided by this court it was held that *cestui que trust*, not being parties, are not bound by the decree." *Richardson v. Davis*, 21 Gratt. 710.

3. NECESSARY PARTIES.

a. In General.—Equity deals with the real parties in interest and if they are not before the court no proper decree can be made. *Castleman v. Berry*, 26 Va. 604, 10 S. E. Rep. 884; *Campbell v. Shipman*, 87 Va. 655, 13 S. E. Rep. 114; *Grove v. Judy*, 24 W. Va. 294; *Kellam v. Sagre*, 30 W. Va. 198, 3 S. E. Rep. 589; *Penn v. Hearon*, 94 Va. 774, 27 S. E. Rep. 599.

The general rule certainly is that none are bound by a judgment or decree except those who were parties or standing in privity with others who were. But there are exceptions to the rule of equal authority with the rule itself. *Baylor v. Dejarnette*, 18 Gratt. 164.

It appearing in the progress of a cause, that a person having such an interest in the subject matter of the suit as to make him a necessary party to the cause, is not before the court, it is error to decree in his favor, without his being first made a party, and ascertaining his rights. *Brown v. Knapp*, 7 W. Va. 678.

b. Distributees.—It is an elementary principle, which requires no citation of authorities to support it, that no valid decree can be pronounced in favor of or against any person who has not appeared or been made either a formal or informal party to the case. And it is equally well settled, that to a suit brought by one or more distributees or general legatees of the estate of a decedent for a settlement of such estate and the recovery by the plaintiff of his distributive share thereof, not only the administrator but also all the distributees or general legatees must be made parties before any decree can be made in such suit. *Woodyard v. Buffington*, 23 W. Va. 196.

c. Heirs.—The personal representative and heirs of a deceased joint grantee of real estate are necessary parties to a bill by a vendor to subject real estate to the payment of the purchase price thereof. *Taylor v. Forbes*, 101 Va. 658.

d. Pendente Lite Purchasers.—At common law it was not necessary to make a *pendente lite* purchaser of lands a party, but the common-law rule is correctly changed by §13, ch. 139, Code 1887 of W. Va., under which it is held that when a party purchases land with notice of an equity in a third party, in a suit by such third party to enforce his equity brought after such purchase, such purchaser is a necessary party if relief by way of a sale of the land is given, unless it appear that he had notice of the suit pending at the time of his purchase, or that notice of his *lis pendens* had been recorded under §13, ch. 139, Code of 1887 before such purchase. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. Rep. 220. And see *Harmon v. Byram*, 11 W. Va. 511; *Zane v. Fink*, 18 W. Va. 693; *Arnold v. Casner*, 22 W. Va. 444; *Lynch v. Andrews*, 25 W. Va. 751, 756. For further discussion of this subject, see monographic note on

"*Lis Pendens*" appended to *Stout v. Vause*, 1 Rob. 169.

4. PROPER BUT NOT INDISPENSABLE PARTIES.

a. In General.—It is a general rule, that all persons interested in the subject matter of the suit must be made parties; and this rule is founded on the reason, that courts of equity aim "to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented." *Story Eq. Pl. § 72*; *Clark v. Long*, 4 Rand. 451; *Jameson v. Deshields*, 3 Gratt. 4. There are exceptions to this general rule which, in the language of JUDGE STORY, "will be found to be governed by the same principle which is, that as the object of the general rule is to accomplish the purposes of justice between all the parties in interest, and it is a rule founded, in some sort, upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be applied so as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights of interests of other persons who are not parties." *Story Eq. Pl. § 77*; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 83; *McClaskey v. O'Brien*, 16 W. Va. 855.

b. Representation.

(1) Statement of Rule.—Where a large number of persons are interested in a common subject it is allowable, according to settled practice, for some to file a bill on behalf of themselves, and the others similarly situated, seeking any relief to which they might all in common be justly entitled, although their individual interest might be separate and distinct. *Bull v. Read*, 13 Gratt. 78; *Blanton v. Southern Fertilizing Co.*, 77 Va. 337; *McClung v. Livesay*, 7 W. Va. 329.

"One of the most frequent exceptions in practice to the general rule is, that the court permits a suit to be brought by one person in behalf of himself and all other persons having a like interest as the plaintiff, when the persons, who answer that description of a like interest with the plaintiff, are very numerous or cannot be easily discovered or ascertained. Thus a creditor may maintain a suit on behalf of himself and all other creditors of a deceased debtor against his proper representatives for an account and application of his assets real as well as personal in payment of their demands." *Norris v. Bean*, 17 W. Va. 602.

(2) Reason for Rule.—In *Reynolds v. Bank of the Valley of Virginia*, 6 Gratt. 180, 181, the law is thus stated by BALDWIN, Judge: "The best general rule, perhaps, to be deduced from the authorities is, that all persons having material interest in the subjects, which are to be affected by the object of the suit, must be made parties to the bill either as plaintiffs or defendants. But there are various classes of cases, to which the application to the rule would be attended with such delay, inconvenience and expense, as would be found intolerable in the administration of justice. Among these are suits brought by creditors against the representative of a deceased debtor, for the account of the assets of his estate and the application thereof to the payment of his debts. In such cases all the creditors have common, and at the same time distinct, interest in the subject and object of the suit; and a strict adherence to the general rule would require them all to be made parties to the bill. To avoid the necessity of this, and yet prevent the unjust and injurious consequences, which might otherwise ensue, a practice has grown up and is well estab-

lished of making those who are not plaintiffs substantial instead of formal parties, by allowing a few or one only of the creditors to sue on behalf of himself and all the rest, and those so represented to come before a master, establish their demands, and participate in the relief." *Norris v. Bean*, 17 W. Va. 602-3.

(3) **Statutory Rule.**—§ 9, c. 137, of the Code, provides that "when, in any suit in equity, the number of parties exceeds thirty, and any one of said parties, jointly interested with others in any question arising therein, shall die, the court may nevertheless proceed, if in its opinion all classes of interest in the case are represented, and the interest of no one will be prejudiced by the trial of the cause, to render a decree in such suit as if such person were alive, decreeing to the heirs at law, distributees or representatives of such person, as the case may require, such interest as such person would have been entitled to had such person been alive at the date of the decree." The circuit court may, at its discretion, act upon this provision of the Code, and this court will seldom interfere with the exercise of such discretion. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. Rep. 561.

(4) **Application of Rule.**—This rule of representation often applies to living persons who are allowed to be made parties by representation for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self interest and affection to make such defense, and it is therefore considered unnecessary to make such living persons parties, and indeed improper to do so, and thus compel them to litigate about an interest which may never vest in them. But the rule also often, and *a fortiori*, applies to persons not in being, and who of course may never be in being, who are allowed to be made parties by representation for reasons not only of convenience and justice, but of necessity also, because it is impossible to make them personally parties. It will be found by an examination of all the cases, that the rule and the reason of it go to this extent, and that necessity is recognized as an all-sufficient reason for it wherever such necessity exists. *Faulkner v. Davis*, 18 Gratt. 680.

Virtual Representation.—For the proposition that, upon the principle of virtual representation, it is in general unnecessary to make parties of persons entitled to a remainder, such as an estate tail, coming after the first estate of inheritance, and yet such parties are bound by the decree. *Baylor v. DeJarnette*, 13 Gratt. 153, is cited and followed in the following cases: *Faulkner v. Davis*, 18 Gratt. 680; *Harrison v. Wallton*, 95 Va. 735, 30 S. E. Rep. 372; *Gray v. Smith*, 76 Fed. Rep. 532, and cases cited; *Hawthorne v. Beckwith*, 89 Va. 790, 17 S. E. Rep. 241; *McArthur v. Allen*, 3 Fed. Rep. 330, and cases cited; 3 Min. Inst. (2d Ed.) 248, where the principal case is cited. See in accord, *Fitzgibbon v. Barry*, 78 Va. 755. In *Williamson v. Jones*, 39 W. Va. 364, 19 S. E. R. 444. The doctrine of virtual representation as laid down is approved, but in that case the doctrine did not apply for the reason that, the parties' interests were vested. *Foot-note* to *Baylor v. DeJarnette*, 13 Gratt. 153.

Where all parties are brought before the court that can be brought before it, and the court acts upon property according to the rights that appear, without fraud, its decision is final and conclusive not only on the parties before the court, but also on those who thereafter come into being. The latter are regarded as parties by representation, and are as effectually bound by decrees as if they had been

in being and made parties in person. *Harrison v. Wallton*, 95 Va. 721, 30 S. E. Rep. 372.

Waiver of Objection by Defendant.—"While it is entirely admitted, that all persons concerned in the demand, made by a bill in equity, ought to be parties plaintiff, with the exception of cases in which they are very numerous and the like; there is no rule or principle which prohibits the defendant, where such parties are really represented, from dispensing with strictness of form, or with objections of a merely legal character in deducing the character of the representative. There may be a difference between the total absence of parties for want of whom the court of equity is disabled from its favorite object of doing complete justice in one suit, and cases in which there is a mere defect in the power of the agent, to which the adverse party desirous perhaps of a speedy decision, is content to abandon his objection." *ROANE, J.*, in *Mayo v. Murchie*, 3 Munf. 399.

c. Division.—While it is the general rule that all persons interested in the division of the same subject ought to be made parties in a suit brought by one or more of them, yet, where the division as to all is not to be made at once and the same time but at several different periods, only those entitled to participate in the division then in question need to be made parties. *Branch v. Booker*, 3 Munf. 48.

d. Agents.

Auctioneers.—It is unquestionably true, that a person who is a mere agent in a transaction ought not to be made a party to a bill, as for instance an auctioneer, who has sold an estate the sale being the matter of controversy. *Tavenner v. Barrett*, 21 W. Va. 673.

Agent for Purchase of Land.—So an agent for the purchase of land is not a proper party to a bill against the principal for a specific performance, although the agent signed the memorandum for the purchase in his own name. See *Jones v. Hart*, 1 Hen. & M. 470; *Tavenner v. Barrett*, 21 W. Va. 673.

Trustees.—"But on the other hand there is a class of persons called generally agents, who are nevertheless properly parties to a suit in equity brought by the principal. The agents to which I refer are trustees. The general rule in such cases is, that trustees as well as the *cestui que trust* are necessary parties in suits in equity. And as a general rule the trustee, who has the legal title must be made a party. The reason for this rule is, that he holds the legal title and should therefore be made a party, though he has no beneficial interest in the subject of controversy; and this rule applies, whenever the legal right to sue for the thing demanded is in a different party from the one claiming the beneficial interest. The one thus holding the legal right to sue is so far as this rule goes in such case regarded as a trustee, who should be made a party. Thus when a bill is filed for the specific performance of a covenant under the hand and seal of one for the benefit of another, the covenantee though he has no beneficial interest, must be a party to a bill brought by the person for whose benefit the covenant was made against the covenantor." *Tavenner v. Barrett*, 21 W. Va. 674.

Agreements Not under Seal.—"But the same rule does not apply to agreements not under seal, where the one party is merely the agent of another, and makes the agreement as such, though in his own name. In such case it is not necessary in suing to enforce such agreements not under seal or to set them aside in equity to bring the agent before the court, for either in law or in equity the principle may in such case interpose and supersede the right of the agent, and claim to have the contract performed to himself, although made in the

name of the agent." *Tavener v. Barrett*, 21 W. Va. 674.

5. RIGHT TO SUE FOR BENEFIT OF ANOTHER.

a. *In General*.—There is no such thing in equity as bringing a suit in the name of one party for the use of another. Equity deals with the real parties in interest. *Auditor v. Johnson*, 1 Hen. & M. 586; *Corbin v. Emmerson*, 10 Leigh 669; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 82; *Omohundro v. Henson*, 26 Gratt. 512; *Palro v. Bethell*, 75 Va. 826; *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671; *Castleman v. Berry*, 86 Va. 604, 10 S. E. Rep. 884; *Tatum v. Ballard*, 94 Va. 370, 26 S. E. Rep. 871; *Penn v. Hearon*, 94 Va. 778, 27 S. E. Rep. 599; *Hurt v. Miller*, 95 Va. 32, 27 S. E. Rep. 881; *Vance v. Evans*, 11 W. Va. 342; *Scott v. Luddington*, 14 W. Va. 398; *McClaskey v. O'Brien*, 16 W. Va. 794; *Zane v. Fink*, 18 W. Va. 604; *Grove v. Judy*, 24 W. Va. 298; *Kellam v. Sayre*, 30 W. Va. 198, 3 S. E. Rep. 589; *Smith v. Cornelius*, 41 W. Va. 50, 33 S. E. Rep. 599. See, treating this subject at length, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

b. *Assignors*.—"JUDGE STORY upon the authority of numerous cases which he cites, lays down the true doctrine as to assignors to be this, that where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignee, and the extent and validity of the assignment are not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the assignor a party." *James River, etc., Co. v. Littlejohn*, 18 Gratt. 82.

When the sole plaintiff voluntarily transfers or assigns his interest in the estate or property, which is in controversy in the suit, after the suit is brought, the suit does not thereby abate, and in most cases it does not thereby become so defective, that it cannot be further proceeded with, unless such transferee or assignee is made a party to the suit, for the reason that such transferee or assignee is a *lis pendens* purchaser from the plaintiff and, as a general rule in such case, is bound by the decision of the suit, in which the estate or property transferred or assigned is in controversy. But perhaps there may be cases, where, if the sole plaintiff voluntarily transfers or assigns his interest in the estate or property, after the suit is brought, the suit will thereby become so defective, that it cannot be proceeded in to final adjudication, until the transferee or assignee is made a party by proper bill. *Zane v. Fink*, 18 W. Va. 604.

6. BILL SHOULD SHOW PROPER PARTIES ARE MADE.

a. *In General*.—A bill in chancery should by proper allegations show on its face, that the proper parties are made to the suit. *McKay v. McKay*, 28 W. Va. 514; *Norris v. Lemen*, 28 W. Va. 336; *White v. Kennedy*, 23 W. Va. 221.

Where it does not appear in the pleadings or otherwise in the case, that a person has an interest in the subject matter of the suit, he is not a necessary party to the suit. *Chapman v. P. & S. R. Co.*, 18 W. Va. 185.

b. Effect of Failure.

(i) *In General*.—If upon a bill in chancery against one defendant, on her filing an answer and stating facts which show that a third party ought to have been made a defendant, the court simply orders this third person to be made a defendant, process issues against him and is served upon him; but the original bill was not amended, and in it there were no allegations against this person, and no relief was prayed against him; evidence is taken to prove the facts alleged in the answer, which show the interest in the suit of this third person and a commissioner of the court reports the facts to the court, after he had served a notice on this third person that the

matter was before him and he would report thereon; this third person never appeared in the suit. The court had no jurisdiction over him, and could in such a case render no decree against him, and if it did so, such decree was a mere nullity, and if such decree was final, it could be reversed on a bill of review or by an appellate court on appeal. *McCoy v. Allen*, 16 W. Va. 724-5.

It is error to decree on a petition filed by permission of the court, making numerous parties, both adults and infants, defendants thereto, on whom neither service of process is had, nor any appearance in any manner by them to such petition shown by the record. *Morgan v. Morgan*, 42 W. Va. 542, 26 S. E. Rep. 294.

(2) *Naming in Summons*.—"If a person is not named in the bill and no allegation with reference to him appears therein, the naming of him in the summons does not make him a party to the suit, although he may have been served with process; and though named in the prayer of the bill and in the summons and served with process, yet if there is no allegation in the bill with reference to him, he is not a party to the suit, because there is nothing in the bill to which he could answer and his rights, if he has any, are not to be adjudicated without giving him an opportunity to defend his interest. *Moseley v. Cocke*, 7 Leigh 224." *Chapman v. P. & S. R. Co.*, 18 W. Va. 196.

(3) *Naming in Prayer of Bill*.—Although a person be named in the prayer of the bill and also in the summons and served with process, yet if there is no allegation in the bill with reference to him, he is not a party to the suit, because there is nothing in the bill, to which he could answer, and his rights, if he has any, are not to be adjudicated without giving him an opportunity to defend his interest. *Chapman v. P. & S. R. Co.*, 18 W. Va. 185.

(4) *Answer by Third Party*.—The mere fact that persons answered a bill in which they were not named, and in which they did not, even by inference, from anything stated in the bill, appear to have any interest or concern, though such answer was by leave of the court, did not make them parties to the cause; and they would not be bound by the decree of the court against them; nor would they be entitled to the benefit of a final decree of the court substantially in their favor; nor could they be either prejudiced or benefited by depositions taken in the cause. *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. Rep. 278.

7. *EFFECT OF BEING MADE A PARTY*.—When a person is made a party to a suit as to his rights involved therein, he must await the action of the court, and cannot, by independent proceedings outside of the suit, defeat such action. *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. Rep. 285.

B. COMPLAINANTS.

1. *IN GENERAL*.—It is very often regarded by a court of equity, though never by a court of law, that it is immaterial whether a particular party in certain cases is made a plaintiff or defendant. *Fleming v. Holt*, 12 W. Va. 153.

A bill in equity may in frame, as to parties, follow the chancery practice used before the enactment of § 37, c. 125, Code, or the form prescribed by that section, but it must do one or the other. If the statutory form be used, persons named in the caption as plaintiff and defendant are such merely from being there named as such; but, if the statutory form be not used, the bill must formally, or in some plain, distinct way make parties plaintiff and defendant; otherwise, it is fatally defective and a decree upon it would be null. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. Rep. 468.

2. INTEREST.

General Rule.—"It is a general rule in equity that every party interested in any suit must be made a party to the suit either as plaintiff or defendant, and the real party in interest must be the complainant; and it is immaterial that the interests of the defendants are in conflict with each other, or that some of their claims are identical with those of the plaintiff. Equity deals with the real parties in interest. *Castleman v. Berry*, 86 Va. 606, 10 S. E. Rep. 884; *Kellam v. Sayre*, 30 W. Va. 198, 3 S. E. Rep. 569." *Campbell v. Shipman*, 87 Va. 659, 13 S. E. Rep. 114; *Stovall v. Border Grange Bank*, 78 Va. 188; *Jameson v. Deshields*, 3 Gratt. 13; *Meek v. Spracher*, 87 Va. 167, 12 S. E. Rep. 397.

Interest of Complainants Must Be Consistent.—In equity it is only requisite that the interest of the plaintiffs be consistent, and it is immaterial that the defendants are in conflict with each other in that some of their claims are identical with those of the plaintiff, etc. *Meek v. Spracher*, 87 Va. 167-8, 12 S. E. Rep. 397.

Necessary Averments in Bill.—A plaintiff cannot obtain relief in equity, unless he both avers in his bill, and, if the averment is denied, also proves, that he has an interest in the subject-matter of the suit, and a proper title to institute the suit. If his want of interest or right to sue appears upon the face of his bill, it ought to be taken advantage of by demurrer; but if it does not so appear, then the defendant may show such want of interest or title by plea or answer. *Barr v. Clayton*, 29 W. Va. 256, 11 S. E. Rep. 899.

In *Sillings v. Bumgardner*, 9 Gratt. 278, this court held, that, although a suit could not be maintained by a plaintiff having no interest, and in such case the objection could not be removed by the introduction of other parties having interests, yet, if it appears that the plaintiff has an interest, though in a different character from that in which he sues, the descriptive words may be stricken out, and the suit may proceed in his name, and that of his co-plaintiffs brought before the court by an amended bill. *Coffman v. Sangston*, 21 Gratt. 269.

Assignee.—The mere possession of a writing by which a debt is acknowledged, without any written agreement from the person to whom that acknowledgment was made, is not sufficient to sustain a bill in equity. In such case, the person to whom the debt was originally due, must be made a party to the suit. *Lynchburg Iron Co. v. Tayloe*, 79 Va. 674, citing *Auditor v. Johnson*, 1 Hen. & M. 536.

3. TAXPAYERS.—Citizens and taxpayers merely as such, having no special property or interest to be affected, save in common with other citizens and taxpayers, cannot become parties to a proceeding by a court to alter the location of the rebuilding a county bridge and cannot sustain an appeal to review such proceeding under § 47, c. 39, Code 1867. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. Rep. 488.

4. MARRIED WOMEN.—By Code, ch. 66, § 12, a married woman may sue and be sued in equity, without joining her husband in the suit where the case concerns her separate property. *Rader v. Neal*, 18 W. Va. 373. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

5. ATTORNEY IN FACT.—A suit cannot be maintained in the name of an attorney in fact, even in a court of equity. *Jones v. Hart*, 1 Hen. & M. 470. See monographic note on "Attorney and Client" appended to *Johnson v. Gibbons*, 27 Gratt. 632.

C. DEFENDANTS.

1. IN GENERAL.—One of the essential qualifications necessary to a bill in chancery is that it should,

either in the caption or in the body of the bill, name some person or persons as parties defendant, and describe them as having some interest in the subject matter of the suit, and pray for some relief against them; and these requisites are as essential to a bill of review as to an original bill, and without them a paper purporting to be a bill of review should be dismissed on demurrer, from the files on motion. *Kanawha Valley Bank v. Wilson*, 35 W. Va. 36, 13 S. E. Rep. 58.

2. PERSONS NOT NAMED IN BILL.—No person has a right to file an answer in any suit in which he is not a party. And, although the subpoena and conditional decree be both served upon him, if he is not named in the bill and if there is no allegation in it, which bears upon or in any manner refers to him and if no decree is prayed against him, either in terms, or in the usual language praying a decree, "against all persons unknown, and who may be hereafter discovered claiming under or combining with the defendants," but it is a distinct charge against other persons, and it prays distinctly a decree against them for certain property, he is not, in any fair sense of the term, made a party defendant. *Moseley v. Cocke*, 7 Leigh 234; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 880.

Where a bill in equity neither makes one a party nor contains matter touching him, and asks no relief as to him, any decree touching him is void, and not *res judicata*. *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. Rep. 215.

3. INTEREST.

In General.—"It may be remarked that the defendants to a bill in equity should consist of all persons interested in the relief sought, who are not already joined as plaintiffs." *Meek v. Spracher*, 87 Va. 167, 12 S. E. Rep. 397.

"No one should be made a defendant against whom there can be no decree or relief granted in the suit. *Barton Ch. Pr.* 133, 138. But all persons materially interested in the subject of a controversy ought to be made parties in equity. *Hill v. Proctor*, 10 W. Va. 60; *Sand. Eq.* 191. This rule, however, is restricted to those who are interested in the property which is involved in issue, and does not extend to persons who have an interest in the point or question litigated. *Sand. Eq.* 191." *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. Rep. 66. And see Code of W. Va., ch. 139, § 7; *Neely v. Jones*, 16 W. Va. 625.

Persons Interested in Resisting Relief Asked for.—Persons are not improper defendants who are so connected with the case made as to be directly interested in obtaining or resisting the specific relief asked in the bill or given in the decree, such as claimants, by written executory contract, of part of the personal property mentioned in the deed of trust in controversy. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. Rep. 611.

A party who is charged in the bill with participation in the forgery of a deed to land, and of taking and certifying a false and fraudulent certificate, as a notary public, of the acknowledgment of such deed, for the purpose of cheating and defrauding the true owners, to the interest and advantage of such notary public, and the object of the bill is to have such deed delivered up to be canceled, is in his individual capacity, a proper party defendant. *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. Rep. 291.

Party Not Named in the Bill.—A party not named in the bill, but whose interest in the subject matter of the bill only appears in the answer of a defendant, cannot file an answer to the bill as a defendant, if his doing so without the bill being first formally amended is objected to by the plaintiff; and if the

court permits such answer to be filed and afterwards renders a decree against the plaintiff in favor of such party thus formally introduced into the case, the appellate court on the appeal of the plaintiff will reverse such decree. But where the record shows affirmatively that the plaintiff was present in the court, when the party was thus formally introduced into the cause and did not object but filed a replication to such answer, and the cause with reference to such new party was fully and fairly heard on its merits without objection to the court below, this will be regarded as a waiver by the plaintiff of such defect in the proceedings in the court below, and the appellate court would not reverse the decree for such defect in the proceedings. *McMullen v. Eagan*, 21 W. Va. 235.

Defendants with Conflicting Interest.—A bill in equity which includes many defendants who have distinct interests is multifarious and therefore erroneous. *Stuart v. Coalter*, 4 Rand. 74; *Crickard v. Crouch*, 41 W. Va. 503, 23 S. E. Rep. 727.

4. NEUTRAL DEFENDANT.—If the party defendant stands nearly neutral, the court is bound to see that all necessary parties are brought before it; but if he prays the court to decree in that stage, or consents that it should so decree, it amounts to waiver of the objection. *ROANE, J.*, in *Mayo v. Murchie*, 3 Munf. 397.

5. INFANTS.—As the rule in equity is that all interested shall be parties to a cause: *held*, not error to make, in suit for specific performance, a party defendant of an infant, who is not named in a contract, but to whom part of the purchase money notes are made payable. *Gentry v. Gentry*, 87 Va. 478, 12 S. E. Rep. 966. See monographic note on "Infants" appended to *Caperton v. Gregory*, 11 Gratt. 505.

6. PERSONS UNKNOWN.—The affidavit of a corporation must, of necessity be made by an agent; and the affidavit of a local attorney of a corporation that the names of certain persons to be made defendants to a bill by such corporation, are to the amount unknown, is a sufficient compliance with § 2230 of the Code, to authorize a proceeding, by publication, against such persons as "parties unknown." *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 274, 24 S. E. Rep. 1016.

Where parties have been properly proceeded against as "parties unknown," they may appear in person or by attorney and file their answers, or may appear within three years after entry of a judgment, decree or order against them; and a plea in abatement by a defendant who has been served with process, setting forth the names and residences of all parties interested in the suit, is immaterial, and should be rejected. *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 274, 24 S. E. Rep. 1016.

D. JOINDER.

1. IN GENERAL.—There is no inflexible rule as to the joinder of parties in the court of chancery. *Snyder v. Cabell*, 20 W. Va. 48, 1 S. E. Rep. 241.

2. COMPLAINANTS.

General Rule.—The general rule is that several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for separate relief of each. Nor can a single complainant, having distinct and independent claims for relief against two or more defendants severally, join them in the same bill. *Snyder v. Cabell*, 20 W. Va. 48, 1 S. E. Rep. 241.

A number of persons who have been fraudulently induced to enter into a contract with a company by means of the same false representations, and have sustained the same injury, except in amount, and

seek precisely the same character of relief, may unite in one bill praying for the cancellation of their contracts, and make the offending company and its officers and agents, through whom the fraudulent representation were made, parties defendants. *Rader v. Bristol Land Co.*, 94 Va. 765, 27 S. E. Rep. 560.

Joinder of Improper Parties.—If one person to whom alone the right asserted in a bill in chancery appertains, and other persons who have no right, join in the bill, and the cause be proceeded in to a decree in a court of chancery, without any objection there to the joining of improper parties plaintiffs in the bill; upon appeal from the decree to this court, the objection will have only this effect here, that the court will consider the right as vested in the plaintiff entitled thereto, and affected by his acts or omission. *Dickenson v. Davis*, 3 Leigh 401.

3. DEFENDANTS.

General Rule.—Defendants who have a common interest and a common defense are properly joined in one suit, and a demurrer to a bill which charges community of interest and defense is properly overruled. *Coleman v. Claytor*, 93 Va. 20, 24 S. E. Rep. 463.

For Discovery.—It is no longer the practice to join, as defendants in a suit in equity, for the purpose of discovery and costs against them, those who are not proper parties on other grounds. *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. Rep. 201. See monographic note on "Bills of Discovery" appended to *Lyons v. Miller*, 6 Gratt. 427.

Settlement of Estates.—Where a creditor comes in under an order for an account of debts against a decedent's estate, and proves a debt upon which a third person is jointly bound with the decedent, such third person is not a necessary party to the suit, as no relief is there sought against him. It is not the practice of the courts, nor is it the policy of the law, to encumber suits for the administration of assets of decedent's estates with collateral issues affecting the adjustment of equities between persons having no privity with many of the other creditors. *Robnett v. Mitchell*, 101 Va. 702. See monographic note on "Creditors' Bills" appended to *Suckley v. Rotchford*, 12 Gratt. 60.

Defendant against Whom There is No Equity.—On the hearing of a suit in chancery, if it be discovered that the cause is not matured for hearing as to some of the defendants, against whom the plaintiff appears to have a claim in equity, the bill ought not to be dismissed upon the merits; but only as to those defendants against whom there is no equity; as to the other defendants, it should be sent back to the rules for farther proceedings; notwithstanding the plaintiff may have been negligent, and the cause was prematurely set for hearing on his motion. *Key v. Hord*, 4 Munf. 485; *Henderson v. Anderson*, 4 Munf. 435.

E. OBJECTIONS.

1. NONJOINER.

a. In General.—No principle of equity is more familiar or better settled than this: that "all persons materially interested in the subject of controversy ought to be made parties in equity, and if they are not, the defect may be taken advantage of, either by demurrer or by the court at the hearing." *Clark v. Long*, 4 Rand. 451; *Armentrout v. Gibbons*, 25 Gratt. 375; *Dabney v. Preston*, 25 Gratt. 841; *Almond v. Rothgeb*, 1 Va. Dec. 138; *Snavely v. Pickle*, 29 Gratt. 43; *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671; *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. Rep. 91; *Burlew v. Quarrier*, 16 W. Va. 108.

"If no relief be sought, as, for instance, if the bill be for discovery alone, it cannot be objected to

for want of parties; but if relief be asked, the prayer of a process must be so framed as to bring all persons interested in the relief before the court, either as defendants or plaintiffs. In both of these points, however, the rule of equity differs from the rule of law, both in the necessity of joining all interested parties in the suit, and in option of joining them as plaintiffs or defendants. At law, a disputed issue alone is contested; the immediate disputants alone are bound by the decision; and they alone are the proper parties to the action. In equity, a decree is asked, and not a decision only; and it is, therefore, requisite that all persons should be before the court whose interest may be effected by the proposed decree, or whose concurrence is necessary to a complete arrangement. The same reason which requires that the immediate disputants be the only parties at law, also requires their arrangement as parties, plaintiffs and defendants, so that all the plaintiffs shall support one side, and all the defendants the other side, of the question in issue. In equity, it is only requisite that the interest of the plaintiffs be consistent, and it is immaterial that the defendants are in conflict with each other or that some of their claims are identical with those of the plaintiff. And, although a conflict of interests among the defendants is no valid objection to a bill, it does not follow that the court will adjudicate on their conflicting claims; in fact, it will not do so, unless the division be necessary to the plaintiff's right." *Meek v. Spracher*, 87 Va. 167-8, 12 S. E. Rep. 397.

b. When Made.—By the well-established practice of courts of equity, all known persons interested in a common unliquidated fund must be made parties in a suit demanding an account and share of that fund. The object of this rule is to prevent multiplicity of suits, and save the parties accountable for the fund from the harassments of repeated settlements and litigation respecting it. This rule of practice is intended for the protection of the accounting party, and is enforced at his instance only. Hence, according to the course of the court of equity in England, the objection must be made by demurrer, either *ore tenus* or in writing or by plea or answer. When the objection has not been made and brought under notice of the court before the decree, it cannot be effectually urged as cause of reversing the decree in an appellate tribunal. To allow it to be so urged by a party who has failed to urge it in the preliminary stages of the litigation, after all the expense and trouble of that litigation shall have been incurred, would frustrate the very object sought by the rule. That object cannot be attained, unless the party for whose protection the rule was established were required to ask its application to prevent future, rather than frustrate passed litigation, and by its frustration render future necessary. *Moore v. George*, 10 Leigh 239.

c. How Made.

(1) *In General.*—If persons materially interested in the subject matter of controversy are not made parties in equity, the defect may be taken advantage of either by demurrer, or by the court at the hearing and although the bill was not demurred to in the court below, nor the defect noticed by that court at the hearing it will be noticed at the hearing in the appellate court, and the decree reversed for that cause. *Cunningham v. Patteson*, 3 Rand. 46; *Richardson v. Hunt*, 2 Munf. 148; *Sheppard v. Starke*, 3 Munf. 29; *Sillings v. Bumgardner*, 9 Gratt. 275; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 54; *Armentrout v. Gibbons*, 25 Gratt. 371; *Dabney v. Preston*, 25 Gratt. 841; *Clayton v. Henley*, 32 Gratt. 46; *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671; *Hinton v. Bland*, 81 Va. 588; *Almond v. Rothgeb*, 1 Va.

Dec. 188; *Proctor v. Hill*, 10 W. Va. 60; *Hoge v. Vintroux*, 31 W. Va. 2; *Morgan v. Blatchley*, 33 W. Va. 155, 10 S. E. Rep. 232; *Hitchcox v. Hitchcox*, 39 W. Va. 607, 20 S. E. Rep. 595; *Crickard v. Crouch*, 41 W. Va. 503, 23 S. E. Rep. 727; *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. Rep. 793; *Miller v. Morrison*, 47 W. Va. 664, 35 S. E. Rep. 906; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 880.

"The rule on this subject is, that where the defect in not making proper parties appears on the face of the bill, the objection may, and ought, to be made by demurrer. Where it does not so appear it should be made by plea or answer. 2 Rob. Prac. 276, old Ed. When, however, the objection is delayed till the hearing in the appellate court—whether it will avail or not will depend much on the circumstances. If the absent party has an interest in the subject matter of controversy, of such a nature that a final decree cannot be made without affecting his interest, the appellate court, of its own motion, will direct that he be brought before the court, whether the objection was or was not made in the court below. If, on the other hand, the interests of the absent parties are separable from those of the parties before the court, so that the court can proceed to a final decree, and do complete justice without affecting the absent parties, the latter are not regarded as indispensable. A defendant who claims that certain persons should be made parties to share a common burden ought to make the objection, as a general rule, in the pleadings; and if the objection be delayed until the case reaches the appellate court, that court will not require it unless it is clear that the absent party is likely to be prejudiced by the decree." *Clayton v. Henley*, 32 Gratt. 65; *Prunty v. Mitchell*, 76 Va. 170.

(2) *Demurrer.*

In General.—A bill should not be dismissed on demurrer merely for the want of proper parties. If it otherwise appears that the plaintiffs may be entitled to relief. *Jameson v. Deshields*, 3 Gratt. 4; *Stewart v. Jackson*, 8 W. Va. 31.

Matter Concerning Separate Estate of Wife.—A demurrer filed to a bill, for nonjoinder of husband in a suit in chancery by wife, upon a matter concerning her separate property, should be overruled. *Rader v. Neal*, 18 W. Va. 373. See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

Demurrer for Want of Parties Should Name Necessary Parties.—A demurrer to a bill for want of parties should properly name the necessary parties defendant, who have been omitted so as to enable the plaintiff to amend his bill and call the attention of the court to this defect; and if it does not, the demurrant cannot complain that the demurrer is not sustained; but the court ought in the final hearing of the case, though the demurrer has been overruled, to decline to determine the cause on its merits, until the necessary parties defendant have been brought before the court by an amendment of the bill and have been given the opportunity to be heard. *Robinson v. Dix*, 18 W. Va. 529.

In *Robinson v. Dix*, 18 W. Va. 528, it is held that the demurrant should name the necessary parties who have been omitted; but it is further held in the same syllabus that the court ought in the final hearing of the cause, though the demurrer has been overruled, to decline to determine the cause on its merits until the necessary parties defendant have been brought before the court by an amendment of the bill, and have been given the opportunity to be heard. *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. Rep. 793.

In the prayer of a bill, parties are described as "Whitley & McConkey," and in the charging part the same parties are prayed to be made defendants, except that these parties are described as "McConkey & Co." In the first part of the decree, they are styled "McConkey and Co." and in the latter part they are called "Whitley & McConkey." It being apparent that they are the same parties, there is no error in overruling a demurrer for that cause. *Highland v. Highland*, 5 W. Va. 63.

Where Party Has Left Jurisdiction.—The general doctrine is, that if a person who ought to be a party departs from the jurisdiction of the court, the plaintiff cannot be required to make him a party. Mitf. Pl. book 2, ch. 3. If a sufficient reason for not bringing a party before the court is suggested by the bill, as if a party is resident out of the jurisdiction of the court, and that fact is charged, a demurrer will not hold. *Moore v. George*, 10 Leigh 245.

(3) Plea in Abatement.

In General.—Mr. Robinson says: "Plea in abatement on account of all contracting parties not being sued, were first made necessary in the time of LORD MANSFIELD. It was then adjudged (in 1770) that the defendant must say in his plea who the partners are, and that if he does not plead the matter in abatement, the objection is waived." 5 Rob. Prac. p. 78. *Prunty v. Mitchell*, 76 Va. 171.

Where a part of the copartners only are sued, or other parties improperly included, it is a matter to be pleaded in abatement for nonjoinder or misjoinder, and if so pleaded will defeat a recovery against those only who are embraced in the action or where improper parties are included as copartners, notwithstanding the provision of the law found in the Code 1860, ch. 177, § 19. *Urton v. Hunter*, 2 W. Va. 88; *Rutter v. Sullivan*, 25 W. Va. 427; *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. Rep. 1033.

Joint Obligors.—Where on a joint obligation one is sued, the defendant cannot take advantage of the nonjoinder except by plea in abatement alleging the joint obligation, and that the co-obligor is alive. *Reynolds v. Hurst*, 18 W. Va. 648.

Record Must Show Error.—An exception for lack of parties to the report of commissioners to make partition is not well taken when the record fails to disclose the interests of such parties. *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. Rep. 516.

The omission of a necessary party, who voluntarily appears, is a harmless error. *Moore v. Bruce*, 85 Va. 139, 7 S. E. Rep. 195.

(4) Court at Hearing.—And if a defect of parties is apparent upon the record, the court will take the objection, though the defendants do not. *Jameson v. Deshields*, 3 Gratt. 13.

And whether the objection is made or not, the court *sua sponte*, where such defect is apparent on the face of the bill and exhibits, will notice the omission. *Armentrout v. Gibbons*, 25 Gratt. 371; *Dabney v. Preston*, 25 Gratt. 388; *Snavey v. Pickle*, 29 Gratt. 42; *Hill v. Proctor*, 10 W. Va. 60; *Morgan v. Blatchley*, 33 W. Va. 155, 10 S. E. Rep. 282; *Hitchcox v. Hitchcox*, 39 W. Va. 607, 20 S. E. Rep. 595.

(5) In Appellate Court.

In General.—"And if the defect be apparent on the face of the record, although the bill was not demurred to in the court below, nor the defect noticed by that court at the hearing, it will be noticed at the hearing in this court, and the decree reversed for that cause. These principles have been recognized and affirmed by this court as well-established rules of equity. In cases too numerous to mention. In *Sillings v. Bumgardner*, 9 Gratt. 273, 275, JUDGE MONCURE, delivering the opinion of the court, says: 'But the counsel for the appellee contended that

this objection not having been made in the court below, now comes too late. But it was not waived in the court below; the want of parties appeared on the face of the bill; and in such cases it is well settled that the objection is fatal in the appellate court, though not taken in the court below.' Citing 2 Rob. Prac. 273, 483, and cases cited; *Richardson v. Hunt*, 3 Munf. 148; *Sheppard v. Starke*, 3 Munf. 29, and the principle has been reaffirmed to its full extent in the most recent case in this court on the subject, *Armentrout v. Gibbons*, 25 Gratt. 371, where some of the numerous decisions of this court on the question are cited." *Dabney v. Preston*, 25 Gratt. 341.

d. Amendments.

(1) Leave Granted in Lower Court.—Where the plaintiff has shown a right to relief against the defendants before the court, his bill ought not to be dismissed, because the proper relief cannot be extended to him, in consequence of his omission to make the necessary parties. In that case the plaintiff ought to have leave to amend his bill. *Mitchell v. Chancellor*, 14 W. Va. 22; *Allen v. Smith*, 1 Leigh 231; *Kincheloe v. Kincheloe*, 11 Leigh 400; *Key v. Hord*, 4 Munf. 486; *Jameson v. Deshields*, 3 Gratt. 13. And see *Harrison v. Loneberger*, 11 W. Va. 75.

Section 53, c. 125, Code, provides that when, in any case, a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be made parties by amendment to the action or suit. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. Rep. 68; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 380; *Jameson v. Deshields*, 3 Gratt. 13.

Multifariousness.—But if, on the hearing of a cause, it appears by the record that all the necessary defendants have not been made parties, and if the bill were amended, and they were made parties that the bill would necessarily be multifarious, the court ought not to give the plaintiff leave to amend his bill; but it should be dismissed without prejudice to the plaintiff in instituting any other suit or suits. *Shaffer v. Petty*, 30 W. Va. 248, 4 S. E. Rep. 278.

When No Relief Is Prayed.—And where parties are already before the court as defendants to an original bill, and no relief is prayed against them, in the amended bill, it is unnecessary to make them, or their personal representatives, parties to such amended bill. *Beckham v. Duncan*, 1 Va. Dec. 669.

(2) Leave Granted in Appellate Court.

In General.—The court of appeal, if there be a defect of parties, will send the case back to the court below that proper parties may be made. *Jameson v. Deshields*, 3 Gratt. 13; *Proctor v. Hill*, 10 W. Va. 60; *Hoge v. Vintroux*, 21 W. Va. 2.

Where Plaintiff Has No Right to Relief.—But where a plaintiff in equity has shown no right to relief, an appellate court will not reverse a decree dismissing his bill, although all the parties directly interested in the subject matter were not before the court. *Mitchell v. Chancellor*, 14 W. Va. 27.

Where Person Would Be Mere Formal Party.—So if it appears affirmatively that a person, if made a party would have been a mere formal party, against whom no decree would have been asked, and whose presence was not necessary for the protection of any of the defendants, the appellate court will not reverse a decree for his absence. *James River, etc., Co. v. Littlejohn*, 18 Gratt. 54.

Plaintiff Should Make Proper Parties.—So in the case of *Swann v. Seldon*, this court decided that the decree dismissing the bill on the merits ought not to be reversed, merely on the ground that some of the persons concerned in interest had not been made parties. It is the business of the plaintiff to make all proper parties. If he fails to do so, it is too late for him, in the appellate court, to take

advantage of his own omission, for the purpose of reversing a decree which is correct and proper in all other respects. *Kincheloe v. Kincheloe*, 11 Leigh 398.

Error Cannot Be Corrected in Lower Court after Appeal.—And errors for the want of necessary parties cannot be corrected in the lower court by an amended and supplemental bill and bill in the nature of a bill of review, after an appeal is allowed and while it is pending in the appellate court. *Almond v. Rothgeb*, 1 Va. Dec. 138.

Cost.—On an appeal from an interlocutory decree, correct on the merits, but erroneously for want of proper parties, the court will reverse the decree, but allow the appellees to recover costs as the parties substantially prevailing; because, an appeal from an interlocutory decree, is only given to prevent the payment of money or change of property, or to settle principles. *Cunningham v. Patteson*, 3 Rand. 66.

e. Objection May Be Waived.—But the objection for want of parties may be expressly relinquished in the court below. *Clark v. Long*, 4 Rand. 453; *Sheppard v. Starke*, 3 Munf. 29; *Armentrout v. Gibbons*, 25 Gratt. 371; *Proctor v. Hill*, 10 W. Va. 60; *Burlew v. Quarrier*, 16 W. Va. 109; *Donahue v. Fackler*, 21 W. Va. 125; *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. Rep. 466; *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. Rep. 793.

In *Burlew v. Quarrier*, 16 W. Va. 108, it is held that: "All persons materially interested in the subject of the controversy ought to be made parties in equity, and, if they are not, the defect may be taken advantage of either by demurrer or by the court at the hearing. It is not necessary, although more regular, that the want of parties should be made either by plea, answer, or demurrer. On the contrary, if it appear on the face of the record that proper parties are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below." *Sheppard v. Starke*, 3 Munf. 29; *Clarke v. Long*, 4 Rand. 451; *Armentrout v. Gibbons*, 25 Gratt. 371; *Hitchcox v. Hitchcox*, 39 W. Va. 607, 20 S. E. Rep. 595; *Donahue v. Fackler*, 21 W. Va. 125; *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. Rep. 793.

Transposing Parties.—It is also the practice in equity to allow amendments of bills by transposing parties from plaintiff to defendant, and *vice versa*, if it is necessary to do complete justice between the parties in the cause. But this will not be allowed at the mere caprice of parties. *Burlew v. Quarrier*, 16 W. Va. 143.

2. MISJOINDER.

a. In General.—If parties having separate and distinct claims unite as plaintiffs it is a misjoinder. *Graveley v. Graveley*, 84 Va. 145, 4 S. E. Rep. 218.

Act of Legislature.—The legislature has by an act approved February 27, 1894, provided "that whenever it shall appear in any action at law or suit in equity, by the pleadings or otherwise, that there has been a misjoinder of parties plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined, and to proceed by or against the others as if such misjoinder had not been made." *Norfolk, etc., R. Co. v. Dougherty*, 92 Va. 375, 23 S. E. Rep. 777.

Application of Act.—The act of assembly approved February 27, 1894, (Acts 1833-4, p. 489,) permitting abatements where there has been a misjoinder of parties plaintiff or defendant does not apply to actions or suits decided before that date. *Norfolk, etc., R. Co. v. Dougherty*, 92 Va. 372, 23 S. E. Rep. 777.

Discretion of Court.—The chancery court exercises a sound discretion in determining whether there is a misjoinder of parties, under the particu-

lar circumstances of each case. *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. Rep. 241.

b. How Objection Made.

In General.—In *Valden v. Stubblefield*, 28 Gratt. 153, it was held, that "in this country the rules well settled, that in cases of misjoinder of parties as plaintiffs in equity, the objection must be made by demurrer, if the defect is apparent on the face of the bill, or by plea or answer if the defect does not so appear; and unless so made, the objection will not avail at the hearing, if a decree can be rendered without prejudice to the rights of parties." *Burlew v. Quarrier*, 16 W. Va. 142-3.

Demurrer.—There is no doubt that where a misjoinder is apparent on the face of the bill, or in a case like this, on the face of the petition, the objection may be raised by demurrer. *Valden v. Stubblefield*, 28 Gratt. 153; *Ward v. Funsten*, 85 Va. 365, 10 S. E. Rep. 415.

M is administrator of husband and wife, and it being doubtful whether the right to a fund is in the estate of husband or wife, he sues for it in equity in both characters. The bill is not demurrable for misjoinder of parties. *Brent v. Washington*, 18 Gratt. 526.

But it is a good ground of demurrer to the whole bill, that a person, who has no interest in the suit and has no equity against the defendant, is improperly joined as a plaintiff. *Tavener v. Barrett*, 21 W. Va. 673.

c. When Objection Made.—Where objection is not made for a misjoinder of parties either by demurrer, plea or otherwise in due time it will be disregarded after arguments on the merits and final hearing. *Dickenson v. Davis*, 2 Leigh 401; *Malone v. Hobbs*, 1 Rob. 300; *Tarr v. Ravenscroft*, 12 Gratt. 651; *Valden v. Stubblefield*, 28 Gratt. 153.

F. NEW PARTIES.

1. IN GENERAL.—"The great objects of a court of equity are, to do complete justice by settling the rights of all persons interested in the subject of the suit, to make the performance of the orders of the court perfectly safe, and to prevent future litigation and multiplicity of suits. To these ends, it is necessary that all persons interested in the matter, should be before the court, in such way as to be bound by its decree. If the bill omit some who are interested, or if, in the progress of the suit, a new interest arises in one, not a party, it is the practice of every day to change the proceedings, either by amended or supplemental bill, so as to bring these new parties before the court; and LORD HARDWICK says, 'It is frequently known, that after a cause is gone into, and even thoroughly heard, yet the court is compelled to let it stand over for want of parties.'" *Kling v. Ashley*, 5 Leigh 411.

2. WHEN ADMITTED.—After a decision by the court of appeals, remanding a cause to the court of chancery, new parties may be admitted. *Anderson v. Anderson*, 1 Hen. & M. 12.

3. WHO ADMITTED.

Parties Having Same Interest as Plaintiff.—When the plaintiff has an interest in the subject matter of a suit, the bill may be amended, and other persons having the same interest, may be joined as coplaintiffs. *Coffman v. Sangston*, 21 Gratt. 268.

Assignees.—A court of equity requires the real parties in interest to bring the suit both legal and equitably, as in the case of trustees or assignees under insolvent acts or assignees in bankruptcy. And where the sole plaintiff, who originally brought the suit in his own name and not *in autre droit*, is discharged under insolvent acts and makes an assignment of his property for the benefit of his creditors, or where such plaintiff has been declared a bankrupt, the assignees must be made parties, before the

suit can be further proceeded in. In such case or cases the suit does not abate in the strict meaning of the word, but becomes so defective, that it cannot be further proceeded with in their absence. And in some other cases where the transfer *pendente lite* is considered as a transfer by operation of law and not voluntary, perhaps the same rule should be applied. *Zane v. Fink*, 18 W. Va. 693.

Interest.—Where the answer insists, that new parties should be made defendants, because they have become interested in the land with the defendants, which land is sought to be subjected to the payment of the purchase money, unless it appears, that they were interested in the land, when the suit was brought, it is not error to decline to make them parties. *Hill v. Maury*, 21 W. Va. 163.

4. HOW ADMITTED.

Petition to Be Admitted.

In General.—Upon a petition filed by a stranger to the cause, asking relief against the defendant therein on new matter contained in such petition, if such defendant ask to become a defendant to such petition, he should be allowed to do so; and, if he be refused the privilege of defending such petition a decree divesting his property rights from him, on the facts contained in such petition, is erroneous. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Leave of Court Necessary.—A petition filed by a stranger to a cause, asking relief against a defendant therein on new matter contained in such petition, must be filed by leave of court. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

In *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. Rep. 604, it is held that, "when a party files his petition, asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and no relief is prayed against him, and he is admitted to become such party defendant, he does not become a party in the cause until he has been made a party by some allegation in the bill as amended." This, however, does not apply in a case where a party files his petition, making the parties to the suit parties thereto, and setting up claim to the subject matter in controversy, when his petition may properly be treated as an original bill. *Sturm v. Fleming*, 32 W. Va. 404; *Skaggs v. Mann*, 46 W. Va. 309, 33 S. E. Rep. 110; *Cleavenger v. Felton*, 46 W. Va. 249, 33 S. E. Rep. 117.

Where a petition is filed in a suit in equity by one not a party to it, and whose rights are not mentioned in the bill, and such petition asks relief touching the subject matter of the bill, and such petition discloses an interest in the petitioner in such manner hostile to the claim of the plaintiff, the plaintiff must file an amended bill to bring the petitioner and his claim before the court, before there can be an adjudication of the plaintiff's rights. The mere petition does not make the petitioner a party for the purposes of decree. *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 380.

Where a person files his petition asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and no relief is prayed against him, and he is admitted to become such party defendant, he does not become a party in the cause until he has been made a party by some allegation in the bill as amended. *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. Rep. 604; *McCoy v. Allen*, 16 W. Va. 724; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. Rep. 380.

Depositing Petition in Clerk's Office.—"The mere depositing a petition in the clerk's office in vacation does not effectuate the object sought; does not

operate *proprio vigore* to make the petitioner a party. To do this an order of the court is necessary. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 508." *Walter v. Chichester*, 84 Va. 724, 6 S. E. Rep. 1.

Form.—A petition filed by a stranger to a cause, asking relief against a defendant therein on new matter contained in such petition, must make such defendant a party to it, and process to answer it must be served on such defendant, unless waived by appearance or otherwise. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Right of Party Petitioning.—A person who comes for the first time into a pending cause by petition, and is a proper person to file such petition, may have prior erroneous orders in the cause reheard and corrected, upon prayer for that purpose in his petition whether the case be proper for a petition for rehearing or bill of review in the case of a party to the cause. *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 637, 23 S. E. Rep. 90.

When Petition Refused.—A petition praying for new parties is properly rejected by the trial court where it appears that they are not necessary parties, and that the object is delay. *Robnett v. Mitchell*, 101 Va. 763.

Laches.—While all persons interested in the subject matter of the suit should be made parties, yet if their case is fully stated and investigated upon their petition to be made parties and on account of their laches they should not be allowed to disturb the status of the case, the appellate court will not reverse the decree of the court below in the case; if, however for other reasons the case must be retried they may be made parties, if they desire it, when the case goes back. *Triplett v. Romine*, 33 Gratt. 651.

Admissions Made in Petition.—A party who files a petition in a cause praying to be admitted as a party defendant, and in his petition admits a fact, cannot thereafter, when so admitted, deny that fact in his answer to the bill. *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. Rep. 516.

Proceedings Pending Appeal.—Upon a petition filed by a stranger to a cause, asking relief against the defendant therein on new matter contained in such petition, if such defendant, by an order in the cause, be allowed to file a petition to set aside a deed from him, vesting such stranger filing the first-mentioned petition with the right asserted therein, and the petition of such defendant be dismissed, and an appeal taken by him, it is error for the court, pending such appeal, to proceed to decree such stranger, upon his petition, the relief sought thereby against such defendant. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

G. DECREES.

1. WHEN REVERSED.

Instance of Parties Not Prejudiced.—An appellate court will not reverse a decree at the instance of a party not prejudiced by it. *Handy v. Scott*, 26 W. Va. 710.

If the court pronounces an erroneous decree in relation to the interest of parties who are not in court, that does not prejudice parties who are in the suit, it is not matter of which the latter can complain. *Kuhn v. Mack*, 4 W. Va. 186.

Where a defendant a short time before the institution of a suit against him, has relinquished all right to and interest in the subject matter of controversy, and subsequently, before the hearing, has his relinquishment put upon record, he cannot complain that the circuit court, without awarding any costs against him, has entered a decree in favor of the plaintiff, and confirming the relinquishment of the defendant. *Workman v. Doran*, 34 W. Va. 604, 12 S. E. Rep. 770.

Instance of Party Having No Interest.—An appellate court will not reverse a decree, though erroneous, at the instance of a party not interested in the property involved in the suit. *Elcan v. Lancasterian School*, 2 Pat. & H. 68; *Chappell v. Robertson*, 2 Rob. 590.

Instance of Nonresident Party.—A nonresident party, against whom a decree has been rendered upon order of publication, must proceed in the manner prescribed by the statute for the review of such decree and cannot in the first instance appeal therefrom to this court. (P. 718.) *Handy v. Scott*, 26 W. Va. 710.

2. EFFECT.—Where the appellate court has decided against the right of certain persons to become parties, upon remand those persons cannot come into the court below as parties and litigate anew the questions already determined. *Robinson v. Crenshaw*, 84 Va. 348, 5 S. E. Rep. 223.

H. MISCELLANEOUS CASES.

Person Made Party to Disqualify as Witness.

When a cause has reached such a stage in proof as to show that a person was an improper party, and was made one in order to disqualify him as a witness, then he should be dismissed out of the suit and thus restore his competency as a witness. *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. Rep. 201.

Effect of Acts Done by Some of the Parties.—Where a large number of persons are interested in a common subject, and acts are done to the injury of the common right, the approval of the majority will neither excuse the wrong nor take away from the other parties their remedy by suit. *Bull v. Read*, 18 Gratt. 78.

Rule against Persons Not Parties to Suit.—It was not error in the court below to refuse to issue a rule against parties who were not named in this suit, to cause them to show for whose use and benefit the same was prosecuted. *Vandiver v. Hyre*, 5 W. Va. 414.

"Whether there are proper parties to a suit, or not, will not depend on the will or election of the suitors, who frequently go to trial without objection; as is evidenced by all those cases where the court themselves direct the cause to stand over for new parties to be made: and they ought, generally, to be such, that the decree if pronounced either way, will be obligatory on all parties interested, and not only in the controversy pending, but avoid the danger of contradictory decrees, thereafter, between any persons interested in the pending controversy." *COALTER, J.*, in *Mayo v. Murchie*, 3 Munf. 376.

Party Having Two Distinct Rights or Interests.

Where the same person has two separate and distinct rights or interests in the subject matter of a suit, and the allegations of the bill comprehend but one of said rights or interests, the fact that such person is made a party to such suit will not estop conclude, or prevent him from asserting or defending his rights or interests in regard to said subject matter so far as they were not involved or comprehended in the allegations of the bill in such suit. As to the matters not so comprehended in the bill, he will not be regarded as a party to the suit. *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. Rep. 828.

A party cannot assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory. Having assumed one position, he and his privies are thereafter estopped from assuming a conflicting position touching the same subject matter. *Cheas., etc., Co. v. Rison*, 99 Va. 19, 37 S. E. Rep. 820.

If a person is interested in the subject matter of a suit in two capacities, the one as trustee in one

deed of trust, and the other as beneficiary in a different deed of trust, both deeds of trust being upon the same property, and he is made a party to a suit brought to set aside the latter trust deed, in which no reference is made to him as trustee in the other trust deed, he will not be regarded as a party to said suit in his capacity of trustee in the former trust deed. *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. Rep. 828.

Coleman v. Lyne's Executor.

October, 1886.

Chancery Practice—Answer—Failure to Notice Allegations of Bill—Effect.—Where the answer of the defendant in Chancery omits to notice some of the allegations of the bill, and replies to others, the allegations not noticed are not considered as admitted: but the plaintiff must except to the answer as insufficient.

Same—Same—Insufficiency.—An answer cannot be excepted to as insufficient after replication.

Same—Settlement of Stale Accounts.—Equity will not, without strong reasons, rip up old transactions, or settle stale accounts.

Same—Bill Pro Confesso—Effect.—Quære whether on a bill taken pro confesso, the plaintiff can have a decree for his claims, without documents or other evidence to support his bill?

This was an appeal from the Chancery Court of Lynchburg, where Coleman filed his bill against Henry Lyne, which was afterwards revived against his two executors. The subpoena to revive was served on both executors; but only one of them answered, and the suit was ordered to stand revived against both. All the circumstances are so fully stated in the following opinion, and the arguments of counsel so fully considered, that no other report is necessary.

Johnson, for the appellant.
Leigh, for the appellee.

October 12. JUDGE CARR delivered his opinion.

The following is a brief history of this case: In 1805, the plaintiff filed his bill stating a partnership for the sale of goods, between himself and Henry Lyne, and filing the articles of agreement by which it was constituted. These bear date in November, 1785; and after stating the terms and nature of the trade, add that it was a small trial made by the parties: that they would keep up a regular correspondence, settle accounts spring and fall, and decline or continue the connection as it should be found advantageous or otherwise. The bill states a settlement in 1789, and a balance of £ 317 13 7½ profits in favor of

***Chancery Practice—Answer—Failure to Notice Allegations of Bill—Effect.**—On this subject, see monographic notes on "Answers, in Equity Pleading" appended to *Tate v. Vance*, 27 Gratt. 571. The principal case is cited to the point in *Cropper v. Burtons*, 5 Leigh 428, 432, and *foot-note*: *Page v. Winston*, 2 Munf. 298; *Clinch River Mineral Co. v. Harrison*, 91 Va. 181, 21 S. E. Rep. 600; *Richardson v. Donebo*, 16 W. Va. 706.

†Same—Same—When Exception Too Late.—When a general replication to the answer is entered, the exceptions to the answer are treated as abandoned, and the answer deemed sufficient to any discovery prayed for. *Hartman v. Evans*, 38 W. Va. 672, 18 S. E. Rep. 811.

‡Same—Stale Accounts—Laches.—See monographic notes on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

The principal case is cited on this subject in *Carr v. Chapman*, 5 Leigh 178 (see *foot-note* to this case); *foot-note* to *Harrison v. Gibson*, 23 Gratt. 212; *Turner v. Dillard*, 82 Va. 539; *Hodgson v. Perkins*, 84 Va. 712, 5 S. E. Rep. 710.

§Same—Bill Pro Confesso—Effect.—See principal case cited in *Campbell v. Lynch*, 6 W. Va. 21.

the plaintiff; but of this settlement, no evidence is produced. The prayer is for the sum stated as a balance, or such as might be found due on account. A conditional decree was taken against the defendant, but he died before its service; and the suit was revived against his executors, Henry Lyne and Thomas Starling. Lyne answered; the plaintiff took a general replication; and commissions for taking depositions were awarded. At the next rules, the plaintiff set down the cause for hearing. This was in November, 1809. At the June Term, 1810, the cause came on for hearing on the bill, answer of Lyne and exhibit; and the Court referred the accounts to a Commissioner. On this order the cause stood, till October, 1819, more than nine years; when, on the motion of the plaintiff, the reference was set
456 aside; and the cause coming on to be heard on the bill, answer, and articles of agreement, the Court dismissed the bill with costs. From this dismissal the appeal comes up.

Various grounds were taken in the argument to convict this decree of error.

It was contended, that the answer did not controvert a single allegation in the bill, which should therefore have been taken as confessed, and the matter thereof decreed. If this were a case where there had been no appearance, or where, after appearance, the defendant had failed to answer, and the plaintiff had by regular steps proceeded to have his bill taken pro confesso, the question would properly arise, whether, upon the statement in the bill without documents or other evidence, the plaintiff could get a decree for his claim. It is a question, however, which need not now be considered. The point before us is a very different one. The defendant has appeared and answered. If the plaintiff had considered the answer as admitting all his allegations, he should have set the cause down on bill and answer. If the answer was deemed insufficient from omitting to notice any material allegations in the bill, the plaintiff should have excepted to it, and called for a better answer. If his exceptions had been sustained, and the defendant had refused to answer further, his bill might have been taken pro confesso generally. *Jopling v. Stuart*, 4 Ves. 619. *Turner v. Turner*, *Ibid.* in note, and other cases there cited. This course of proceeding puts the defendant on his guard, and prevents surprise.

But, a much broader doctrine was contended for, and one which seems to me pregnant with mischief, and calculated to entrap incautious defendants. It was insisted that all the allegations of the bill, not expressly denied by the answer, must be considered as admitted by the defendant to be true; and the counsel put it on this ground. A total failure to answer admits the whole bill to be true; ergo, a partial failure to answer admits the part
457 unanswered to be true. But in the case of a total failure, the *party is in contempt; and yet such steps are taken, as are calculated to warn him of the effects of his contumacy. Whereas, when he answers, and no exception is taken to

his answer as insufficient, he has no notice that hereafter, at the hearing, certain facts will be relied on as proved because he has not expressly noticed and negatived them in his answer.

One or two cases were cited from our Reports, as countenancing the idea of the counsel; but, they will be found to be cases as in *Page's ex'rs v. Winston's adm'r*, 2 Munf. 298, in which the allegation in the bill was, that some fact did not exist, or that something was not done. (negatives which could not be proved,) or cases where the documents and circumstances in the cause prove, *prima facie*, that the fact alleged and not denied, is true; as in *Scott & ux. v. Gibbon & Co.* 2 Munf. 86.

But in the case at bar, so far from setting down the cause on bill and answer, or excepting for insufficiency, the plaintiff has taken a general replication to the answer; thereby waiving all exception to it, and acknowledging that it does not contain a sufficient admission of the allegations in the bill. In 1 *Newland's Chancery*, 183, it is said, "The plaintiff must take care also, not to reply to the answer, if he means to except to it; for thereby the answer is admitted to be sufficient." In 2 *Madd. Chancery*, 275, it is said, where the defendant, by his answer, admits the plaintiff's case, or sufficiently so to render the examination of witnesses unnecessary, a replication (unless in the case of an infant) need not be filed; and for this he cites *Wyatt's Prac. Reg.* 374, and *Keeper v. Wilde*, 1 Vern. 140. *Hinde's Practice*, 289. The replication in the plaintiff's answer or reply to the defendant's plea or answer; and this must be filed in order to put the answer in issue, unless the plaintiff find sufficient matter confessed, in the defendant's answer, to ground a decree upon, and sets down his cause upon bill and answer." This is the uniform language of the books of practice. Nay, the very words of the replication

458 *say, "This repliant saith that he will aver and prove his said bill to be true, certain." &c. and "that the said answer is uncertain, untrue," &c. "all which matters and things, this repliant is, and will be, ready to aver and prove," &c. After this, surely the plaintiff is estopped from relying on the answer to prove his whole case; and in point of fact and common sense, the answer (though it is informal, and, upon exceptions, must have been adjudged insufficient,) does not contain an admission of the allegations in the bill. The executor means to say only, that he is wholly ignorant of the matter, and that neither the books nor papers of his testator throw any light upon it.

The next position taken was, that the Court, instead of dismissing the bill, should have ordered a second account, or an issue. I know very well, that in general, where a partnership is stated in the bill, and confessed by the answer, an account is of course; but that rule is always subject to this exception; that the party applying for the account do not sleep upon his case, but bring it forward in a reasonable time. Equity will not, without strong

reason, led it aid to rip up old transactions, or settle stale accounts; especially, if that settlement is to be made, not by the parties themselves, but by their successors, who know nothing of the business. In the case of *Lacon v. Briggs*, 3 Atk. 105, Lord Hardwicke, where an account was asked after 17 years, says, "I am of opinion, that if I should decree an account in this case, I should make one of the worst precedents that a Court of Equity can make, for disturbing the peace of families." *Ray v. Bogart*, 2 Johns. Cas. 432, is a very strong case to this point; also *Ellison v. Moffat*, 1 Johns. Ch. Rep. 46, where the bill on a partnership was brought after 26 years; and though the intervention of the American war accounted for part of that time, though there were books of the firm, and though the defendants, who were executors, had offered \$2,500 by way of compromise; yet, when in their answer they alleged that they were unable to

state an account, having no books nor vouchers of their testator: that the offer of a compromise, was merely an effort to buy their peace; and that the demand was stale and barred by time; the Chancellor dismissed the bill, saying, "It would not be sound discretion to overhaul accounts in favor of a party, who has slept on his rights for such a length of time; especially against the representatives of the other party, who have no knowledge of the original transaction. It is against the principles of public policy to require an account, after the plaintiff has been guilty of so great laches." It is useless to cite other cases. The books are full of them. In the case before us, the partnership seems intended to have been a temporary thing, a mere experiment upon a very limited scale, and settlement of accounts twice a year. It commenced in 1785, and the suit is brought in 1805, twenty years after. Whether the connection lasted one, two, or three years, we know not. Indeed, except the statement in the bill (which is no evidence) we have not one title of information on the subject. The defendant died before answer. One of his executors answered. The other never appeared; nor did the plaintiff take any steps to bring him before the Court. He seems to have been quite satisfied to drop him, and proceed singly against the other. The plaintiff set down the cause on the answer of Lyne, saying that he knew nothing of the matter, and had no books or accounts of his testator. The Court ordered an account. The case stood on the order for nine years. Then, on the motion of the plaintiff, it was set aside, and the cause brought again to a hearing. It had been now thirty-four years since the date of the partnership. In all this time, the plaintiff had not been able to produce an atom of evidence. Ought the Court to have ordered another account, or an issue? Assuredly not in my opinion. Indeed, I think it would have been right to have dismissed the bill, when the Court first sent it to a commissioner. It was then 25 years old. The plaintiff had stated in his bill, that he had no materials for an account. The defendant was dead; and his repre-

sentative had said he knew nothing about it. How then could an account be taken?

It was strongly objected, that costs were decreed against the plaintiff; but I do not see that it was wrong. He had filed a bill in a case where he did not produce the least evidence, that there was a single cent due him, a case wholly unsupported. Why should he not pay the costs?

I think the decree should be affirmed.

The other Judges concurred, and the decree was affirmed.*

Morris v. Deshazo.

October, 1826.

Appeals—At What Time Bond Must Be Given.—An appeal from a Court of Common Law cannot be allowed, with condition to give bond and security, after the term at which the judgment was obtained.

Same—Same.—But a Court of Chancery has power to grant an appeal, if bond and security be given within a reasonable and limited time. In the next vacation after the term at which the decree was rendered.

Morris filed a caveat in the County Court of Henry, against Deshazo, to prevent the issuing of a grant to the latter. A jury was impanelled, who rendered a verdict for the defendant; and the Court gave judgment accordingly. An appeal was granted to the plaintiff, on condition that he should give bond and security "in the clerk's office, within thirty days." The Superior Court affirmed the said judgment; and Morris obtained a supersedeas from a Judge of this Court.

Wickham, for the appellant.

461 "Leigh, for the appellee.

As the argument turned on the merits, and the cause was decided on the regularity of the appeal, nothing need be said as to the points made in the argument.

October 16. JUDGE GREEN delivered the opinion of the Court.†

The appeal in this case, from the County to the Superior Court, was improvidently allowed, upon the condition that the appellant should give bond and security in the clerk's office within thirty days; and which was accordingly given after the adjournment of the Court. An appeal from a judgment in a Court of Law, cannot be allowed upon such terms, as has been decided in *Thompson & O'Neal v. Evans*, 6 Munf. 397; although appeals from decisions in the Superior Courts of Chancery may be allowed, upon such a condition. *Steady v. Jackson*, 1 Rand. 413. The acts of Assembly upon this subject, as to appeals both from Courts of Law and Chancery, seem, at first view, to have the same effect; but they have not. An appeal can be allowed from a judgment at Law, only by the Court pronouncing the judgment, and during the term of the Court at which the judgment was pronounced. The same Court, at a subsequent term, or the Judge thereof, in vacation, cannot, under any circumstances, allow an appeal; nor can an appeal be allowed in such case, by an Appellate Court, or a Judge thereof, under

*JUDGES COALTER and CABELL, absent.

†See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 368.

‡JUDGE COALTER, absent.

any circumstances. The judgment can be brought before an Appellate Court, only by a writ of error, or a supersedeas, awarded by the Appellate Court, or a Judge thereof. The act of Assembly, in respect to these cases, provides, that "Before granting any appeal, or issuing of any writ of error or supersedeas, the party praying the

462 same, shall enter into "bond," &c. As an appeal can only be granted in Court, and by the Court during the term at which the judgment was pronounced; and the bond is to be given before the granting of the appeal; it follows, that the giving of a bond after the term, does not justify the allowance of an appeal during the term. If an appeal under such circumstances were valid, it would have its effect from the moment it was granted, and the plaintiff's right would be suspended for a time, without security, and the bond might never be given. In the cases of writs of error and supersedeas, although they may be awarded, they cannot issue or have any effect, until bond and security be given.

Appeals may be allowed from decrees in Chancery, by the Court pronouncing the decrees, during the term; in which case the statute directs, that "before granting any such appeal," the party shall give bond and security; but, an Appellate Court, or a Judge thereof, in vacation, or the Chancellor who has pronounced the decree, may, during the succeeding vacation, grant an appeal, if it appear to his satisfaction, that the failure to appeal from his decree at the time, or during the term when it was pronounced, did not proceed from any culpable neglect in the petitioner, or that upon the whole circumstances of the case, the petitioner ought to have the benefit of an appeal. These appeals, allowed by the Appellate Court, or a Judge thereof, or by a Chancellor who pronounced the decree, in the next vacation, are analogous to the writ of error, or supersedeas, at law. Although allowed, they have no effect, until the bond and security be given; and this of necessity, for the bond is given, not to the Judge, but in the clerk's office. If, at the time a decree is pronounced, the party wishes an appeal, but is not then prepared to take and perfect it, by giving bond and security, and should satisfy the Judge that this inability does not arise from his culpable neglect, or, that upon the whole circumstances, he ought to have the benefit of an appeal; to allow an appeal, upon condition that bond and security

463 should be given within a reasonable *and limited time, in the next vacation, would be doing, in effect, only what he would be bound to do in vacation, upon being satisfied of the same facts; and the order would have the same effect, as if it had been made in vacation. It would not intercept the execution of the decree, until the bond and security were given. This power in the Chancellor, to allow an appeal in vacation, after the term at which the decree was pronounced, and the want of power in the Judge of the Court of Law, to allow an appeal after the term at which the judgment was given, makes an appeal allowed in Court, from a

decree, with time to give bond and security, good; and an appeal from a judgment at law, upon such condition, irregular.

The judgment of the Superior Court is reversed; and the Court giving such judgment as the Superior Court ought to have given, the appeal from the County to the Superior Court is dismissed as improvidently granted; the appeal bond being given after the expiration of the term at which the judgment was given; the appellee to recover his costs in this Court, being the party substantially prevailing.

M'Rae v. Scott & Saunders.

October, 1836.

Instructions—Matters of Fact.—The instruction of a Court to the jury ought not to involve matters of fact as well as of law.

Appeal from the Superior Court of Chesterfield county.

Scott & Saunders, surviving partners of the late firm of Lyle, Scott & Saunders, brought assumpsit against M'Rae, for the amount of certain goods taken up by the defendant at the store of the plaintiffs.

464 The defendant *pleaded non assumpsit, and the jury rendered a verdict for the plaintiffs. Judgment was given accordingly.

At the trial, the defendant filed a bill of exceptions, stating that at the trial the defendant introduced a witness to prove, that in the latter part of the year 1812, the defendant being engaged at a game of cards with Saunders, one of the plaintiffs, and others, he, the defendant, won of the said Saunders \$215, which was then received; that all gaming ceased thereafter between the said parties, and there was no further gaming at that time between any other persons; that some time after the gaming between the parties was over, and they had left the card table, (about the space of a quarter of an hour,) but before the company broke, and in the same room, the said Saunders applied to the defendant for the loan of money, which the defendant positively refused; but the said Saunders replied, that it was hard that the defendant should be indebted to the firm of Lyle, Scott & Saunders, and would not lend him, nor pay them; that the defendant then

***Instruction—Matters of Fact.**—In *Richmond & D. R. Co. v. Noell*, 86 Va. 24. 9 S. E. Rep. 478, it is said: "It is a fundamental maxim that the court responds to questions of law, and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact: and the decided cases, says Mr. Conway Robinson, evince a zealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that when the evidence is parol, any opinion as to the weight, effect or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, will be an invasion of the province of the jury. 1 Rob. Pr. 388; *Cornett v. Rhudy*, 80 Va. 710; *McDowell v. Crawford*, 11 Gratt. 402; *Bart. Law Pr.* 214; *Baring v. Reeder*, 1 Hen. & M. 174; *Moore v. Chapman*, 3 Hen. & M. 206; *Whitacre v. Milhaney*, 4 Munf. 810; *McRae v. Scott*, 4 Rand. (Va.) 463; *Davis v. Miller*, 14 Gratt. 1; *Hopkins v. Richardson*, 9 Gratt. 485." To the same effect the principal case is cited in *Cornett v. Rhudy*, 80 Va. 716; *Tyler v. C. & O. R. Co.*, 88 Va. 394, 13 S. E. Rep. 975.

For further information on this subject, see monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

said, he would pay to Lyle, Scott & Saunders what silver he had about him, if he, Saunders, would promise to credit him on their books; that the money, (\$215,) was paid, and Saunders promised that he would enter the credit in the books of Lyle, Scott & Saunders, the next morning. Upon this evidence, on the motion of the plaintiffs, the Court instructed the jury that the said \$215 so won of, and so paid to Saunders, does not entitle the defendant to a credit therefor against the plaintiffs in this action. 1. Because this paying and receiving back the money lost by Saunders, is to be regarded in the same light as if the promise to give credit had been made direct for the money lost. 2. Because the money to be received by Saunders was for his own use, and not for the concern. 3. Because the said sum of \$215 might have been recovered by Saunders of the defendant; and having so received it back, he was not bound by his promise to give the credit in the *company's books.

To this opinion the defendant excepted, and took an appeal.

The case was submitted.

October 20. The PRESIDENT delivered the opinion of the Court.*

The objection to the instruction of the Judge to the jury, which is stated in the bill of exceptions, is, that it involves matter of fact which ought to have been left to the jury. Whether paying the money lost at play by Saunders, one of the plaintiffs, to the defendant, and his receiving it back, under the circumstances stated in the bill of exceptions, was to be regarded, (as was said by the judge,) in the same light as if the promise had been made directly for the money lost, was matter to be deduced or not, by the jury, from the evidence. So also, whether the money received by Saunders, was for his own use, and not for the firm. If for the firm, his promise to credit in the books, the next morning, was not a void promise, as stated by the Judge; although, as regarded the money lost at play, he had his remedy against the defendant, under the statute against gaming.

The judgment is therefore to be reversed, the verdict to be set aside, and further proceedings had therein; in which the instruction given is to be refused.

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*Sam v. Blakemore.

October, 1826.

Appeal—Refusal to Allow Person to Sue in Forma Pauperis.—An appeal will lie from the order of an Inferior Court refusing to grant leave to a person held in slavery, to sue in forma pauperis.

Appeal from the Superior Court of Lee county.

Sam, a man of colour, held in slavery by Blakemore, petitioned the Superior Court for leave to sue for his freedom. This petition was accompanied by several affidavits, and a statement of the case by the counsel, who had been appointed by the Court to conduct the cause on behalf of the petitioner. The Court refused to grant

*JUDGE COALTER absent.

†See generally, monographic note on "Appeals and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 223.

the prayer of the petition, because the fact stated by the counsel were not sustained by the evidence.

The petitioner appealed.

Nicholas, for the appellant, assigned by the Court.

No Counsel, for the appellee.

October 21. The PRESIDENT delivered the opinion of the Court.†

The affidavits in this case, and the circumstances stated in the opinion of the counsel appointed by the Court, on the application of the pauper, present a case which certainly would have justified the Superior Court in making the order authorising the pauper to sue for his freedom, in pursuance of the act of Assembly. The Court, therefore, erred in refusing to make such order, and in dismissing the complaint of the pauper.

If this were an ordinary case, the difficulties which have been suggested as to the right of the plaintiff to appeal from

such an order, might be insurmountable; as to which we *give no opinion. But, in these pauper cases for freedom, this Court have not adhered strictly to rules applicable to other cases, nor to the letter of the act giving it jurisdiction. In a plain action of assault and battery, in which a penny damages were given on a plea of not guilty, it has often decided on the right of the pauper to freedom, though that question was not involved in the pleadings. In the present case, though the plaintiff might perhaps renew his application to sue for his freedom, on further proof, (as to which it is not necessary to give an opinion) yet, for all that appears, the judgment of the Superior Court may be final as regards his right to freedom; which, if not a franchise, is analogous to it, and ought to bring the case within the spirit of that clause of the act, which gives to the Court jurisdiction in cases in which a franchise is brought in question.

The judgment is therefore reversed, and the case remanded for further proceedings, in which the Superior Court is to make the order permitting the plaintiff to sue in forma pauperis, according to the provisions of the act.

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*Allen v. Gibson.

October, 1826.

Unlawful Detainer;—Complaint—Allegations.—In a writ of unlawful detainer, under the act of 1814, the omission to state in the complaint the estimated quantity of the land in dispute, is not fatal, if the complaint contains a reasonably certain description.

Same—By Mortgagee—Statute.—Under this act, a mortgagee may obtain possession of the mortgaged premises after forfeiture, by the mode of proceeding therein pointed out.

Same—Same—Civil Remedy.—This act gives a civil remedy for the immediate recovery of the pos-

†JUDGE COALTER absent.

§Unlawful Detainer.—See on this subject, monographic note on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

A party who is entitled to the possession of land as against the defendant, no matter how, or in what manner or mode he may have acquired such right, or whether he has ever been in possession or not, may bring an action of unlawful detainer for the recovery of the possession. Hawkins v. Wilson, 1 W. Va. 124, citing the principal case as authority for

session, in certain cases, even where no force occurred.

Same—Tenant in Common—One tenant in common may have this remedy for the whole land, against any party having no right whatever, without joining his co-tenant.

The case was this. Gibson filed a complaint of unlawful detainer, under the act of Assembly of February 12, 1814, against Allen, for, that the defendant "unlawfully and against his consent, withholds from him the possession of two lots or parcels of ground lying and being in the city aforesaid, (the city of Richmond) on E street, commonly called the Brickrow, just below the United States Bank, one of which lots binds upon the said E street, and the other lies in the rear thereof, with all the houses thereon, and the appendages and appurtenances thereof, whereof he prays restitution of the possession." A justice issued his warrant to the sergeant of the city of Richmond, reciting the complaint in the same terms, and requiring him to summon the defendant Allen, and at least eighteen freeholders as jurors, to try the complaint aforesaid. The warrant also required the sergeant to give notice to at least two other justices of the peace for the said city, and to request their attendance, &c.

The jury so summoned were sworn "to try whether the defendant, against the consent of the plaintiff, holds possession of the tenements mentioned in the complaint filed in this cause; whether the said defendant hath so held possession thereof against the consent of the plaintiff, for three years next before the exhibition of the said complaint; and whether the plaintiff hath the right of possession in the tenements aforesaid?" The jury returned a verdict "that the defendant did, at 469 the time of the exhibition of *the complaint filed in this cause, hold possession of the tenements therein mentioned, against the consent of the plaintiff: that the said defendant hath not so held possession thereof, against the consent of the plaintiff, for three years next before the exhibition of said complaint; and that the plaintiff had the right of possession in the tenements aforesaid."

The Court gave judgment that the plaintiff recover against the defendant the possession of the tenements aforesaid, &c.

On the trial, the plaintiff offered in evidence in support of his action, a deed of mortgage executed by the defendant to the plaintiff and John Lesslie, on the 20th of April, 1816, reciting, that Lesslie had endorsed certain notes for Allen, which had come into the possession of Gibson, and Allen being desirous of securing the said Lesslie harmless from the effects of his said endorsements, conveyed to Gibson and

Lesslie the lots in question with other property; but, if Allen should discharge the debts aforesaid, then the said Gibson and Lesslie should re-convey the said mortgaged premises.

To this evidence the defendant objected, as not being proper to sustain the right of possession of the plaintiff alone to the premises in the writ mentioned, as the said deed shewed a right also in another; but this objection was over-ruled by the Court, and the deed permitted to go to the jury as proper evidence, to have such influence with the jury as it might lawfully have. The defendant excepted.

The Court also gave the following opinions: 1. That it is competent to a mortgagee to eject a mortgagor (as in the present case) by this mode of proceeding, under the act of Assembly. 2. That to enable the plaintiff in this cause to recover against the defendant the premises in question, it is not necessary to prove that the said plaintiff ever did have the possession of the premises which he now claims.

3. That the pendency of a suit between the same parties and others, which is shewn at this time to exist in the Superior Court of Chancery, the object of which suit is to foreclose the said mortgage, is no bar or impediment to the complainant's proceeding in this form of action; although another suit is depending in the said Court of Chancery, between different parties, by which the property in question may be recovered; and in consequence of which, the proceedings in the first mentioned suit have been suspended.

To all these opinions, the defendant excepted.

Other exceptions were taken which are not important, as they are not noticed by the Court.

A writ of supersedeas was granted by the Superior Court, and the judgment was affirmed.

The cause was brought by supersedeas to this Court.

Nicholas, for the appellant.

Stanard, for the appellee.

It was contended for the appellant, First, That the proceeding in this case being in derogation of the common law, ought to be strictly followed; which was not done in these several particulars: 1. The complaint does not state the contents of the land in dispute. 2. The jury were sworn to try whether the plaintiff "hath" the right of possession referring to the time of trial, but they find that the plaintiff "had" the right of possession; referring to an uncertain antecedent period.

Secondly. The justices erred in their decisions mentioned in the bills of exceptions. 1. The right under the mortgage was a joint right and could not be severed. 2. The act of Assembly was intended to redress cases of a violent deprivation of possession, not to the case of a mortgagee, after forfeiture. 3. The pendency of the suits in Chancery rendered the procedure in this summary remedy, improper.

471 *October 27. JUDGE GREEN delivered his opinion, in which the other Judges concurred.¶

¶ JUDGE COALTER, and CABELL absent.

the statement. The principal cases cited to the same effect in Pannill v. Coles, 81 Va. 385.

See the principal case also cited in Board of Education v. Crawford, 14 W. Va. 800; Railroad v. Harness, 24 W. Va. 516; Childs v. Hurd, 32 W. Va. 87, 9 S. E. Rep. 370.

Same—By Tenant in Common.—One joint tenant or tenant in common may, in an action of unlawful detainer, recover the possession of the whole land, without joining his cotenant in the action. Voss v. King, 33 W. Va. 242, 10 S. E. Rep. 404, citing the principal case as its authority.

Allen mortgaged the premises in dispute to Gibson and Lesslie, by a deed which conveyed a joint estate to the mortgagees. Lesslie died. The deed contained a covenant that the mortgagor should possess and enjoy the mortgage premises, until default should be made in the payment of the money. Default was made. Gibson, the surviving mortgagee, proceeded, under the act of February 12, 1814, (Rev. Code, 445, ch. 115,) to recover possession of the mortgaged premises. Judgment was given for the plaintiff, and the case has come here by supersedeas. Several bills of exception were taken by the defendant.

The material questions in the case are, whether a mortgagee can, in any case, obtain the possession of the mortgaged premises by a proceeding under that act? And if he can, whether the surviving mortgagee can recover in his own name, without joining the heirs of the deceased mortgagee as a party in the proceeding?

The objection that the complaint omits to state the estimated quantity of the land, is, I think, entitled to no weight. The statute directs the complaint to be in the form prescribed, or to that effect. The only object of this direction was, to require a reasonably certain description of the property claimed. Such a description is found in the complaint upon which the proceedings in this case were founded. The property is in the city of Richmond, and described as lots bounded by a certain street, and adjoining the United States Bank.

By the common law, one who had a right or title to enter into land, had a right to enter and hold with force; and even since the statutes against forcible entries and detainers, a party having a right of entry is not responsible in a civil action, or in a common indictment for trespass, for
472 *a forcible entry or detainer. Hawkins, P. C. 140, ch. 64, sec. 1. By the statute of 5 Rich. 2, Stat. 1, ch. 8, forcible entries and detainers were made a public offence; and upon conviction, the party evicted was restored to the possession, as a consequence of the conviction, unless the wrong-doer had 3 years possession before the institution of the prosecution.

The substance of the British statutes on this subject, was enacted in Virginia in 1789. 13 Hen. St. at Lar. p. 5. That act provided, "that none shall make any entry into any lands or tenements, or other possessions whatever, but in case where entry is given by law; and in such case, not with strong hand, nor with a multitude of people, but only in a peaceable and easy manner; and that none who shall have entered into the same in a peaceable manner, shall hold the same afterwards with force;" and if any should do the contrary, it directs an enquiry by a justice of the peace through a jury, and if any be found guilty of a violation of the act, that restitution be made to the party so put out, unless the wrong-doer has had possession for three years. A party who entered, or held by force after a peaceable entry, fell within the provisions of this act, whether he had or had not a right of entry or possession.

This act was re-modelled by the act of 1814, so as to make it a civil remedy for the immediate recovery of the possession, in certain cases, even where no force occurred. It provides, first, that "none shall enter into any lands or tenements, but in case where entry is given by law; and in such case, not with strong hand, nor multitude of people, but only in a peaceable and easy manner. None who shall have entered in a peaceable manner, shall hold the same against the consent of the party entitled to the possession thereof." Secondly, "If any shall enter, or shall have entered, into any lands or tenements, in case where entry is not given by law, or, if any shall enter, or shall have entered, into any lands or tenements, with strong hand, or with multitude of people, even in
473 case *where entry is given by law, the party turned out of possession, by such unlawful, or by such forcible entry, by whatever right or title he held such possession, or whatever estate he held or claimed in the lands or tenements of which he was so dispossessed, shall, at any time within three years thereafter, be entitled to the summary remedy herein provided." Thirdly, "If any shall enter, or shall have entered, in a peaceable manner, into any lands or tenements, in a case where such entry is lawful, and after the expiration of his right, shall continue to hold the same against the consent of the party entitled to the possession, the party so entitled, as tenant of the freehold, tenant for years, or otherwise, shall be entitled to the like summary remedy, at any time within three years after the possession shall have been so withheld from him against his consent."

The first section only prohibits unlawful entries, and forcible entry where the entry is lawful; but does not prohibit a person who is entitled to the possession, from holding with force, if he has entered peaceably.

The second section gives a remedy to a party turned out of possession, by another entering where no entry is given him by law, or entering by force. The case of a mortgagee never in possession, claiming against a mortgagor who never entered upon the mortgage, nor turned him out of possession, certainly does not fall within the provision of this section. If a mortgagee who has never been in possession, can avail himself of this summary remedy, it must be by force of the third section.

There is considerable difficulty in determining the effect of this third section; and, in order to understand it, it will be necessary to look to other provisions of the statute, which seem to have a bearing upon it. The act, in prescribing the forms of proceeding in enforcing this summary remedy, proceeds: "The party so turned out of possession, or so held out of possession, may exhibit his complaint, &c. in the following form, or to the following
474 *effect." The form prescribed for the complaint of a person held out of possession, is, "A. B. complains that C. D. unlawfully, and against his consent, withholds from him the possession of a certain tenement, &c. whereof he prays

restitution of the possession." The Justice's warrant recites this complaint and prayer verbatim. The charge to be given to the jury is, "You shall well and truly try, whether the defendant, C. D. against the consent of the plaintiff, holds possession of the tenement mentioned in the complaint filed in this cause; whether the said defendant hath so held the possession thereof, against the consent of the plaintiff, for three years next before the exhibition of the said complaint; and, whether the plaintiff hath the right of possession in the tenement aforesaid." The form of the verdict, as prescribed by the act, is, "We, the jury, find that the defendant did, (or did not,) at the time of the exhibition of the complaint filed in this cause, hold possession of the tenement therein mentioned, against the consent of the plaintiff: that the defendant hath (or hath not) so held possession thereof against the consent of the plaintiff, for three years next before the exhibition of the said complaint; and that the plaintiff hath (or hath not) the right of possession in the tenement aforesaid." The act then directs, that if the jury shall find that at the exhibition of the complaint, the defendant held possession of the tenement against the consent of the plaintiff, and that the defendant had not so held it against the plaintiff's consent, for three years next before the exhibition of the complaint, and that the plaintiff hath the right of possession, the justices shall render judgment in favor of the plaintiff, that he recover possession of the tenement aforesaid, with full costs, and shall award a writ of *abere facias possessionem*.

The terms of the third section, in their literal import, can be applied only to the cases of persons originally entering by a title which gives a temporary, or defeasible estate, or to the representatives
475 of the first taker of such *an estate; and the expressions of the complaint seem to have contemplated only such cases, in which the complainant, or some one under whom he claims, (other than the person in possession,) once had the possession, the restitution of which he prays. This expression only applies to the return of possession from one who received it, or took it, from another, to that other, or to some one claiming under him. It does not, in strictness, apply to a delivery of possession by a vendor to a vendee, or a mortgagor to a mortgagee. Such a delivery could not properly be called a restitution. If this distinction between one entitled in reversion or remainder after a temporary or defeasible estate, and a purchaser from the party in possession, was in the mind of the Legislature, when these clauses were penned, (as I do not think was the fact,) the distinction was completely discarded in the after clauses of the law, which give the summary remedy to any one entitled to the possession, if he pursues it within three years of the period at which his right to possession accrued. The charge to the jury and the prescribed form of the verdict, preclude all other enquiries, but whether the defendant held against the consent of the plaintiff, when

he exhibited his complaint; whether he had or had not so held for three years; and whether the plaintiff hath the right of possession; and if the jury find these fact for the plaintiff, which they must do, if they appear, no matter under what circumstances the defendant entered, or when; and no matter how the plaintiff's right of possession arose, the statute peremptorily directs that judgment be given for the plaintiff, not to be restored to the possession of the tenement, but to recover the possession of it; and that a writ of possession, not of restitution, be awarded. Upon such a charge to the jury, which, in effect, stand in the place of an issue between the parties, the question, whether the plaintiff is or is not entitled to the possession, is fully open to all sorts of evidence. But, I do not see that it would be

possible for the jury to find against
476 him, if he had a *right to possession, because he had acquired the right in a particular way. A mortgagee, after the mortgage is forfeited, has a right to the possession of the mortgaged premises, and may enter thereon, or maintain an ejectment; and the assertion of this right may be necessary to secure the payment of the debt. The value of the property may not be sufficient to pay the debt, with the accumulated interest during the pendency of an ejectment, or a bill to foreclose, (in which cases arbitrary appeals are permitted,) unless the rents and profits can be reached to keep down the interest; and they cannot be reached in the case of a first mortgagee, (unless under peculiar circumstances,) but by his getting the possession of the land.

The policy of the statute, upon this construction, was strongly objected to, as subjecting the party in a summary way, upon a short notice, and before two Magistrates only, to be turned out of possession; and it was insisted, that being in derogation of the common law, it should be construed strictly. I do not see the force of this objection. The Justices may adjourn from time to time, as the justice of the case may require, so as to enable the party to make a full defence, and to produce all his evidence. The party may have the assistance of counsel, as in any other Court; may save all questions of law by exceptions; and is entitled for any apparent error, to a writ of error or supersedeas, though not to an arbitrary appeal, as in ejectment. He cannot, therefore, be turned out of possession, by any erroneous proceeding. At the same time, he cannot delay the plaintiff in the pursuit of his rights, at pleasure, by arbitrary appeals; nor does this proceeding affect his right in any other controversy on the same subject, in any other form. As, therefore, the defendant can in no case be turned out of possession, unless it is apparent that he ought to surrender the possession of the demand of the plaintiff, and to retain it would be unjust, I cannot see any objection to giving his statute a liberal construction, as a remedial statute,
477 *even if the question under consideration, were, upon the words of the statute, more doubtful than I think it is.

The next enquiry is, whether this proceeding can be maintained by one of several tenants in common. This proceeding involves no question of title. The only question is, whether the plaintiff is entitled to possession as against the defendant. For the purpose of determining his question, the title may be given in evidence. As against all others than his companions, a joint-tenant, tenant in common, or coparcener, is entitled to the possession of the whole. One parcener or tenant in common may enter for all; and if he enters generally, it is in point of law an entry for all. 9 Vin. Abr. 456; Entry, F. pl. 1, 2, 3; and one parcener could, in assise, recover the whole against an abator; for she had right against all who had no right. Ibid. pl. 2, note. So one joint-tenant or tenant in common might maintain a warrant of forcible entry and detainer against his companion. 13 Vin. Abr. 381, pl. 14. In assise for the whole land, if it appear that the plaintiff is entitled to one moiety, and the defendant to the other, the judgment should be only for a moiety. 3 Vin. Abr. 233; B. 6, pl. 1. In a writ of right, and other real actions, the mere right is involved, and the proceeding and recovery must be according to the title; and in ejectment, nothing can be recovered but that for which the lessor of the plaintiff can make a valid lease. One joint tenant, coparcener, or tenant in common, although he has a right to the possession of the whole against strangers, cannot make a valid lease for more than his own part of the land; and therefore, no more can be recovered in ejectment than the part to which the lessor, who is a joint tenant, tenant in common, or parcener, is entitled.

I think, therefore, that one tenant in common can pursue this remedy for the whole land, against any person having no right whatever.

Judgment affirmed.

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*Vail v. Nelson, &c.

October, 1826.

Specific Execution—Contract—When Enforced.—In general, a contract will not be enforced by a Court of Equity, if the party asking the execution of it has been in default, and the other party will thereby suffer a serious loss, if compelled to carry the contract into effect.

Same—Same—Same—Defect in Title Known to Purchaser.—But, if the purchaser knew, when he made his contract, that there was a defect in the title, and it would take a considerable time to remove it; or acquires this knowledge after his purchase, and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract; he has no ground of complaint.

This was an appeal from the Richmond Chancery Court, where Vail brought a suit against Nelson and others, to set aside a

***Specific Execution—Contract—When Enforced.**—See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243. See the principal case also cited on this subject in *Payne v. Graves*, 5 Leigh 578; *Handly v. Snodgrass*, 9 Leigh 492; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 310; *Ford v. Evker*, 86 Va. 79, 9 S. E. Rep. 500; *Miller v. Lorentz*, 99 W. Va. 172, 19 S. E. Rep. 395; *foot-note to Parrill v. McKinley*, 9 Gratt. 1, containing an extract from *Miller v. Lorentz*, 99 W. Va. 172, 19 S. E. Rep. 395; *Lowther Oil Co. v. Miller-Sibley Oil Co.* (W. Va.), 44 S. E. Rep. 437.

Same—Same—Same—Defect in Title Known to Purchaser.—To the point that, where the purchaser knows, when he makes his contract that there is a defect in the title, and that it will take a consider-

able time to remove it, or acquires his knowledge after his purchase, and acquiesces in the delay, or proceeds with knowledge of the defect, in the execution of the contract, he has no ground of complaint, the principal case is cited in *Goddin v. Vaughan*, 14 Gratt. 125; *Rader v. Neal*, 13 W. Va. 388; *Johnston v. Jarrett*, 14 W. Va. 237; *Dodson v. Hays*, 29 W. Va. 593, 2 S. E. Rep. 425; in *Broyles v. Bee*, 18 W. Va. 520, it is said: "It is true, as they claim, that a contract to sell a fee-simple estate implies in the absence of an express stipulation to the contrary, that the estate is unincumbered, and that the vendor has good title, and that there are no incumbrances on the land, that may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase. *Christian v. Cabell*, 22 Gratt. 82; *Garnett v. Macon*, 6 Call 309. But if the vendor does not affect to have a perfect title, and expressly sells such as he has with a special warranty, he is entitled to specific execution without being first required to show a clear title. *Bailey v. James*, 11 Gratt. 468; *Goddin v. Vaughan*, 14 Gratt. 124; *Vail v. Nelson*, 4 Rand. 478; *Sutton v. Sutton*, 7 Gratt. 234."

sale of real property, made by Nelson to the plaintiff. The whole subject is so fully explained in the following opinion, that no other report is necessary.

Scott, for the appellant.
W. F. Wickham, for the appellee.

October 29. JUDGE GREEN.

Nelson, professing to act as attorney in fact for D. Diggs, administrator of A. Smith, sold at public sale a house and lot at York Town. The advertisement exhibited by the crier at the sale, stated that the property belonged to the heirs of Doctor Augustine Smith, and would be sold upon a credit of one, two, and three years; the purchaser giving bond with approved security, and a deed of trust on the property; and that possession would be given on the first day of January then next. Nothing was said as to the time when a conveyance was to be made. The sale was on the 15th of December, 1817. The appellant became the purchaser, and executed his bonds according to the terms of the advertisement. He entered into the possession of the property, and held it until 1821. In the mean time, early in

1819, one of the houses on the lot, 479 *and the most valuable, was consumed by fire. No demand was made by the purchaser for a conveyance, until after this event; and when it was made, it was made upon Nelson, who says that he refused to make a conveyance, having no authority to do so; but informed the appellant that Diggs, the administrator, and his wife, late the widow of Augustine Smith, and such of the children as were of age, would convey as soon as the first payment was made. Thereupon, the appellant, in June, 1819, filed his bill seeking to vacate the contract, and to have the bond surrendered, upon the ground that the vendor, at the time of the sale, had no title; and that in consequence of the infancy of some of the heirs of A. Smith, at the time of the sale, no complete title could be made; and that the impediment still existed as to some of the heirs. The family of A. Smith, (who died intestate,) entitled to this property, were his widow, who intermarried with Diggs, who administered on his estate, and five children, one only of whom was of age when the sale was made. All were made defendants in this cause, by an amended bill. The son of A. Smith, who was of age at the time of the

able time to remove it, or acquires his knowledge after his purchase, and acquiesces in the delay, or proceeds with knowledge of the defect, in the execution of the contract, he has no ground of complaint, the principal case is cited in *Goddin v. Vaughan*, 14 Gratt. 125; *Rader v. Neal*, 13 W. Va. 388; *Johnston v. Jarrett*, 14 W. Va. 237; *Dodson v. Hays*, 29 W. Va. 593, 2 S. E. Rep. 425; in *Broyles v. Bee*, 18 W. Va. 520, it is said: "It is true, as they claim, that a contract to sell a fee-simple estate implies in the absence of an express stipulation to the contrary, that the estate is unincumbered, and that the vendor has good title, and that there are no incumbrances on the land, that may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase. *Christian v. Cabell*, 22 Gratt. 82; *Garnett v. Macon*, 6 Call 309. But if the vendor does not affect to have a perfect title, and expressly sells such as he has with a special warranty, he is entitled to specific execution without being first required to show a clear title. *Bailey v. James*, 11 Gratt. 468; *Goddin v. Vaughan*, 14 Gratt. 124; *Vail v. Nelson*, 4 Rand. 478; *Sutton v. Sutton*, 7 Gratt. 234."

sale, answered that the sale was made with his privity and consent; and that he was willing to convey his interest to the purchaser. All the other children answering after they came of age, agree to confirm the sale, and to convey to the purchaser. Two of these did not attain their age until after July, 1821. No written contract was entered into, shewing the terms of the agreement. Nelson filed the power of attorney from Diggs, authorising him to sell the property.

It might be inferred from the advertisement, stating that a deed of trust was to be given by the purchaser, that a good title was to be immediately made to him. The complainant alleges that such were the terms of the sale; and that it was publicly proclaimed, and understood by him and the by-standers generally, that a title would be made to the purchaser, upon the terms of the sale being complied

480 *with; and that, accordingly, upon the execution of the bonds, he demanded a conveyance from Nelson; when, to his astonishment, Nelson told him he was not authorised to make a deed. Two witnesses, Gibbs the crier, and Wynne, state, "that it was understood at the sale, and stated in the advertisement, that when the terms of the sale were complied with, a title would be made." On the other hand, Nelson denies that there was any such stipulation. The advertisement is produced, with a memorandum of the sale, endorsed at the time of the sale, by Gibbs the crier, and proved by him. It is proved, that the advertisement was read by the crier, before the biddings; and there is no stipulation in the advertisement as to the time when the title should be conveyed. Nelson denies that any application was made by complainant for a title, until after the burning of the house in 1819. It is proved, that the purchaser had said that he knew that the title was in part in infants, and could not be conveyed until they came of age; and he entered into the possession, and retained possession of the property for nearly four years, never claiming a conveyance until after the house was burned.

Upon these facts, it is impossible to resist the conclusion, that the purchaser knew perfectly the state of the title, when he purchased, and that no title could be made until the infants came of age; and that he neither demanded nor expected a title to be made until then.

The Chancellor thought that the contract ought to be executed, and decreed accordingly.

How far time is material in a Court of Equity, upon the question of enforcing the execution of a contract, depends upon the particular circumstances of each case, and the conduct of the parties. The authorities upon this subject are collected in Sugden's Law of Vendors and Purchasers; and in the judgment of Chief Justice Marshall in *Garnett v. Macon*.

481 *In general, the contract will not be enforced by a Court of Equity, if the party asking the execution of the contract has been in default, and the other party will thereby suffer a serious loss, if

compelled to carry the contract into effect. But, if the purchaser knew, when he made his contract, that there was a defect in the title, and that it would take a considerable time to remove it, or acquires this knowledge after his purchase, and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract; he cannot complain. *Pincke v. Curtis*, 4 Bro. Ch. Cas. 329.

In this case, the purchaser knew that no conveyance could be immediately made; and that there was no possible means of removing the impediment, but the efflux of time; yet, with this knowledge, he made the purchase, and proceeded to carry it into effect as far as under existing circumstances it could be done. And, indeed, there was no time stipulated for making the conveyance. The fair inference from the whole circumstances of the case, is, that the agreement was that the conveyance by the children should be procured, when they came of age; and if so, then the contract can now be executed literally, according to the intention of the parties.

The principle of the decree of the Court of Chancery is therefore right. But it is erroneous in this, that it dissolves the injunction unconditionally, and directs the defendants to convey to the plaintiff; whereas, the order for dissolving the injunction should have been upon the condition, that the defendants executed a deed to the plaintiff, with general warranty, and filed it, duly authenticated for record, with the clerk of the Court, for the use of the plaintiff. The reservation in the decree is proper.*

482 *The decree should therefore be reversed, and a decree entered according to the foregoing principles; the appellees to recover their costs, being the parties substantially prevailing.

The other Judges concurred.†

Commonwealth v. M'Clanschan's Executors.

October, 1826.

Sale of Real Estate—Defect of Title—Liability of Vendor.—The vendor of real estate is not responsible for any defects of title, unless he has bound himself by some covenant or warranty to protect the vendee, or unless he has been guilty of some fraud or concealment.

Same—Sale by Commonwealth—Caveat Emptor.—When the Commonwealth sells the lands of a public debtor, and the purchaser is afterwards evicted by title paramount, the purchaser has no redress against the Commonwealth: as the law only authorises a sale of all the estate and interest of the debtor. The rule caveat emptor applies in such cases.

*This reservation was, that the defendants should have liberty to apply to the Court for an order directing the sale of the premises, for the payment of the purchase money. If they should be advised so to do.—Note in Original Edition.

†JUDGE CALVERT absent.

Sale of Real Estate—Defect of Title—Liability of Vendor.—In a sale of real estate no warranty of title is implied, and, in the absence of fraud or concealment, by the vendor, he cannot be visited with losses arising from defects of title, except so far as he has bound himself by covenant or warranty to protect his vendee against them. *Price v. Ayres*, 10 Gratt. 578, citing *Com. v. M'Clanschan* as its authority. To the same effect, the principal case is cited in *Johnston v. Mendenhall*, 9 W. Va. 119; *McFarland v. Douglass*, 11 W. Va. 652; *Johnston v. Jarrett*, 14 W. Va. 236; *Worthington v. Staunton*, 16 W. Va. 242. The principal case is also cited in *Brown v. Armistead*, 6 Rand. 602.

The executors of William M'Clanachan, deceased, presented a petition to the Auditor for the sum of \$400, with interest thereon from the 10th of May, 1802. The claim was founded on a purchase made by M'Clanachan of a tract of land, sold by the Commonwealth as the property of William O. Winton; but of which land M'Clanachan's representatives had been evicted, and for which they claim of the Commonwealth the purchase money with interest as aforesaid. The Auditor rejected the petition, and the executors obtained an appeal from the Chancellor of the Richmond District.

The circumstances of the case are stated in the following opinion, so far as they are necessary to this report. The material question was, whether the Commonwealth was bound to make a good title to lands sold by her, for a public debt; or in other words, whether she was bound to
483 *make compensation to the purchaser, in case of an eviction by title paramount?

The Chancellor decreed that the Auditor should issue a warrant on the Treasurer for payment to the petitioners of \$400 with interest from the 10th day of May, until paid; and the Attorney General, on behalf of the Commonwealth, appealed.

Attorney General, for the appellant, insisted that the rule caveat emptor applied in all cases of the sale of real property, and that unless there was something peculiar in the case of the Commonwealth, the general rule must prevail. Sugd. 346. That the Commonwealth is not bound to warrant the title to a purchaser, is proved by 2 Rev. Code, 52, sec. 12. If it be said that the land sold shall be the debtor's land, the obvious meaning of that expression is, that the land seized in execution shall be sold as the debtor's.

Leigh, for the appellees.

The sheriff conveyed, not Winston's title, but the land itself. The rule caveat emptor does not apply to this case, because the Commonwealth professes, by her deed, to sell the lands of the debtor; and if it should turn out that the land sold was not the debtor's, it follows that the Commonwealth has conveyed, and the purchaser bought, a subject which does not exist.

October 31. JUDGE CARR delivered the opinion of the Court.*

By the laws of Virginia, the land of public defaulters, (against whom the State has obtained judgment,) is subjected to be taken in execution, and sold by the sheriff.

484 *Under this law, an execution issued from the General Court against the lands, &c. of William O. Winton, to the sheriff of Botetourt county. Lands were taken and not sold for want of time. A venditioni exponas followed; and under it the land was sold. Price, the public agent, made the bid; but, permitted M'Clanachan to become the purchaser; who paid the money, and received from the sheriff a deed. The sale took place in May, 1802, and the deed of the sheriff is dated March, 1803. This same land M'Clanachan had sold in 1790, to one Meaux of Ken-

tucky. In 1794, Richard Littlepage, as attorney in fact for Meaux, had sold and conveyed it to William O. Winston and Robert Page; which deed was recorded in the county of Botetourt, the place of M'Clanachan's residence; and at the time of the sale of the land under execution, there was, it seems, a suit depending in the High Court of Chancery by Meaux, to set aside the sale and conveyance by Littlepage to Winston and Page, as fraudulent. In 1823, a decree was given in that suit, pronouncing the sale fraudulent, and decreeing the land to Meaux. Under this decree M'Clanachan's representatives have suffered an eviction; and, on that ground, have petitioned the Auditor for the return of the purchase money, with interest. The petition was refused; an appeal granted by the Chancellor; the cause heard; and a decree against the Commonwealth for the purchase money and interest. We are to enquire, whether this decree be correct.

In every transaction of purchase and sale, it is the contract of the parties which fixes the terms and the responsibility, which shews what the one intended to buy, and the other to sell. Where there is no fraud, the contract is the law of the parties; and no tribunal can change, alter or modify it in any manner. To do so, would be to make contracts for men. When a man buys land, he has, or may and ought to have, all the deeds, the whole chain of title, before him. This title it is his duty to look into and to take such covenants and warranty in his deed, as
485 *will protect him; and where there is no fraud or concealment, he can only look to the covenants and warranty, in case of eviction, and will have no claim, either at law or in equity, further than they give it to him. If he has bought with covenants against the acts of the vendor and his heirs only, and he is evicted by title paramount, he has no claim against the vendor. If he has bought without any covenant at all, he has no claim against any body. It is his folly to have made such a contract; and the law will not give him an action, who has not provided one for himself. The books teem with cases in support of these positions.

In Roswell v. Vaughan, Cro. Jac. 196, it is said, that if a man sell another's estate, without covenant or warranty, it is at the peril of the buyer; because the thing being in the realty, he might have looked into the title.

In Medina v. Stoughton, 1 Salk. 211; Per Lord Holt: "Where the seller (of a personal chattel) is out of possession, there may be room to question his title, and caveat emptor, in such case, to have either an express warranty or a good title. So it is in the case of lands, whether the seller be in or out of possession; for the seller cannot have them without title, and the buyer is, at his peril, to see it."

In Goodittle v. Morgan, 1 Term. Rep. 762; Per Ashhurst, Justice: "No man ought to be so absurd as to make a purchase, without looking at the title deeds; and if he is, he must take the consequence of his own negligence."

In Johnson v. Johnson, 3 Bos. & Pull.

*JUDGE COALTER, absent.

170; Per Lord Alvanley: "Every purchaser may protect his title by proper covenants. Where the vendor's title is actually conveyed to the purchaser, the rule caveat emptor applies."

Hiern v. Miller, 13 Ves. 121: The Lord Chancellor says, "No person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even prima facie evidence. He may be tenant by sufferance, or a trespasser. A purchaser must

486 *look to his title; and to neglect it, is crassa negligentia."

In Serjeant Maynard's Case, 2 Freem. 1, the Lord Chancellor said that "there being no fraud or surprise in the case, if the party was not aided by his covenants, he would not be helped in equity;" and yet there, the purchase money had been paid, and a third person had made title.

In Wakeman v. The Dutchess of Rutland, 3 Ves. 234, the Lord Chancellor says. "As to the extent of the covenant, there was a case about three years ago. An estate was bought. As to one moiety, there was a clear defect of title, which the counsel for the purchaser had overlooked. He was evicted of one moiety. He filed a bill, asserting a claim in equity to be re-paid a moiety of the purchase money. He had taken his conveyance with the common covenants. The eviction was not within his covenant. I felt the hardship, but thought I could not raise an equity, where there was no covenant to warrant the title."

Many more cases might be cited; but, perhaps, too much has already been said on a subject so long and so well settled.

Let us now look to the actual covenants in the deed before us. It is made by the sheriff. He sets out the executions under which he sold, and the whole proceeding; conveys the land to M'Clanachan, and concludes thus: and "he the said John Smyth, sheriff as aforesaid, doth by these presents warrant and defend the title to the aforesaid tracts of land, so far as by law he is bound, in his official acts, to warrant and defend the same, to the said William M'Clanachan, his heirs and assigns." In the Rev. Code, vol. 2, p. 52, § 12, it is said, "If the owner of the land, before or at the day of the sale, shall not make payment of the debt due to the public, the sheriff or officer shall proceed to sell the said lands and tenements, or such estate and interest as the party convict shall have therein," &c. In the 17th section of the same law, it is said,

487 *"In all sales of lands, by virtue of any execution, the sheriff or other officer shall convey the same to the purchaser or purchasers, his heirs or assigns, at his costs, by deed in writing, sealed and recorded as the laws direct for other conveyances of land; which deed shall recite the execution, purchase and consideration, and shall be effectual for passing to the purchaser, his heirs or assigns, all the estate and interest which the debtor or the Commonwealth had, and might lawfully part with, in the lands."

Here, then, we see the extent of the sheriff's authority, and the effect and nature of

his deed. He is to sell the lands, or such estate and interest as the debtor shall have therein; and his deed shall pass to the purchaser, all the estate and interest which the debtor or the Commonwealth had, and might lawfully part with, in the lands. Surely his warranty could extend to nothing more than he sold and conveyed, the title of the debtor. It was the business of every one who meant to buy, to inspect the title deeds, and discover what that title was. It was never intended that the Commonwealth should be involved in controversies as to the title of her debtors' lands, sold under her execution. She sold their interest merely. The price would be more or less, as that interest should appear great or small, clear or doubtful. Every one was fairly put upon the examination of title. With M'Clanachan, this must have been an easy matter. He had sold the land to Meaux. The deed from the attorney in fact of Meaux, was recorded in his own county. The suit brought by Meaux to set aside the sale, was depending. With these facts, it was his business to be acquainted; and that he was so, there is every reason to believe, from the very small price of the land, compared with the former sales. He probably weighed the chances, and was willing to incur the risque, for the prospect of the gain. The hazard was a fair one; and if the result has disappointed his hope, he has no right to complain. He accepted the deed and paid the money, thereby executing the contract. By the covenants

488 *in the deed alone, can his right to redress be tested. No covenant in that deed has been broken, and he has no claim on the Commonwealth.

Decree reversed, and petition dismissed.

Moore v. Mauro.*

November, 1836.

Misjoinder of Issue—Effect of Verdict.—The misjoinder of an issue is not fatal after a verdict, and it being stated in the record that issue was joined.

*For monographic note on Bill of Particulars, see end of case.

***Misjoinder of Issue—Effect of Verdict.**—In Huffman v. Alderson, 9 W. Va. 684, it is said: "The Virginia cases formerly held, that when there was a special replication containing new matter, there can be no issue thereon without a rejoinder, and that this objection is not obviated by the statement in the record, that the jury were sworn to try the issue, or rendered a verdict on the issues joined; but it was held otherwise in a more recent case of *Moore v. Mauro*, 4 Rand. 488, and this decision was approved in *Southside R. Co. v. Daniel*, 20 Gratt. 360. In that case, as in this, the record showed no issue made upon the special plea; one had been made upon the general issue, and the jury were sworn to try the issue, but, in their verdict, they state that they find for the plaintiffs on the issues joined. The court held that this was a misjoining of issue, cured by the statute of Jeoffails." And in *Henry v. Ohio River R. Co.*, 40 W. Va. 239, 21 S. E. Rep. 885, it is said: "Some cases hold that even where there is a statement that issue is joined, though there is none that the plea or other pleading was filed, there is still no issue, and the defect is fatal. *Wilkinson v. Bennett*, 8 Munf. 314; *Stevens v. Tallafarro*, 1 Wash. 194; *Lockridge v. Carlisle*, 6 Rand. 20. Others hold, not that there is an issue in such case, but that it is merely misjoinder, and cured by statute of Jeoffails after verdict. *Moore v. Mauro*, 4 Rand. 488; *Huffman v. Alderson*, 9 W. Va. 616; *Railroad Co. v. Daniel*, 20 Gratt. 344. There is conflict in these cases. See 1 Bart. Law Prac. 482."

On this point the principal case is also cited in foot-note to *Stevens v. Tallafarro*, 1 Wash. 155; foot-note to *Walden v. Payne*, 2 Wash. 1; *Southside R.*

Statute of Limitations—Saving—Application of.—The saving in the 4th section of the Act of limitations, (1 Rev. Code, 488,) applies to the 7th section of the same Act; by which, an action between merchant and merchant is neither barred by one year, nor five years.

Statute—Proceedings in Civil Suit—Sufficiency of Account.—Under the 86th section of the Act concerning proceedings in civil suits, &c. (1 Rev. Code, 510,) an account filed in an action of indebitatus assumpsit, which gives notice of the character of a claim is sufficient, although it may be made up of various items of which no notice is given.

Assumpsit was brought in the Superior Court of Law for the county of Harrison, by Jonathan Mauro against Richard W. Moore. The declaration contained several counts. The first was indebitatus assumpsit "for divers goods, wares and merchandize," sold and delivered by the plaintiff to the defendant. The second was on a quantum meruit. The third, on a quantum valebant. Another count was on an inisimul computassent.

The plaintiff filed two accounts with his declaration, stating the various items on which the claim arose.

The defendant pleaded non assumpsit, and a special plea stating, that the action was founded on an account for goods, wares and merchandize sold and delivered, and that the said supposed causes of action did not accrue within one year next before the commencement of the action; and concludes with a verification.

489 *The plaintiff joined issue on the first plea; and to the special plea, he replied that at the time of the said sale of the goods, wares and merchandize aforesaid, he the plaintiff and the defendant were merchants, and the goods, &c. were sold and delivered by the plaintiff as such merchant, to the defendant as such merchant; and this he is ready to verify.

There is no rejoinder to this replication; but the record states that "issue is thereon joined."

The jury rendered a verdict for the plaintiff, and judgment was given accordingly.

At the trial, the defendant filed a bill of exceptions, stating, that the plaintiff introduced two accounts, (which are the accounts filed with the declaration:) that he also introduced a witness to prove that the defendant had bought of him (the plaintiff,) on credit, sundry articles of groceries, and other different articles of merchandize, besides the coffee mentioned in the said accounts; which evidence the plaintiff offered under that part of one of the accounts, which charges the defendant with merchandize per bill, due 10th July, 1819, \$480 60. The defendant objected to this evidence, but the objection was over-ruled; and the plaintiff was permitted to prove by the witness, under the charge aforesaid, that the plaintiff sold and delivered to the defendant, on the day in the account men-

tioned, to the amount of the said sum of \$480 60, and delivered therewith a bill of the particular merchandize, with the prices, to the defendant, other than the three bags of coffee charged in the same account as of the 22d of May, 1819. To this opinion, the defendant excepted.

The defendant appealed.

Wickham, for the appellant.

No Counsel, for the appellee.

The points made at the bar are fully stated in the opinion of the Court.
490 *November 1. The PRESIDENT delivered the opinion of the Court.||

This is an action of assumpsit for goods, wares and merchandize, sold and delivered. There are several counts in the declaration, and two accounts filed with it, in pursuance of the 86th section of the Act for limitation of actions, &c. 1 Rev. Code, 510. The defendant pleaded two pleas; non assumpsit, on which issue was joined; and also that the cause of action, for goods sold and delivered, did not accrue within one year next, &c.; to which the plaintiff replied, that at the time of the sale and delivery of the goods, &c. in the declaration mentioned, the plaintiff and defendant were merchants, and that the said goods, &c. were sold, &c. by the plaintiff as such merchant, and bought, &c. by the defendant as such merchant; on which, though there is no rejoinder in the record, it is stated that issue was joined, and a general verdict. At the trial, a bill of exceptions was filed, setting forth that the plaintiff offered two accounts, those filed with the declaration; and introduced a witness to prove, that the defendant bought of him sundry goods, included in the item dated 1819, April 10th, merchandise per bill, three months due, 10th of July, 1819, \$480 60; and that a bill of particulars was delivered to the defendant with the articles; which proof was admitted by the Court to go to the jury.

Several objections were taken by the counsel for the defendant. The first was to the misjoining of the issue upon the plea of the act of limitations; there being no rejoinder to the replication. But that objection was admitted to be obviated by the act of Jeofails, it being stated in the record that issue was joined on it.

The next objection was to the replication itself, on the supposed ground that the saving in the 4th section of the act of limitations, (1 Rev. Code, 488,) does 491 not apply to the *7th section of the same act, which enacts, that actions founded on any account for goods, and on any article charged in a store account, shall be commenced, &c. within one year next, &c. and not after; but that it applies to the limitation of five years in the 4th section only.

It would be strange indeed, if this construction was to prevail; if an action of indebitatus assumpsit between merchant and merchant, is not to be barred by the saving in the act after five years, but is to be barred before, that is, after one year. This objection was not well considered, or it would not have been made. In Tomlin,

[JUDGE COALTER absent.

Co. v. Daniel, 20 Gratt. 344, 359, 360, 361, and foot-note; Grime v. McCox, 8 W. Va. 206; Douglass v. Central Land Co., 12 W. Va. 512; Carey v. Mannington, 23 W. Va. 19.

*Statute of Limitations.—See monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 691.

The principal case is cited on this subject in *Wortham v. Smith*, 15 Gratt. 493, 494. See principal case also cited in *Campbell v. Angus*, 91 Va. 441, 22 S. E. Rep. 167.

†Account.—Sufficiency.—See principal case cited with approval in *Fitch v. Leitch*, 11 Leigh 475.

&c. v. Kelly, 1 Wash. 190, it was decided by this Court, that the act of 1799 applied only to the store accounts of retail dealers.

A further objection to the replication was, that it applies as well to the insimul computassent charged in the declaration, as to the counts for goods, &c. sold and delivered; and the case of Webber v. Tivill, 2 Saund. 121, was relied on. But it has no application. In that case, the plea and replication were general, and applied to the insimul computassent as well as to the indebitatus assumpsit for goods, wares, &c. charged in the declaration. In this case, the plea expressly applies to the counts for goods, wares and merchandize only, and not to the insimul computassent. As to that count, the issue was joined on the plea of non assumpsit. But, if otherwise, in the case of Webber v. Tivill, there was a demurrer to the replication; in the case before the Court, issue was joined, on which there was a general verdict; after which no objection can be taken, either of form or substance, which might have been taken advantage of by a demurrer, and which shall not have been so taken advantage of. 1 Rev. Code, 512, sec. 103.

The last objection was to the admission of the proof set out in the bill of exceptions. The 86th section of the act aforesaid enacts, that in every action of indebitatus assumpsit, the plaintiff shall file with his declaration, an account stating distinctly the several items of his claim against the defendant; and that on failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly described in the declaration, as to give the defendant full notice of the character thereof. The object of this section was to give the defendant full notice of any claim which might be insisted on before the jury, under the general counts in the declaration. The words of the section are, "full notice of the character thereof;" that is, whether the claim was for goods, wares and merchandize, for money laid out, &c. for money received to the use of the plaintiff, &c. &c. The item in the account, which is objected to, certainly gave this notice; and though upon the evidence to the jury, it was made up of many articles, the character of the claim is sufficiently designated; and the proof that the articles included in it were sold and delivered to the defendant by the plaintiff, was properly admitted by the Court to the jury.

The judgment is therefore to be affirmed.

BILL OF PARTICULARS

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- III. Its Effect.
- IV. When Ordered.
 - A. In Discretion of Court.
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V. Requisites.

- A. Generally.
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 2. On Demand for Store Account, Note Filed.
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- VI. Amendments.
 - A. When Allowed.
- VII. Objections to.
 - A. General Rule.
 1. Demurrer Ineffectual.
 - B. Exception.
 - C. Must Be Raised in Trial Court.

Cross-Reference to Monographic Notes.

Assumpsit, appended to Kennaird v. Jones, 9 Gratt. 183.

I. OFFICE OF THE BILL.

The office of a bill of particulars is not to set forth matters of evidence, but to inform the opposite party of the cause of action to be relied on at the trial, and which is not plainly set out in the pleadings. *Richmond & D. R. Co. v. Payne*, 86 Va. 483, 10 S. E. Rep. 749.

And in *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 26 S. E. Rep. 1009, it is said that, the object of a bill of particulars is to give the opposing party more definite information of the character of the claim or defense than is generally disclosed by the declaration, notice or plea, and to prevent surprise. See *Campbell Co. v. Angus Co.*, 91 Va. 438, 23 S. E. Rep. 167; *Am. Hide & Leather Co. v. Chalkley (Va.)*, 44 S. E. Rep. 706.

But a statement of the particulars cannot be required when the declaration sets out the grounds of action and particulars of claim, with sufficient definiteness to give the defendant notice thereof. It can be demanded only where the declaration is, allowably under the law, so general as not to apprise the defendant of the real cause of action. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 30 S. E. Rep. 696.

II. WHEN DEMANDED.

The object of a bill of particulars being to advise the defendant of the precise nature and extent of the demand against him, the usual and better practice is, to demand such bill before pleading to the merits. *Am. Hide & Leather Co. v. Chalkley (Va.)*, 44 S. E. Rep. 706.

III. ITS EFFECT.

If a declaration *in assumpsit* be filed against two defendants jointly containing the common counts, and a bill of particulars be filed purporting to be an account against both defendants jointly, but on the trial of the case on the plea of *non assumpsit*, the evidence shows only a part of the items in the bill of particulars are charged against the two defendants jointly, and that the other items are charged against one of the defendants individually, the jury can only find a verdict on the items in the account, which are charges against the two defendants jointly, and can render no verdict against one of the defendants severally on the items of the account, which are charges against him severally. *Enos v. Stansbury*, 18 W. Va. 477.

IV. WHEN ORDERED.

A. IN DISCRETION OF COURT.—It is, ordinarily, within the discretion of the court to order a bill of particulars, yet, the power is much less frequently

exercised in actions of tort than in actions *ex contractu*, as the general rule in tort is, that if a pleading is not sufficiently specific the remedy is by demurrer. *Richmond & D. R. Co. v. Payne*, 86 Va. 483, 10 S. E. Rep. 749.

1. **WHEN, AND WHEN NOT, NECESSARY.**—The common law principle that in an action of *assumpsit*, under the general issue, a general payment before suit brought may be proved without a bill of particulars, prevails in this state; but, if payment after suit brought is relied on, it must be pleaded; if a general payment, it may be proved without a bill of particulars, and, if specific, or partial, payments are relied on, they must be specified in a bill of particulars. *Shanklin v. Crisamore*, 4 W. Va. 136.

2. **IN SUIT FOR RENT.**—In a suit for rent due, the defendant may, at the trial, prove and have allowed against any such debt any payment or set-off which is so described in his plea, or in an account filed therewith as to give the plaintiff notice of its nature, but not otherwise. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. Rep. 813.

3. **TO PUT ADVERSE PARTY ON NOTICE.**—Where the pleading is allowably, under the law of pleading, general, so as not to fairly apprise the adverse party of what he has to meet, a bill of particulars may be demanded to amplify the pleadings, so as to more minutely specify the claim or defense and prevent surprise on the trial, but no call for a bill of particulars of evidence can be made. *W. Va. Trans. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. Rep. 596.

4. **SHALL BE FILED IN INDEBITATUS ASSUMPSIT.**—In every action of *indebitatus assumpsit* the plaintiff shall file with his declaration an account, stating distinctly the several items of his claim against the defendant, and on failure thereof he shall not prove any item not so plainly and particularly described in his declaration as to give defendant full notice of its character. *Fitch v. Leitch*, 11 Leigh 473.

5. **IN ACTIONS OTHER THAN ASSUMPSIT.**—In actions other than *assumpsit* the plaintiff should be required to give the defendant full notice of the subject or character of his claim, and, if the declaration fails to do this, the plaintiff should, if called upon, file such statement of particulars as will put defendant upon notice. *City of Richmond v. Leaker*, 90 Va. 7, 37 S. E. Rep. 349.

6. **WHERE NO SPECIFIC PAYMENT RELIED ON.**—Where the defendant relies upon a specific payment or set-off by way of discount against a debt, an account stating distinctly the nature of such payment or set-off and the several items thereof, must be filed with the plea, though the defendant may rely upon the parol admissions of the plaintiff to prove such payment. But this is not necessary where no specific payment is relied on. *Rice v. Annatt*, 8 Gratt. 567.

7. **IN ACTIONS FOR PERSONAL INJURIES.**—In actions to recover damages for personal injury to plaintiff, resulting from failure on the part of defendant to furnish proper tools to do the work assigned, where the declaration avers it was the duty of defendant to furnish "suitable and reasonable tools," etc., "then well known to defendant and possessed and kept by it," with which to do the work, it is not necessary to furnish a bill of particulars thereof. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 509.

V. REQUISITES.

A. **GENERALLY.**—A bill of particulars should contain the grounds of action not evidence. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 30 S. E. Rep. 666.

And, in an action of *assumpsit*, if the plaintiff serves on the defendant a copy of the account sued on, it must be intelligible, and such as to inform him of the precise nature of the claim, and its extent. *Burwell v. Burgess*, 33 Gratt. 472. See *Johnson v. Fry*, 88 Va. 668, 12 S. E. Rep. 973; *Fitch v. Leitch*, 11 Leigh 475; *Moore v. Mauro*, 4 Rand. 488.

B. WHEN SUFFICIENT.

1. **ACCOUNT OF STATEMENT RENDERED.**—Where plaintiff in *assumpsit* filed with his declaration an account in these words, "1883, Jan'y 1. To balance due per account rendered, \$1406.07." It was held a sufficient specification of plaintiff's claim. *Fitch v. Leitch*, 11 Leigh 471.

2. **IF NOTICE OF SOME ITEMS NOT GIVEN.**—An account filed in an action of *indebitatus assumpsit* which gives notice of the character of a claim is sufficient, although it may be made up of various items of which no notice is given. *Moore v. Mauros*, 4 Rand. 488. And see *Fitch v. Leitch*, 11 Leigh 474.

3. **WHEN ACCOUNT NOT DATED.**—When declaration in *assumpsit* states the date of the account filed, but which account was not dated, it was sufficient, it being presented as a debt due at the date of the suit. *Kenefick v. Caulfield*, 88 Va. 123, 13 S. E. Rep. 348.

4. **ACCOUNT OF "PER ACCOUNT RENDERED," WITH PROOF.**—An account filed with the declaration in *assumpsit* for goods sold, charging goods sold "per account rendered," with proof that the account was rendered, is sufficient. *Robinson v. Burks*, 13 Leigh 378.

5. **FILING NOTE.**—In an action of *assumpsit*, defendant pleads *non assumpsit*, and, with it, files affidavit of set off, and the set off, which is a note. This is a substantial compliance with the statute, the record showing that plaintiff had full notice of the character of the set off, and that he was not taken by surprise. *Bell v. Crawford*, 8 Gratt. 133.

C. WHEN NOT SUFFICIENT.

1. **WHEN ITEMS NOT PLAINLY MENTIONED.**—Where the declaration does not plainly describe the items, and the account filed therewith merely mentions the sums paid, without any information about them, the account is not sufficient. *Johnson v. Fry*, 88 Va. 668, 12 S. E. Rep. 973. See *Burwell v. Burgess*, 32 Gratt. 472.

2. **ON DEMAND FOR STORE ACCOUNT, NOTE FILED.**—An account, stating the several items of the claim in every action of *assumpsit* is required to be filed, and, if a bill of particulars is filed specifying only a note and no other claim, proof will not be received of any demand for a store account. *Walsh v. Schilling*, 33 W. Va. 106, 10 S. E. Rep. 55.

3. **NOT PROPERLY DESIGNATING CREDITOR.**—In an action of *assumpsit* by an administrator, the count is for money had and received, and the bill of particulars merely states an account in which the defendant is debtor to the administrator for a stated sum of money received. The count and the bill of particulars are not sufficient to admit of proof of an admission by the defendant that he had received from a third person certain money belonging to the estate of plaintiff's intestate. *Minor v. Minor*, 8 Gratt. 1. See *Mann v. Perry*, 3 W. Va. 581.

VI. AMENDMENTS.

A. **WHEN ALLOWED.**—If substantial justice require that the plaintiff be allowed to amend his bill of particulars, and if it be clear that such amendment cannot operate a surprise to the defendant, the cause ought not to be continued because of such amendment. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 534.

VII. OBJECTIONS TO.

A. GENERAL RULE.

1. **DEMURRER INEFFECTUAL.**—The bill of particulars is not a part of the pleading so as to be reached by demurrer. *Clarke v. Ohio River R. Co.*, 39 W. Va. 782, 20 S. E. Rep. 696. See *Abell v. P. M. Life Ins. Co.*, 18 W. Va. 400; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. Rep. 366.

And so it was held in *Booker v. Donohoe*, 95 Va. 362, 38 S. E. Rep. 584, that, the account which the statute requires to be filed with an action of *assumpsit*, setting forth the items of the plaintiff's claim, is not a part of the declaration, so as to be subject to demurrer. See *Campbell v. Angus*, 91 Va. 438, 22 S. E. Rep. 167. Overruling *Wright v. Smith*, 81 Va. 779. See also, *King v. N. & W. R. Co.*, 99 Va. 626, 39 S. E. Rep. 701; *Sheppard v. Peabody Ins. Co.*, 31 W. Va. 368; *Columbia Accident Ass'n v. Rockey*, 93 Va. 683, 25 S. E. Rep. 1009.

B. **EXCEPTION.**—But the rule is otherwise, where the parties agree in writing that the case made by the declaration may be supplemented by the bill of particulars. *King v. N. & W. R. Co.*, 99 Va. 625, 39 S. E. Rep. 701.

C. **MUST BE RAISED IN TRIAL COURT.**—In action for damages, defendant's motion that plaintiff be required to file bill of particulars is denied, but at the next term it is allowed, and plaintiff files bill, and trial proceeds without defendant asking for time to consider his defense. He cannot raise the objection in the appellate court. *Cent. Lun. Asylum v. Flanagan*, 80 Va. 114.

And in *Varner v. Core*, 20 W. Va. 479, it was held, that, if defendant fails, during trial, to ask the court to require plaintiff to file a statement setting out his objections to the settlement in controversy, he cannot be heard to complain in the appellate court.

493 ***Straughan & Others v. Wright & Others.**

November, 1836.

Chancery Practice—Partition—When a Matter of Right.—A bill in equity for partition is a matter of right, if the title of the plaintiff is admitted or clear; but, if that be denied, and it depends on doubtful facts, or questions of law, a Court of Equity will either dismiss the bill, or retain it until the right is decided at law.

Same—Same—Twenty Years Adverse Possession.—In questions purely equitable, twenty years adverse possession will bar the remedy of the plaintiff; but, where the Court is only called upon to grant partition under a legal title, which is disputed, the proper course is to retain the cause until the title is decided at law.

Same—Assistance to Assert Legal Title.—Quære, whether a Court of Equity would refuse to assist a party to assert a legal title, when the right of entry is barred by twenty years adverse possession, by removing impediments to a fair trial at law?

This was an appeal from the Chancery Court of Fredericksburg, where William Wright and others filed their bill against Richard Wright and others, praying partition of a tract of land. The facts are set forth at large in the following opinion:

Stanard, for the appellants.

J. Mayo, for the appellees.

November 2. JUDGE GREEN delivered his opinion, in which the other Judges concurred.†

Richard Wright, by his will dated in 1740, devised to his son Francis, a tract of land in Lower Machodick, which had been

given to the testator by his brother John Wright, and also, after the death of his wife, the tract of land on which the testator lived, to him and his heirs forever. Francis Wright was then, as appears by the will, under the age of eighteen. Francis made his will in December, 1775, and died before the 26th of March, 1776. By this will, he directed that the land he had purchased of John Rust, should be sold for the payment of his debts, and the

494 *surplus proceeds of the sale equally divided between his three sons, Benedict Wright, Johnson Wigginton Wright, and Wright Wright. (The testator had no son named Wright Wright, and no attempt is made to shew which of the sons was intended by this name.) He also gave to his wife the dwelling-house and one-third of the land adjoining it, for life; and also, one-third of his personal estate, for life; and after her death, to be equally divided amongst all his children; and directed that all the rest of his estate should be equally divided amongst all his children. On the 26th of March, 1776, the will was proved by three witnesses. The executors qualified; and John Rochester, who was chosen guardian of Presley Wright, the heir at law of Francis Wright, was directed to be summoned to contest the recording of the will. No step was taken on this order, so far as appears. But, on the 26th of March, 1793, the Court in which the will was recorded, made an order in these words: "On the motion of Francis Wright, it is ordered that this will be recorded, the heir at law consenting thereto." On the 13th of November, 1753, Gerard Davis and Thomas M'Farlane and Elizabeth his wife, conveyed 123 acres of land to Francis Wright, which does not appear to have lain adjoining any other land held by Francis Wright. Francis Wright left five children living at the time of his death, Presley, (the eldest son, and heir at law,) Benedict, William, Nancy, and Johnson W. Wright. Such of those children as were alive, and the representatives of one who was dead, filed their bill on the 12th of July, 1820, against the heirs of Presley Wright, who died in 1810, intestate; and afterwards against the purchasers claiming under some of the heirs of Presley Wright, claiming a partition of a tract of land described as containing acres, of which Francis Wright died seized and possessed, and which he was entitled to under the will of Richard Wright. They charge that soon after the death of Francis Wright, Presley Wright entered upon the whole of the said

495 tract of *land, and received the rents and profits thereof during his life, and that his heirs, and those claiming under them, have received the rents and profits since his death.

The answer of some of the defendants seems to consider the claim of the plaintiffs as applying to the tract of land of 123 acres, before mentioned, purchased by Francis Wright from Gerard Davis and others. These defendants rely upon the uninterrupted possession of the land mentioned in the bill, by Presley Wright, and those claiming under him, from the death of Francis Wright, until the exhibition of

*See foot-note to *Stuart v. Coalter*, 4 Rand. 74. The principal case is cited in *Currin v. Spruill*, 10 Gratt. 147; *Hudson v. Putney*, 14 W. Va. 573.

†JUDGE COALTER absent.

the bill, (a period of forty-five years,) without any claim set up, or made known, to the persons in possession, by the complainants, or those under whom some of them claim. They contest the sufficiency of the proof of the will, and state that the clerk's office of Westmoreland county, (in which the land lies,) was burnt, with many of its records; but at what time it was burned, they state that they know not. All the defendants who answered, contested the right of the plaintiff to any part of the land. The delay on the part of the plaintiffs to assert their title, is not attempted to be accounted for. The depositions of the witnesses are unimportant, and are not evidence against one of the parties, a purchaser of a moiety of the land, who was not made a party to the cause until after all the depositions were taken.

The Court of Chancery decreed partition according to the prayer of the bill; describing the land so to be divided as the tract of land mentioned in the bill.

The difficulties which present themselves, in the prosecution of writs of partition at law, have induced the Courts of Equity, upon one of their general principles, to assume a jurisdiction to decree partition; and it is now considered that an application to a Court of Equity for that purpose, is not addressed to the discretion of the Court, but is a matter of right if the title of the plaintiff is admitted or clear. But, if that be denied, and it depends on doubtful facts, or on doubtful questions of law, a Court of

496 Equity *will either dismiss the bill as unfit for its jurisdiction, or, retaining the bill, refuse relief until the plaintiff shall have established his right at law. If the Court of Equity should undertake to decide upon the validity of the plaintiff's title in either of these cases, they would, in the one case, invade the province of a jury, and in the other, of a Court of Law; and in either case, violate the rule that equity cannot take jurisdiction of questions involving the legal title to lands; especially when the title can be asserted without any impediment in a Court of Law. *Agar v. Fairfax*, 17 Ves. 552. *Calmady v. Calmady*, 2 Ves. jr. 570. *Baring v. Nash*, 1 Ves. & Beam. 556. *Cartwright v. Pulteney*, 2 Atk. 380. *Wilkin v. Wilkin*, 1 Johns. Ch. Cas. Phips v. Green, 3 Johns. Ch. Cas. 300. *Wiseley v. Findlay*, 3 Rand. 361.

In this case, the validity of the probat of the will, under which the plaintiffs claim, is contested. There is no proof of the execution of the will, so as to pass real property, but the order of Court in 1793, ordering the will to be recorded, upon the motion of Francis Wright, (who does not appear, from any thing in the record, to have had any interest in the will;) and with the consent of the heir, who is not named in the order; and the order of Court in 1776, stating that the will was proved by three witnesses, and directing the heir at law, by name, to be summoned to contest the will by his guardian; an order upon which no further proceedings appear to have been had. Whether these orders were sufficient proofs of the due execution

of the will to pass real estate, was a question emphatically proper for a Court of Law.

The defendants also rely upon an adversary possession of upward of forty-five years. Whether this possession was adversary or not, was proper for the decision of a jury in an action at law; and if adversary, whether the right of the plaintiffs was or was not barred by the statute of limitations, presented many questions purely legal, and involved other questions of fact, particularly as to the ages of the children of the testator, which do not appear in the record.

497 *The defendants rely upon the presumptions arising from the great lapse of time, connected with the other circumstances of the case, as a bar to the plaintiffs' demand, independent of the statute of limitations; either that Presley Wright, under whom they claim, had some title paramount the will of his father, or that satisfaction had been made to the plaintiffs in the assignment of other portions of the estate of the testator to them, or otherwise. These also were questions proper to be discussed and settled only in a Court of Law. The Court of Chancery should not have undertaken to settle the question of title, depending upon such and so many questions of law and fact; but should have left the plaintiffs to assert their title at law.

The decree must therefore be reversed; and the only question which remains, is, whether the bill should be dismissed or retained for a reasonable time, to enable the plaintiffs to establish their title at law if they can, and to allow them, in that event, to resort again to the Court of Chancery, for a decree for partition in this suit? The defendants insist that the bill should be dismissed, because as they allege, a Court of Equity will not assist a party after an adverse possession of twenty years, which would be sufficient to bar an ejectment at law. This is certainly now the settled rule, when the plaintiff asserts a purely equitable title, upon which, if it were a legal title, the right of entry at law would be barred. This is established by the cases of *Cholmondely v. Clinton*, 2 Jac. & Walk. 138; and *Elmendorf v. Taylor*, 10 Wheat. 152, cited in the argument of this case. Whether a Court of Equity would refuse to assist a party to assert a legal title, when the right of entry was barred by twenty years adversary possession, by removing impediments to a fair trial at law, it is unnecessary to determine. In this case, the plaintiffs claim partition under a legal title. They ask no assistance of the Court to enable them to assert that title; nor can we say confidently on the matter in this record, that their right of entry was barred

by an adverse possession of twenty 498 years, under *such circumstances as would constitute a bar to an action of ejectment at law, or that they would be barred of their writ of right. If the Court of Equity refused to entertain the bill for partition, they might still sue for their undivided portion of the property by ejectment or writ of right; and if they recovered and were put into possession, according to the judgment, the Court

of Equity could not then refuse a decree for partition, whether the recovery was in ejectment or in a writ of right.

I think, therefore, that the bill should be retained a reasonable time, to be fixed by the Court of Chancery, that the plaintiffs may prosecute such action at law as they may be advised to institute, for the establishment of their title, with liberty to the plaintiffs, if they should succeed at law, to resort to the Court of Chancery for a decree for partition in this suit.

Gilliam v. Allen.

November, 1826.

Bail—Advantage Gained by Plaintiff against.—It is a general rule, liable to very few exceptions, that no tribunal can take from a plaintiff a legal advantage which he has gained against bail, if such advantage happens, without any participation or agency of the plaintiff.

Special bail—Entry at Clerk's Table—When Allowable.—Special bail cannot be entered at the clerk's table, unless it is directed by the Court, or assented to by the plaintiff's counsel; even where the appearance bail is offered as special bail.

This was a bill filed by R. C. Gilliam in the Richmond Chancery Court, against William F. Allen. The bill states that Gilliam was appearance bail for Reuben Johnson, in a suit brought by Allen, assignee of J. I. Johnson, and that a judgment was obtained against him by the misprision of the clerk, in not having entered him special bail, *when he had taken the proper steps to have the entry made. An injunction was prayed for and obtained.

The answer of the defendant denies that the plaintiff ever did enter himself special bail, or ever directed it to be done.

It appeared by the record in the common law suit, that a plea was entered for the appearance bail, and a verdict rendered on that plea. It also appeared that another person was appearance bail together with Gilliam.

The deputy clerk of the Superior Court deposed, that no special bail was entered in the suit in question; and that he has no recollection that any directions were given to that effect: that if such directions had been given at a proper time, he thinks they would have been attended to, &c.

Reuben Johnson proved, that he went with Gilliam to the Court, for the purpose of the said Gilliam entering himself special bail: that they went to the clerk's table, and informed the deputy clerk of their business, who answered that it should be attended to.

The injunction was dissolved by the Chancellor; and a motion to reinstate being refused by him, it was reinstated by the Court of Appeals. The injunction was dissolved and the bill dismissed on a hearing.

From this decree the plaintiff appealed.

M. Robinson and S. Taylor, for the appellant.

Daniel, for the appellee.

November 2. JUDGE CARR, delivered his opinion.

The bill in this case seems to have been carelessly and inaccurately drawn. It states, that Allen had gotten a judgment at law, against Reuben Johnson and Gil-

liam, his appearance bail; whereas the judgment, as the record shews, was against R. Johnson and John I. Johnson and R. C. Gilliam, sureties for the defendant's appearance.

500 *This will be found a difference not without its influence on the case.

Again. The plaintiff Gilliam states, that he did enter himself at the proper period as special bail, in Court, when in session; and that the judgment against him is a misprision of the clerk. The record shews, that the suit was tried on a plea for the appearance bail; and the clerk swears, that there is no entry of special bail on the record. Indeed the evidence adduced by the plaintiff Gilliam, is not to prove (as stated in his bill,) that he did enter himself special bail; but that he told the clerk to enter him. These, I have no doubt, are inaccuracies resulting from carelessness and not design.

Upon the case made by the record, I do not think equity can interfere, without overstepping the proper line of its jurisdiction, and doing much mischief. The laws of the land give the plaintiff a right in his suit at law, to require bail in such actions as this; and by the regular operation of law, unless the bail takes the proper steps to relieve himself, he becomes bound for the debt. If this happens without any agency or participation of the plaintiff, I hold it to be the general rule, liable to very few exceptions, that no tribunal has a right to take from him his advantage; and this has been the language of this Court.

In *Croughton v. Duval*, 3 Call, 69, they say that though sureties are favoured in equity, fair creditors are favourites also, and will not be deprived of their legal rights without some fraud or neglect. Here the creditor has gotten a legal right, without the least shadow of fraud; and as to negligence, it is all on the other side.

In *Anderson v. Anderson*, 2 Call, 198, a marriage settlement was not recorded, and equity was asked to interfere, upon the ground that the failure to record was through the fraud of the husband, and ought not to prejudice the rights of the feme covert. The Court said, that equity would not interpose in such a case, though the recording were prevented by accident, or unavoidable necessity, or even fraud, if the creditors were neither parties nor

501 privies *to the fraud. And this is the true equitable doctrine, to be traced through the whole system. Unless you can attach some equity upon the conscience of a party, you never can take from him a legal advantage. A. sells land to B. for \$10,000, who pays down the whole sum. Equity would compel a conveyance. But, if A. should sell this land to C. who should pay the purchase money and receive a deed, before notice of B's equity, C. will hold the land; because he has the advantage of the law, and you can attach no equity upon his conscience; he has done nothing unfair. Even in relieving against forfeitures and penalties, equity requires that the accident which incurred them, should have been unavoidable, and mingled with no neglect of the party; and that the case should lie completely in compensation:

that the Court should be able to place the parties precisely where they stood before the accident. Here the accident was neither unavoidable, nor can you replace the parties. To replace them, the Court would have to set aside the judgment, and reinstate the cause upon the law docket, just as it stood before the office-judgment was set aside. Can the Court do this? We have laid it down in many cases, that this Court cannot correct the errors of Courts of Law. Much less, I presume, can we set aside their judgments in this way. But, if the Court could do this, can it call back time? And do we not know that a man who was perfectly good five years past, may be insolvent now? The only way in which the Court could interfere, I apprehend, would be by injoining the judgment as to the bail; and this unquestionably would not replace the parties where they stood.

But, the bail here has been guilty of negligence. Taking his evidence in its utmost latitude, and giving it full faith and credit, it proves only this: that Gilliam went to the clerk's table, during the session of the Court, and told the clerk that he had come for the purpose of entering himself special bail in the suit of

Allen v. Johnson, and the clerk said it should be attended to. Now, this was

502 no entry of "bail. But it was said, that it was all that the plaintiff was bound to do; because, being appearance bail, he had a right to enter himself special bail, without a motion to the Court. To this position, I can by no means assent. The requiring and receiving bail, is a judicial act. The clerk has no power to make the entry, unless directed by the Court, or assented to by the plaintiff's counsel. "Every judgment," (says the law) "entered in the office against defendant and bail, or defendant and sheriff, shall be set aside, if the defendant, &c. shall be allowed to appear without bail, put in good bail being ruled so to do, or surrender himself in custody, and plead to issue immediately." Again, "If the defendant shall fail to appear, or shall not give special bail, being ruled thereto by the Court, the bail for appearance may defend," &c. These clauses shew, that it is the Court, and not the clerk, who are to act in this matter. The mere entry of special bail, though the defendant immediately confess judgment, discharges the common bail; and that, whether the common bail enter himself special bail, or some other person be entered. (See *Grays v. Hines*, 4 Munf. 437. *Fisher v. Riddle*, 1 Hen. & Munf. 330.) Could it be supposed that the clerk, without the interference of the Court, would have power to take a step which operated so materially on the interest of the plaintiff? In *Bartle v. Coleman*, 6 Wheat. 475, Ch. J. Marshall, speaking of our decisions on this subject, says, "It has not only been determined that the defendant may enter special bail and defend the suit, at any time before final judgment, but also, that if he appears and pleads without giving special bail, or appears and confesses judgment, the appearance bail is discharged. It is also (he adds,) well known to be the settled practice

of Virginia, if special bail be given, to discharge the appearance bail, although the defendant should not appear, but the judgment should become final, either on his default or on the execution of the writ of enquiry."

I hold it most clear, therefore, that in no case can the clerk, of his own

503 mere motion, receive "special bail.

I have thought it well to observe thus much, because it was said at the bar to be the practice in the country for common bail to be entered special bail, without a motion to the Court; a practice, (as it was also said,) growing out of the case of *Dunlops v. Laporte*, 1 Hen. & Munf. 22. That was a motion in open Court for a supersedeas. One of the objections taken, was, that the appearance bail was permitted to be entered special bail, without proof of his sufficiency, though the plaintiff objected; the Court below over-ruling the objection, on the ground that the plaintiff not having excepted to him as appearance bail, had admitted his goodness. The supersedeas was refused by this Court "without difficulty," as the Reporter states; but the Court do not state their reasons. It seems a necessary consequence of their refusal, however, that they considered a failure to except to appearance bail, an admission of his sufficiency; at least so far as to relieve the party offering him as special bail, from any further proof of his sufficiency. But I question whether this Court intended to go so far as to say, that the plaintiff was bound, under all circumstances, to accept him. Suppose he could produce unquestionable evidence that he was not good. Suppose that after he had been received as appearance bail, he had taken the insolvent debtor's oath. Would the plaintiff be precluded from shewing this? I should think not. However this may be, there is no question with me, that in all cases the motion must be to the Court, unless the opposite counsel assent to the entry.

But the case before us could not come within *Dunlops v. Laporte*, taken in its utmost extent. Here there were two persons taken as appearance bail, John I. Johnson and Gilliam; and though it should be said, that by failing to except, the sufficiency of these two, as special bail, is admitted, it cannot follow that the sufficiency of one of them is admitted. By the same rule it might be said, that if twenty persons were taken as appearance bail, a failure to except to the whole would be

504 an admission that any one* of the twenty was good bail. Gilliam, therefore, in merely speaking to the clerk, came far short of what was necessary to entitle him to enter himself special bail. He should have spoken to his counsel, submitted the motion to the Court, and shewn, (if required,) his sufficiency; and upon this ground alone, if there were none other, he has no claim to the aid of equity. In the case of *Dickinson v. Sizer*, ante, 113, I stated at large my general views on this subject, and the authorities relied on for their support. To that case I refer.

I think the decree must be affirmed.

The other Judges concurred, and the decree was affirmed.*

*JUDGE COALTER, absent.

Brown & Rives v. Ralston & Pleasants.*

November, 1826.

Freight—When Due.†—It is a general principle, that freight is not due until it is earned by a delivery of the cargo, unless the delivery is prevented by the default of the shipper or his agents.

Same—When Shipper Excuses from Paying.—If it is impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying freight. By two Judges.

Special Verdict.—A special verdict must contain facts, and not evidence of facts.

Protest.—In what cases a protest is necessary.

New Trial;—Venire De Novo.§—Difference between a new trial and a venire de novo. By CARR, Judge.

This was an action on the case brought in the Superior Court of Henrico County, by Ralston & Pleasants against Brown & Rives. The action was founded on a charter party not under seal, by which it was agreed, that a certain brig called the

Commerce, belonging to the plain-
505 tiffs, *should take a cargo of tobacco and four for the defendants, from Richmond to Cadiz. The jury found a special verdict, which is set forth at large in the opinion of Judge Carr. The Court gave judgment for the plaintiffs, and the defendants appealed to this Court.

Call and Wickham, for the appellants.

Leigh, for the appellees.

November 6. JUDGE CARR, delivered his opinion.

This is an action of assumpsit on a charter party not under seal. The jury have found a special verdict, setting out the charter party, and stating various other facts, leaving the law to the Court. There is also an agreement of the parties making the bills of lading part of the record. The charter party is not drawn out at length, in the usual form, but considerably abridged. By it, the plaintiffs engage the brig Commerce, commanded by Dixon Brown, to take a cargo of tobacco and flour for the defendants, from Richmond to Cadiz direct, at 5l. per hogshead, and 11s. 3d. per barrel, freight, with 5 per cent. primage; "the concerned understanding that twenty running days shall be allowed for unloading the vessel after she arrives at Cadiz, and the master gives notice to the consignee that he is ready to unload; and for every additional day's detention, the shippers shall pay \$50 demurrage, quarantine always excepted, provided it is enforced with such rigor as to prevent vessels from discharging and landing their cargoes, and not otherwise." The jury also find, that in pursuance of the charter party, the plaintiffs shipped on board the said brig, 100 hogsheads of tobacco, and 750 barrels of flour, and addressed the ship and cargo to James C. Wardrop, at Cadiz, their agent and consignee: that the brig arrived in safety at Cadiz, on the 19th of January, 1810, and

the captain immediately reported his
506 arrival *to Hackley, acting consul of the United States, and agent for Wardrop, as to the flour, and notified him of his readiness to deliver the cargo according to the charter party: that according to the course and usage of trade at Cadiz, vessels arriving with cargoes are anchored in the bay, which is spacious, and the cargoes are deliverable along-side to lighters sent by the agents or consignees; and it is not the duty of masters to land their cargoes: that Wardrop was absent from Cadiz when the vessel arrived, and did not return until July 1810: that Hackley sent on the letters to Wardrop, which the vessel brought, with the knowledge of the master; and in about ten days, received instructions from Wardrop, relative to the tobacco part of the cargo, and undertook the agency as to it; of which he gave notice to Brown; but he gave him no directions at any time, touching the tobacco, nor did the master apply for any such directions: that between the 19th of January, 1810, and the first of March, inclusive, Hackley received 741 barrels of the flour, and paid the freight thereon: that about the time of the arrival of the vessel, or a little after, there being war between Spain and France, a French army had invaded Spain and were marching towards Cadiz, a strong place of war open to the sea, its port and anchorage safe from sudden attacks from land, and the British then the allies of Spain, having command of the sea: that on the approach of the French, great numbers of the Spanish army and other subjects, came to Cadiz; and all the lighters and boats usually employed in taking goods from the ships to the town, were subjected to impressment, and most of them were actually impressed by the government: that owing to this, many vessels remained unloaded in the harbour, from the 28th of January, 1810, (when the French were marching to, and threatening Cadiz,) to the 7th of March following; it being with the greatest difficulty that boats and lighters could be procured, and when procured, they were constantly liable to be

impressed: that the 100 hogsheads of
507 tobacco and 9 barrels *of flour remained on board until the 7th of March, when by a violent gale of wind, and without any fault of master or mariners, the vessel was driven from her moorings upon a part of the neighbouring coast of Spain then in possession of the French, by whom the vessel and cargo were burned: that when the brig arrived at Cadiz, there was no market for tobacco, nor was it the intention of Wardrop or Hackley to sell it there, unless for a price for which it would not sell, but to re-ship it and send it to England. The jury conclude by finding for the defendants, if the Court shall be of opinion, upon the facts found, that the plaintiffs are not entitled to recover. If the Court shall be of opinion, that the plaintiffs are entitled to recover for demurrage only, then they find for the plaintiffs \$1050 with interest. If the Court shall be of opinion, that the plaintiffs ought to recover freight and primage only, they find for the plaintiffs \$2209 64,

*For sequel of principal case, see Brown v. Ralston, 9 Leigh 532.

†Freight—When Due.—See principal case cited in opinion of PRESIDENT TUCKER in Brown v. Ralston, 9 Leigh 546.

§New Trial.—See monographic note on "New Trials" appended to Boswell v. Jones, 1 Wash. 322.

§Venire De Novo.—If a verdict is imperfect by reason of any ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, a venire de novo ought to be awarded. Brown v. Ferguson, 4 Leigh 55, citing the principal case as its authority.

See the principal case also cited in Dove v. Com., 82 Va. 303.

with interest. And if the Court shall be of opinion, that they ought to recover freight, primage and demurrage, they find for the plaintiffs, \$3259 64, with interest. The Court decided, that the plaintiffs were entitled to freight, primage and demurrage, and rendered judgment accordingly; from which the appeal is taken.

Cases of commercial and maritime law, are of very rare occurrence in this agricultural land. I have found but one case in all our books of Reports, which touches the question of freight; nor does that involve any of the points raised here. Indeed, I have been able to find no case in any book, deciding those points directly. I must therefore consider them pretty much on general principles.

It may perhaps conduce to clearness, to give a distinct and separate examination to the question of freight and demurrage.

1. As to freight. The vessel which undertakes to carry goods from one port to another for hire, has a duty to perform before she can claim her reward. That

duty is the safe transportation of the goods to the destined port, *and their delivery there, to the shipper or his consignee. It is a general rule, therefore, that a plaintiff who sues for freight, must, to sustain his action, shew a carriage and delivery of the goods; but if the plaintiff can shew, that he has performed all the stipulations of his contract, so far as the defendant would permit; and that the carriage or delivery of the goods was prevented by the act or default of the shipper; he will be just as much entitled to his reward, as if the goods had been carried and delivered; and this, under the operation of a principle quite as well settled, as that which, in the first place, holds a part to the performance of that duty, for which he claims a reward. On this principle, it has been decided, that if goods are taken on board, and the ship has broken ground, and the shipper unload them, having changed his mind as to the adventure, freight is due. *Beaw. lex merc. 130.* So, if a ship is freighted to go to any port to load, and on her arrival the freighter or his agent will furnish no load, the master having waited the proper time, she is entitled to full freight. These are cases where the ship has been prevented from carriage of the goods, and is yet entitled to freight. The following shews, that the failure to deliver, if caused by the freighter, will not deprive the owner of his freight. A merchant insured his goods to a port abroad, there to be landed. The factor, after their arrival, sells the cargo aboard, without unloading the ship, and the buyer contracts for the freight of them to some other port; but, before the ship broke ground, she was, by some accident, destroyed. Held, that the property of the merchandize being changed, and freight contracted *de novo*, amounts to as much as if the goods had been landed, so as to give the ship a perfect claim for her first freight. The construction of charter parties should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract re-

lates. *Abb. 203.* The jury have found, that the master arrived safely at Cadiz with the goods: that he *gave immediate notice of his arrival and readiness to deliver the cargo to Hackley, who was the agent for the flour, and the only agent, (the consignee being absent;) and they find also, that according to the usage of trade at Cadiz, it is not the duty of the master to land the cargo, but of the consignee to send lighters along-side the vessel to receive it. Here then are all the facts found, which it was necessary for the owners to prove, in order to make out their claim to freight; the safe carriage, the offer to deliver, and the usage of the port.

There is no imperfection, no uncertainty in the verdict, thus far. The case for the plaintiffs being thus *prima facie* made out, we must look to the verdict for matter of defence; for, unless the finding state enough to destroy the plaintiffs' case, there must (it seems to me) be a recovery.

It devolves on the defendants to shew that the failure to unload the vessel proceeded from no default of theirs. They have attempted this, first, by shewing from the charter party that they had the right to convert the vessel into a store-ship, and keep the goods on board as long as they chose to pay the demurrage. Secondly, by shewing from the circumstances of the case, that they could not get the lighters to take the cargo from the ship. Thirdly, that from the master's having made no protest against the delay, it is evident that he assented to it.

1. As to the right of the defendants to convert the vessel into a store-ship. The claim is founded on that part of the contract, which says, "twenty running days shall be allowed for unloading the vessel, and for every additional day's detention, the shippers shall pay \$50 demurrage." Without looking to the books or the usage, it would seem to me, that upon the face of the contract, and the reason of the thing, this pretension must be pronounced unfounded. The business of the ship was the carriage of goods for freight. The purpose of this contract was the transportation of the flour and tobacco to Cadiz, and their delivery at that port. The parties considered that the cargo may be *discharged in twenty days. They therefore give the shipper this term for that purpose. Can any one look at this charter party, and not see that it is a part of the contract that the ship shall be unloaded in twenty days? For what other possible purpose, could this term have been introduced into the contract? We cannot suppose that the parties meant nothing by it. But the shipper might fail in his undertaking. The vessel might not be unloaded within twenty days; and to secure himself in that event, the owner has it stipulated, that for every day's detention afterwards, he shall receive \$50 demurrage. Can we suppose that by this stipulation, intended for his own benefit merely, the owner meant to give to the shipper a right to detain the ship *ad libitum*; to convert her into a store-ship; to suspend the claim of freight for an indefinite space; and during the

whole time of suspension, to throw upon the owner the risk of the cargo, so far as his freight was concerned? If there were no authorities upon the subject, I could never believe this to be the contract of the parties. But the usages of trade, and the definition of demurrage given by all the books, contradict the idea. They tell us that "demurrage is an allowance made to the master of a ship by his freighters, for staying longer in a place than the time first appointed for his departure, or his staying at the delivering ports." *Beaw. lex. merc.* 142. In *Abbott on Shipping*, also, p. 191, 192, it is said, "The merchant usually covenants to load and unload the ship, within a limited number of days, after she is ready to receive the cargo, and after arrival at the destined port. Frequently, also, it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay, and the payment to be made for it, are both called demurrage." Upon reason and authority, therefore, this ground of defence fails.

2. The second ground of defence is, that the circumstances of the case put it out of the power of the shippers
511 *to unload the vessel, and therefore that they are in no default, and so not liable for freight. I am by no means satisfied, that if the finding of the jury supported this ground, it would be a good defence against the claim of freight, where the loss of the cargo (as in this case,) happened after the expiration of the lay days. The parties have made a positive contract; the owner to allow twenty days for unloading the vessel; and the shipper that he will unload her in twenty days. Suppose the ship arrived at her destined port; no impediment in the way; and that the shipper might unload her in two days. The master gives notice, and presses the immediate delivery of the cargo. The shipper may say, "No: I will not unload you one hour sooner than the expiration of the twenty days;" and if after this, and within the twenty days, the cargo is lost, though by inevitable accident, the owner loses his freight. Why is this? Because by the contract the shipper had twenty days to unload. If, then, the law of the contract is equally binding on both parties, how is it that the shipper is not liable for the freight, after the twenty days, though he were prevented by uncontrollable circumstances from unloading? He has positively contracted to unload within that time, making no provision for accidents or circumstances. That he might bind himself in this manner, I suppose there can be no doubt; not that a party would be held to do an impossible thing; but surely the owner and shipper might agree, the one that he would hold his claim for freight, subject to the accidents which might happen within the twenty days; the other, that after the twenty days, the claim to freight should be complete, and he would take all subsequent risk.

In *Hadley v. Clarke, &c.* 8 Term Rep. 259, a ship had taken goods to carry from Liverpool to Leghorn. When she arrived

at Falmouth, on her way, an embargo was laid, which continued two years. During all this time, the master kept the goods on board. At length, he returned to Liverpool, and the plaintiff received his 512 goods, by agreement "that such receipt should not prejudice his action. He sued the owner for breach of his contract, in not carrying the goods, and recovered 297l. 18, in damages, that being the amount he had paid for insurance on the goods. The verdict was subject to the opinion of the Court on the case stated. The Court were unanimous in favor of the plaintiff. Justice Lawrence says, "It was incumbent on these defendants, when they entered into this contract, so specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, the dangers of the seas only excepted. That, therefore is the only excuse they can make for not performing the contract. If they intended that they should be excused for any other cause, they should have introduced such an exception into their contract; and he cites a case from *Alleyne*, 27."

In *Touteng v. Hubbard*, 3 Bos. & Pull. 291, Lord Alvanley, delivering the opinion of the Court, approves of the doctrine in *Hadley v. Clarke*. He says, "The case of *Paradine v. Jane*, *Alleyne*, 27, which was cited by Mr. Justice Lawrence, in *Hadley v. Clarke*, appears to me to be founded on much good sense. The third resolution is, that were the law creates a duty or charge, and the party is disabled to perform it, without any act in him, and hath no remedy over, there the law will excuse him; but where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract."

Leer v. Yates, 3 Taunt. Rep. 386. Same v. *Cowell*, and Same v. *Gorst*. The plaintiff, in these causes, declared in assumpsit against each defendant, for detaining the ship *Marianna*, of which he was master, on demurrage, with certain goods on board, for a long time. Upon the trial it appeared, that the master of the vessel, which was a general ship, having a British license, had taken on board at Bourdeaux, 513 *the goods consigned to the several defendants, and also the goods for many other consignees, and had signed and delivered to each of the shippers a bill of lading, whereby he acknowledged "the shipping on board the *Marianna* of the goods (describing them,) to be taken out in twenty days after arrival, or to pay 4l. per day demurrage." The *Marianna* arrived in the London docks on the 17th of June. Certain of the consignees choosing to have their goods bonded, the vessel could not, from the crowded state of the dock, make her delivery, until 46 days after the 20 days. Some of the goods of other shippers were over those of the defendants, so that the defendants' goods could not be got at in the ordinary courts of delivering the ship, until those above them were removed. The

defendant Cowell had bonded his goods as early as the 22d of August, and had made frequent demands of them; but they could not be delivered, because of the goods of others that were above them. Neither of the three defendants had paid, or offered to pay, the duties. The jury found against each defendant 1841. damages, being the amount of demurrage at 41. per day for 46 days. The Judge reserved liberty to the defendants to move to reduce the verdict. Lens Serjeant obtained rules to set the verdicts aside and enter nonsuits. He moved upon the ground that a general claim for demurrage arises only in the case, where the delay, whether caused by the act of the defendant or not, has been beneficial to, and occasioned in the service of the defendant. But here, it had arisen from the extent of the commerce of the country, co-operating with the law restricting the delivery of these goods to the London docks; a misfortune which fell with equal hardship on the plaintiff and the defendant, and could not render the defendant answerable for the consequences. Serjeants Sheppard and Best shewed cause. The plaintiff (they said) does not found this action upon any mis-feasance or non-feasance of the defendant. The bill of lading contains evidence of a contract to pay demurrage, if the ship be detained

514 beyond a certain *number of days, from what cause soever that detention may arise. and of the rate at which that demurrage is to be compensated. There is nothing illegal in making such a contract, and the Court cannot enquire into the prudence or imprudence of it. Ch. J. Mansfield delivered the opinion of the Court. He said, "It is impossible to decide these three very singular causes, without being struck with the enormous gain which the owner may get by this bill of lading, and which may possibly much exceed what in justice and conscience he ought to receive. This is a general ship. Thirty or forty persons may have goods on board, and for every one of them the owner may have his 41. per day. I was struck very much with the argument, that it was not the fault of the defendant, but the fault of the plaintiff himself, that these goods could not be got out till the others which were above them were delivered. But it is not, in truth, the fault either of the plaintiff or defendant, that the goods could not be taken out. There can be only so many goods at the top of a vessel as the proper stowage of the goods will allow. Therefore, all the others must be at the bottom; and as this is a general ship, and the goods do not all belong to one consignee, the goods of some of the consignees must be undermost. If this argument would avail, therefore, that the captain is not entitled to demurrage for the goods which were not uppermost, it would restrain the contract for demurrage to the few persons whose goods were at the top; but that construction would be contrary to the positive contract; for it is impossible to get out of this bill of lading, which, though it is a singular species of contract to bind a consignee, by an instrument signed not by himself, but by the captain; yet, as the consignors delivered

the goods on board, under that bill, and the defendants accepted that bill of lading, it is binding on them; and therefore this action may be sustained on the general count for demurrage. Rule discharged." I consider this case as deciding a principle very like that which I have advanced.

515 *I have stated these ideas and cases, to shew the ground of my doubt, whether this defence, if sustained, would be good. But grant that it would be good; that if the defendants were prevented by the vis major, ice, storms, &c. from unloading, they would be excused.

Yet it must be admitted, that this being matter of defence, it devolved on them to prove that it was impossible to unload before the destruction of the vessel. Have the jury found this? So far from it, that, as it seems to me, they have found what amounts to the contrary. The vessel arrived at Cadiz on the 19th of January, 1810. The jury find that there was war between France and Spain; and that from the 28th of January, (ten days after the arrival of the ship,) to the 7th of March, (when she was lost,) there was the greatest difficulty in procuring lighters; because the French army being on their march, and threatening Cadiz, many Spanish soldiers and subjects flocked thither, and the lighters were all subjected to impressment, and most of them were impressed by the government. Now, when the jury say there was the greatest difficulty in getting lighters, they do not mean that it was impossible to get them. On the contrary, I understand them to mean that it was possible, though very difficult. They find other facts, which go strongly to shew, that with diligence and activity, there might have been a delivery of the cargo. For ten days after the arrival of the vessel, there was no difficulty, that we hear of, in getting lighters; for it was not until the 28th of January, that the government began to impress them. Of the 750 barrels of flour, 741 were delivered, leaving only 9, and those probably for the consumption of the crew. This shews what the consignee could do, where interest prompted. Flour, no doubt, sold high in a besieged city. Why was not the tobacco delivered also? In the first place, there was no agent at Cadiz, authorised to attend to it, for ten days after the ship arrived; and secondly, the jury find that there was no market for tobacco at Cadiz, and that neither Wardrop nor Hackley intended it should remain there,

516 *(as they could not get the price they asked;) but meant to send it to England. This throws a strong light upon the probable cause of the tobacco's remaining on board. There was no stimulus to excite the activity of the shipper. On the contrary, it was best for him that it should remain in the ship; for, if landed, the French might take it. These are but inferences, to be sure, and would not be relied on as establishing any fact; yet they go strongly to corroborate what I consider the actual finding of the jury, that it was possible to have unloaded the vessel. This second ground of defence, therefore, seems to me as unsubstantial as the first.

3. The third is, that the master assented

to the delay in unloading, and that this assent binds the owners. We must look again to the special verdict to see how this position is sustained. The jury find "that when Hackley received the agency as to the tobacco, he gave notice of it to Brown, but he gave him no directions at any time, touching the tobacco, nor did Brown apply for any such directions." This surely was no assent to the delay. The captain had given notice to Hackley of his readiness to deliver the cargo. He had no need of any directions from Hackley. He had nothing to do, until lighters should come along side for the tobacco; and he needed no directions to inform him, that whenever they should come, he must deliver it. But it is contended that his failure to protest against the delay, is proof of his assent. This seems to me a strange mode of treating a special verdict. The jury find no assent of the master. They say not one word about his having protested or not. We are forbidden to presume or infer any facts in special verdicts; and yet we are to say he assented.

But it is said that at least the failure to protest was evidence of assent: that the jury ought to have found the fact; and that on this ground, the verdict should be set aside, and the cause sent back for a more perfect finding. I cannot consider the subject in that light. For what
517 object *was a protest necessary? The parties had entered into a written contract, regulating the duties of each; the master to carry the goods and report himself; the shipper to unlade them within twenty days, and to pay \$50 for every day's detention afterwards. The master had given due notice of his arrival and readiness to deliver. This was all he had to do, until the lighters should come along side. Could his protest have given the owners any new right? No; for the contract did not make it necessary to the claim of demurrage, nor to hasten the unloading of the vessel. The shippers bound themselves to unload in twenty days after notice of arrival, (not after protest) and to pay the demurrage. Was the protest necessary to furnish evidence? This is sometimes the case, and then it is said to be received, only from necessity. *Boyer v. Moore*, 2 Dall. Rep. 196. But here, it could not be wanting to prove any part of the plaintiffs' case; for the jury have, without it, found the facts necessary to their recovery. Can it be said that a protest was necessary, simply to prove that the master did not assent to the delay? This would seem to be inverting the order of things. The defendants rely, in their defence, on the assent of the master, and they insist that the absence of evidence that he did not assent, is proof that he did assent. I think no protest was necessary; nor do I think there are any defects or uncertainties in the verdict, which should induce us to send the case back. Enough is found to shew that the owners have complied with their contract, and ought to have their hire, as there is nothing found to protect the defendants from their claim. That more is not found in favor of the defendants, we must conclude, is, because there was no evidence to justify the jury in finding more.

On this point of a *venire de novo*, I will say a few words more, from the high respect I feel for the opinions of my brethren who differ with me in this particular.

Witham v. Lewis, 1 Wils. Rep. 54, 55, "a *venire facias de novo* and a new
518 trial are very different things, *though alike in some points. They agree in this; that a new trial takes place in both, and that the Court may or may not grant either. They differ in this; that the *venire facias* is the ancient proceeding of the common law, the new trial a modern invention to mitigate the severity of the proceeding by attain. New trials are generally granted where a general verdict is found; a *venire de novo*, upon a special verdict. The most material difference between them is, that a *venire* must be granted upon matter appearing upon the record; but a new trial may be granted upon things out of it; as, if the verdict be contrary to the evidence, or the Judge has given wrong instructions. But a *venire* can only be granted in one of two cases. 1. If it appear upon the face of the verdict, that it is so imperfect that no judgment can be given upon it. 2. Where it appears that the jury ought to have found other facts differently. An example of the first, is the case of *Chatie v. Harwell*, a prosecution for selling wine by retail. *Venire de novo*, because of the imperfection of the verdict; the Act of Parliament having particularly mentioned retail measure, as quart, gallon, &c. and the verdict only found that he sold wine by bottles, without taking notice of the measures in the Statute. As to the second head, where it appears on the record that the jury ought to have found otherwise; "in an action of trover, if the jury, in a special verdict, find that the plaintiff demanded goods of the defendant, and he refused to deliver them, a *venire de novo* ought to go; because the jury have found only evidence of a conversion, instead of finding the conversion itself." This is a decision of high authority, being upon error from a judgment of the King's Bench, and tried by all the Judges, Chancellor Hardwicke among them, and they were unanimous. The above is extracted from the opinion of Ch. J. Willes, delivering the opinion of the Court.

Try our case by the rules here laid down as to a *venire facias de novo*. The verdict must be, first, so imperfect that no judgment can be given; or secondly, it
519 must appear *on the record, that the jury had evidence before them sufficient to authorise them to find facts which they have not found.

1. Is there not enough found here to justify judgment for the plaintiffs; the safe carriage of the cargo to the port; notice of readiness to deliver; and the custom of the port, that it is the shipper's duty to take the goods from the ship, not the duty of the master to land them? Is not this enough to make out the plaintiffs' claim, unless contradicted by some other finding, or something found to excuse the defendant? And is any such thing found?

2. What evidence is there in the finding, which shews that the jury ought to have found facts which they have not found?

They find, that all the boats and lighters were subject to impressment by the government, and most of them were impressed. Can we say from this, that it was impossible for the defendants to unload the vessel? Or that they have deduced the fact improperly, when they say that from this cause, it was "with the greatest difficulty," that boats and lighters could be gotten? Again. The jury find, that the master did not apply to Hackley for directions as to the tobacco. Does this shew that they ought to have found that he assented to the delay? I cannot think so. They find no protest; and I agree, that we must take it there was none. Does this prove that they had evidence before them, which justified their finding the master's assent to the delay? Clearly not; for the protest could have answered no purpose. Every thing was fixed by the contract, and the master had performed his part. If he did assent, it must have been by some positive word or deed, and this the defendants should have proved. The record gives us no vestige of such proof. I cannot therefore see that there is any ground for a *venire de novo*. I conclude that the plaintiffs ought to recover the freight.

As to the demurrage, the principles which I have attempted to elucidate, if they be correct, decide that point without difficulty. The contract binds the defendants to *pay the demurrage for every day after the expiration of the lay days. If they would be excused from this by proving that it was impossible to unload within the twenty days, they have not proved it; the jury have not found it; and they remain bound according to the charter party.

I have said nothing of the primage. It follows the freight of course. Upon the whole, I am for affirming the judgment of the Court below.

JUDGE GREEN.

It is admitted by the counsel on both sides, that there is no precedent to be found in the books of maritime law, deciding whether freight is due or not, when the vessel and cargo have safely reached the destined port, the stipulated lay days for unloading, have expired before the vessel is unloaded and discharged, and the cargo afterwards lost by the perils of the sea or other inevitable accident; and that this question must be determined upon general principles.

On the part of the appellants it is insisted, that it is a general rule that freight is not due until the goods are delivered to the consignee, at the port of delivery. And this is true, when there is a stipulation to deliver, upon a principle of universal law, applicable to all contracts, that one who stipulates to do any thing for a reward, cannot be entitled to the stipulated compensation, until the thing is done, for the doing of which the reward is to be paid; so that, if the performance of the thing stipulated, is prevented by any means, without the default of the other party, no compensation is due. It is however a principle as universal as that above stated, that if the party, who is to do something as a condition precedent to the compensation to

be paid for the doing of it, is ready, able, and willing to do it according to his contract, and offers to do it, and the performance is prevented by the act or default of the other party, the party so offering to perform has the same *rights, as if he had actually performed his undertaking. Thus; "If goods are fully laden on board, and the ship hath broke ground, and the merchant, on consideration, determine again to unload them and not to prosecute the adventure, by the maritime law the freight is due." *Beaw. Lex Merc.* 130. So, if a ship is freighted to go to any place to load, and on arrival there the factor cannot, or will not, put any thing on board her after the master has staid the days agreed upon by the charter party, and made his regular protests, he shall be paid, empty or full. *Ibid.* 131. So, if a ship is freighted out and home, and after having delivered her cargo at the place agreed on, there are no goods provided for her re-lading; the master must stay the days agreed on by the charter party, and make his regular protest for his freighter's non-compliance; who will, in that case, be obliged to pay him, empty or full; though, should the master not wait the time stipulated, or omit to make his protest, he will lose his freight. *Ibid.* 134. And upon this principle the case from *Molloy*, 243, cited in 16 *Vin.* 412, proceeded: "A merchant insured his goods to a port abroad, and there to be landed. The factor, after the arrival of the ship, sells the cargo aboard without ever unloading the ship; and the buyer of the goods contracts for the freight of them to some other port. But, before the ship breaks ground, she is, by some accident, destroyed. In this case, the assured and buyer are left without remedy; for, the property of the merchandize being changed, and freight contracted *de novo*, the same doth amount to as much as if the goods had been landed."

In the argument, some exceptions were mentioned to the general rule, that a delivery of the goods is necessary to entitle the ship to freight, unless the delivery is prevented by the default of the freighter. One of these cases is founded on an ordinance of *Lewis the 14th*, mentioned by *Valin*, authorising a demand for freight when the goods are carried to the destined port, and prohibited to be landed by the laws of the country. Another is the case of *capture by a belligerent, and the separation of the ship and cargo by the unlivery of the latter, and both ship and cargo released. In this case the English Court of Admiralty has allowed freight. These cases have no application to the case at bar; and whether they ought to be received as law here, it is unnecessary to determine. They are exceptions to a general rule, founded upon particular reasons applicable to those particular cases; and the exception proves the general rule.

Let us apply the general principles above stated, to the case at bar. The appellees contend, that the terms of the charter party did not bind them to deliver the cargo at the port of Cadiz, but only to carry it there. The contract must be reasonably construed. The nature of the transaction

indicates irresistibly, that the sole purpose of employing the vessel, was to deliver her cargo at Cadiz, or any other port, to which she might be ordered, in the event provided for in the agreement. It surely could not be said, that the owners had earned their freight by carrying the cargo to the port of Cadiz, giving notice that it was there, refusing to deliver it, and bringing it back immediately. The days allowed for unloading, decisively prove, that she was there to be unloaded, and the goods delivered to the shippers or their consignee or assigns. The mode of delivery, whether to lighters along-side the ship furnished by the consignee, or on the wharf, or at the ware-house, depended upon the mercantile custom at the city of Cadiz; and according to this custom, as found by the jury, the consignee was bound to furnish lighters along-side the ship; and a safe delivery to them would have discharged the owners of the ship from any further care of responsibility for the goods. The construction of charter parties must be liberal, agreeable to the intention of the parties, the usage of trade in general, and of the particular trade to which the contract relates. Abbott on Shipping, 203, 246. The manner of delivering the goods, and consequently, the period when the responsibility of the master and owner

523 *will cease, depends upon the custom of particular places, and the usage of particular trades. Abbott on Shipping, 246 & sequ. The general rule, therefore, applies to this case. The vessel and cargo arrived at the port of Cadiz in safety. The master gave immediate notice of his arrival and readiness to deliver the cargo. This was all that he was bound to do at any time; and certainly he could do no more, until the expiration of the stipulated lay days. The lighters were not furnished by the consignee or his agent to receive that part of the cargo which was finally lost, either within the agreed lay days or after; and upon the principles before stated, the defendants were bound to pay freight and primage according to their contract, unless they were under no obligation to receive the cargo until they chose to receive it; or unless they were prevented from receiving it, by circumstances which made it impossible for them to unload the vessel before she was lost.

The appellants contend, that by the terms of the charter party, they were under no obligation to unload the goods until they chose to do so; and that they had a right to detain the vessel as long as they pleased, paying the stipulated demurrage; and therefore, the non-delivery of the cargo cannot be attributable to any culpable laches on their part, of which the appellees can rightfully complain. They argue, that the lay days were compensated for in the freight to be paid upon the delivery of the cargo; that any additional delay was compensated for by the stipulated demurrage; and that so long as they were willing to pay the demurrage, the master was bound to suspend the delivery of the cargo, retaining it on board the vessel, at the peril of losing the freight if the cargo should be lost and never delivered.

The best examination and consideration which I have been enabled to give to the subject, have led me to a different conclusion. The very contract to carry for freight, implies in its nature, on the one hand, that the master shall submit to any delay arising from necessity, and not 524 from *the default of the merchant; and on the other, that the merchant shall discharge the vessel with all the dispatch possible, under existing circumstances: that, if there were no stipulation for lay days, and the landing of the cargo were prevented for any length of time by an uncontrollable necessity, the vis major, such as storms, ice, or the orders of the government, the master would not only be entitled to no damages for the delay, but if the cargo were in the mean time lost, he would not be entitled to freight, any more than if it had been lost in the midst of the voyage; whilst if the delivery of the cargo were delayed by the default of the merchant, and without necessity, the master would not only be entitled to damages for such unnecessary delay, but to the stipulated freight, even if the cargo were lost in consequence of such delay. He might land the cargo, and store it at the expense of the merchant, retaining a lien upon it for his freight. Without a stipulation as to the time to be allowed for unloading and receiving the cargo, each case might give occasion to a contest between the parties, whether the merchant had used due diligence in discharging the ship, and whether he was liable for damages for delay in unloading; and in case of the loss of the cargo by such delay, whether the captain was entitled to freight. To avoid such controversies, charter parties usually contain a stipulation for lay days, prescribing a time within which, if the ship is discharged, no laches can be imputed to the merchant, and if the cargo is lost, no damages nor freight claimed. But, this stipulation has no further effect upon the obligations of the parties, resulting as before said, from the nature of the contract, so that if, by the default of the merchant, the vessel were not discharged within the stipulated lay days, the parties would be in the same situation as to all subsequent delay, as if there had been no lay days agreed upon. If by the merchant's default, the vessel was not discharged within the lay days, the captain would be entitled to damages and freight, and might land 525 the cargo as aforesaid. *But, if the unloading were, during the lay days, prevented by an irresistible necessity, and that impediment continued after the expiration of the lay days, the master would be bound to wait until the impediment was removed, if it were in its nature temporary; and until the vessel, with due diligence, could be unloaded, without any right to damages for the delay, beyond the lay days. In case of loss of the cargo, during the impediment, or before it could be unloaded after the impediment removed, he would lose his freight. This, it seems to me, would be the effect of a contract containing no stipulation for demurrage after the expiration of the lay days.

In such cases, two questions would arise;

first, whether the delay beyond the lay days, proceeded from the default of the merchant; and if so, secondly, what was the amount of the damage sustained by the master, for which the merchant would be responsible.

The first of those questions is incapable, in its nature, of being solved by any previous stipulation between the parties. The second may be adjusted by agreement between the parties, before as well as after it arises. Accordingly, there is usually found in every charter party, a stipulation to pay demurrage for delay; sometimes after the expiration of the lay days, sometimes without any stipulation as to lay days; as is the form of a charter party given by Beawes in his *Lex Mercatoria*, page 135. The natural office of a stipulation to pay an ascertained sum for demurrage, seems to be only to liquidate beforehand, the damages which the master may be entitled to claim, for a delay occasioned by the default of the merchant. The contract of the master to deliver the cargo, necessarily implies a stipulation to submit to the delay necessary for discharging the ship, in consideration of the freight agreed to be paid. To say that in case of a stipulation to pay demurrage without any lay days being agreed on, the demurrage would be payable from the moment

that the ship arrived at her port of destination and notice thereof, *even during the time necessary for unloading, when no impediment exists, would be to contradict the implied stipulation of the master aforesaid, and to render the terms of the contract inconsistent with each other. The literal meaning of the word demurrage seems to be, a delay occasioned by the default of the merchant. The forms of charter parties, as given in Beawes' *Lex Merc.* 134, 135, contain stipulations, (not to pay demurrage for delay, but) to pay for demurrage so much per day.

These consequences, deduced from the nature of the contract, may be controlled at the pleasure of the parties, according to their agreement. Are they controlled or affected by the stipulations of the parties in this case? The charter party in this case, seems to be nothing more than an abridgment of a charter party in its usual form. I have already noticed, that there is no stipulation for the delivery of the cargo. That is necessarily implied from the nature of the contract, and from its other terms. The engagement of the owners is to take a cargo to Cadiz, without the usual exception of the dangers of the seas. Yet that exception is implied from the nature of the contract, and the owners would not have been responsible for the loss of the cargo, if it had been lost by the perils of the sea. Neither is there a stipulation as usual, that the ship shall be staunch, well manned, and provided. Yet there was an obligation on the owners, that she should be so, implied from the nature of the contract. In the clause concerning demurrage, the usual stipulation to pay demurrage, ("if any shall be by the default of the shipper,") is omitted. But, that condition seems to me

to be implied from the general agreement to pay demurrage, which is for delay occasioned by the default of the freighter.

But, since the parties may, by express contract, vary the consequences which result from the nature of the contract, and the merchant might bind himself to pay demurrage, no matter what was the cause of the delay, it may be argued, that the words "quarantine always excepted," provided *it is enforced with such rigor as to prevent vessels from discharging and landing their cargoes during its continuance, and not otherwise," found in this charter party, have the effect of excepting this case from the general rule; since it excuses the freighter from paying demurrage in a specified case, in which he would not have been liable under the general rule, and there was no necessity for this exception, unless he was to be liable in all other events. I think this is one of the cases, to which the maxim "*expressio eorum quae tacite insunt nihil operatur*" applies, Abbott on Shipping, 242, 243; as the exception of the danger of the seas does not deprive the owner of his right to be exempted from responsibility for the goods if lost by the act of God, as by lightning; Abbott on Shipping, 295, or by pirates; *Ibid.* 292.

Some of the cases which have led me to this view of the effect of the contract to pay demurrage, are the following: *Jamieson & Co. v. Laurie*, 6 Bro. Parl. Cas. 474, (2d edition.) There the stipulation was to load the ship by an appointed day, and no provision for demurrage. The ship was delayed at the request of the freighter's agent, and compensation in the nature of demurrage allowed for the delay.

In *Stuck v. Tenant*, Abbott, 233, the running days for receiving and delivering the cargo were fixed by the charter party at 50 days, with permission to the freighter to keep her a further time upon payment of 5l. per day. Upon a suit for twenty days' demurrage, the defence was, that the freighter, intending to bond and warehouse the goods, had done all that was necessary on his part for that purpose, and that the dock company had delayed to land and warehouse them. Held, that the freighter was answerable for the delay, as it would not have happened, if he had thought fit to discharge the duties, instead of giving security for the payment; and the Chief Justice thought that the freighter would have been liable, if the company had improperly refused or delayed to

unload the vessel. *I suppose that by this was meant, that if they could have been landed not otherwise than by the company, the freighter would have been liable for their default; because the company would have been liable over to him for the damages sustained. But, if the failure to unload had proceeded from the act of God, or the government, against which the freighter could have no redress, the case implies that he would have been excused; as a carrier is excused for loss by the act of God, or public enemies, but not by the act of any one responsible for his acts.

So, in a case (stated in *Jacobson's Sea*

Laws, 250,) of a charter party stipulating for lay days and demurrage, and an action for demurrage, the defence was that the unloading was prevented by ice. The decree was, "that the freighter was liable for the demurrage, unless he could prove that the discharge of the vessel was impossible;" and of course, upon such proof, he would not be liable.

I have already observed, that the legal effect of a contract simply to carry and receive a cargo, in which either party would be excused from responsibility, if prevented from performing his undertaking by an irresistible necessity against which he could have no redress (as the master, by the destruction of the cargo by tempest or lightning before it was possible to carry and deliver it, or the owner, by the destruction of it before it was possible to receive it,) may be controlled by the contract of the parties. The master may bind himself, at all events, to deliver the cargo safely, and so to insure against all accidents; or the merchant may bind himself, at all events, to unload the vessel in a given time, or to answer for the consequences, if that is not done from any cause. In each particular case, the question whether either party intends so to bind himself, depend upon the particular covenants which he has stipulated to perform.

Thus, in *Hadley v. Clarke*, the embargo of two years, which prevented the master from carrying the goods, according to his contract during that time, did not
529 make it "impossible to do it, whenever the embargo was taken off; and an embargo is always, in such cases, considered as a temporary impediment, which both parties are bound to submit to, without either being responsible to the other; but it never dissolves the contract. If the goods had been destroyed without the default of the master, and so that he would have had no remedy over, or if the carrying of the goods had been peremptorily prohibited by the government, the master would not have been responsible.

In the three cases in 3 Taunt. 386, the contract was, that the "goods were to be taken out in twenty days after arrival, or each of the shippers to pay 4l. per day demurrage." The goods were by law required to be landed at a particular dock; a regulation presumed to be known to the contracting parties, when they fixed upon twenty days, within which the parties stipulated to unload the vessel. The delay in taking out the goods arose, not from accidental and unforeseen causes, but from the nature of the trade. The law required all goods of that description to be landed at a particular place; and so many vessels were there to be unloaded, that the plaintiffs' vessel could not be unloaded within the twenty days. The hazard of this delay, arising out of a known and usual state of things, was the very hazard contracted for. The hazard of the delay of the first twenty days, the ship-owner took upon himself; and of all beyond that, the shippers took upon themselves. If, after the twenty days, the vessel had foundered in port from a storm, and the goods been lost,

although the shippers would have been liable upon this construction of the contract for the demurrage, I incline to think they would not have been liable for the freight.

The case of *Paradine v. Jane*, cited in *Hadley v. Clarke*, was this: To an action of debt for rent upon a lease for years, the tenant pleaded, that "Prince Rupert, an alien and enemy, invaded the country with an army, and turned and kept him out of the tenement leased," &c. The Court decided, that he was, notwithstanding,
530 bound by *his covenant to pay the rent, as he would have been if the land had been surrounded by water. The Judges, in discussing this case, laid down some rules, and stated some cases, by way of exemplifying them; the substance of which was, that when the law creates a duty or charge, and the party is disabled to perform it without any default in him, and has no remedy over, there the law will excuse him; as in case of waste, if a house be destroyed by tempest or enemies. But, when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; as if a tenant covenants to repair, and the house be destroyed by lightning or enemies, he is bound to repair. And it was added, as a reason for the principal judgment, that as the tenant was entitled to the casual profits, he ought to bear the casual loss.

This case, and the principles laid down in it, seem to me to have no bearing upon the case at bar. In all the cases specified, the accident did not make it impossible for the party to do what he contracted to do. The tenant, in the one case, might pay the rent, notwithstanding the invasion of Prince Rupert; and in the other, might rebuild the house, notwithstanding the destruction, by lightning or enemies. But, in the latter case, if the land had been overwhelmed by the sea, or sunk by an earthquake, or condemned for the public use, then the tenant would be prevented by the vis major, from doing the thing contracted for, in any possible way. He could not build, repair or re-build; and the question would be in that case, whether he was responsible for damages for not performing his covenant? I think not; and this is our case.

By a simple contract to carry, I do not think the master of a ship covenants against all accidents, or makes himself answerable for the loss of the goods by shipwreck, a public enemy, or any other unavoidable accident; although there is in his contract no exception of the perils of the sea or any other, as in this case.
531 It becomes impossible, *without his default, to do what he has undertaken. He cannot carry what no longer exists. Nor do I think it can be inferred from a mutual agreement to allow a given time for unloading, that the party covenants to unload at all events, within that time, even if it became impossible to do so, by the state of the elements, or the destruction of the property without the default of the owner, or by the acts of those who cannot be made responsible to him.

I conclude, therefore, that if it was im-

possible to unload the vessel before she was lost with the residue of the cargo, the plaintiffs are neither entitled to demurrage nor to freight upon the tobacco lost. But, if the vessel could have been unloaded and discharged within the lay days, or thereafter, before she was lost, and the failure to unload her proceeded from the default of the defendants or their agents, the freight was due from the moment that default incurred; and demurrage also was due from that time, or from the expiration of the lay days, if the default happened within the lay days. And although it might have been possible to unload the vessel within the lay days, or before she was lost; yet, if the delay in unloading her was with the assent of the master, then the defendants would not have been in default, nor have been answerable, either for freight or demurrage. *Volenti non fit injuria*. The facts upon which the rights of the plaintiffs, and responsibility of the defendants depend, are, whether it was, under existing circumstances, impossible to unload the vessel or not; if not impossible, at what time she might have been unloaded; and if it were possible to unload her, whether the obligation of the defendants to unload her, was waived by the master, and the delay consented to by him: In short, whether the defendants or their agents were in default or not.

If these conclusions are just, then the special verdict does not find sufficient matter to enable us to give judgment upon it either way. It does not find an impossibility to discharge the vessel; but 532 it finds facts upon which an inference as to that fact, might be made either way; an inference which it belongs exclusively to a jury to make. It finds facts, from which it might be inferred, that Hackley purposely left the tobacco on board, until he made up his mind what to do with it. It finds facts, from which it might be inferred or not, that the captain consented to the delay in discharging the cargo: that he not only did not call upon Hackley to discharge the cargo, after he was informed he had authority to receive and dispose of the tobacco, but failed to make his protest against the delay. Whether these circumstances amounted to proof of assent by the captain to the delay, was a matter exclusively for the jury, and would depend upon the custom of merchants and ship-owners, in respect to such protests, and the effect of a failure to protest; which would depend upon evidence as to the custom, to be given to the jury.

These facts are not ascertained by the verdict, which must therefore be set aside, and a new trial awarded.

The PRESIDENT.

The contract on which this action is founded, though not under seal, is in the nature of a charter party. It contains the usual stipulations in such instruments, and subjects the parties to like obligations. The delivery of the cargo at the port of delivery, is a precedent condition, and must be performed to entitle the plaintiffs to freight, under the contract itself. This obligation on the part of the ship-owners, is implied in the stipulation in the con-

tract to carry the cargo from Richmond in Virginia, to Cadiz in Spain; and by the bills of lading, which are made a part of the special verdict, they expressly engage to deliver the cargo to James C. Wardrop, consignee of the defendants at that port. Hence it is a general principle, that freight is never due, till it is earned by a right-ful delivery of the cargo. In an action on the charter party alone, there is no excep-

tion to this rule; because, on general 533 principles, "the party who is to perform a precedent condition, must shew that he has performed it, to entitle him to his action, if he relies solely on the contract. If he is prevented from performing it by the acts or omissions of the other party, or by any thing else that will excuse him, the ground of his action is changed, and that ground must be set out in the pleadings. It is so set out in the declaration in this case. The ground is, that the defendants failed in providing, and having ready at the port of delivery, a consignee or agent to receive the cargo; in consequence of which, the vessel was delayed and lost before the cargo could be delivered; and on this ground, and not on the ground that the plaintiffs had performed their contract, must they rely. The special verdict and case agreed, have application to this case, and no other. If it were a demurrer to evidence, instead of a special verdict, I should incline to the opinion, upon the facts stated in the special verdict, that if there was default any where, it was in the plaintiffs and not in the defendants. I should rather infer from the facts and circumstances stated, that the cargo remained on board with the assent of the master and agent of the consignee, until it was lost. But, on a special verdict, no fact is to be inferred by the Court; and the enquiry is, is the verdict sufficiently certain to found a judgment upon, either for plaintiffs or defendants? My own impression is, that it is not. The gist of the action on the special counts in the declaration is, that the defendants failed in providing and having ready at the port of Cadiz, a consignee to receive the cargo. The findings of the jury which apply to this charge, are, that the master, on his arrival on the 19th of January, 1810, at the port of Cadiz, reported his arrival to Richard S. Hackley, vice consul for the United States at that place, and also agent for the consignee Wardrop as to the flour, but not as to the tobacco part of the cargo; and notified him that he was then and there ready to deliver the cargo, according to the contract: that the said Wardrop, the consignee, was at that time absent 534 from Cadiz at Valencia, and "so remained until July, 1810; to whom the said Hackley transmitted the letters of the defendants, which had been delivered to him by the master; of which the master had notice: that about ten days from the arrival of the vessel and cargo at Cadiz, the said Hackley did receive instructions from the said Wardrop, relative to the tobacco part of the cargo, and undertook to act as agent of the defendants concerning the same, and gave notice thereof to the master; but gave no directions whatever,

at any time, touching that part of the cargo; nor did the master apply for any: that between the 19th day of January, 1810, and the 1st of March following, inclusive, the said Hackley received from on board the vessel, 741 barrels of flour, and paid the freight. So far then, the facts do not support the charge in the declaration to which they apply. In ten days from the arrival of the vessel, the defendants had an agent at the port of delivery, as to the whole cargo, and cannot be said to have failed in providing and having ready, at the port of delivery, a consignee to receive the cargo, in consequence of which, the vessel was delayed and lost; as is charged in the declaration. Ten days were not an unreasonable delay after the arrival of the vessel in another quarter of the globe; and the notice from Hackley, that he was the agent of the consignee after that time, as to the tobacco also, was notice that he was ready to receive it, according to the usage of the port, which is found by the jury; though he gave no directions to the master respecting it. The running days to be paid for in the freight had not expired; ten days of them remained, and the vessel was not lost until the 9th of March following. The delay charged in the declaration refers to the failure to have a consignee ready to receive the cargo, on its arrival at the port of delivery. But suppose it to refer to the time which elapsed after notice to the master that Hackley was agent as to the tobacco part of the cargo. It is expressly found by the jury, that after that notice, the master did not apply for directions as to that part of the cargo; nor

535 is it *found that he made his protest, as is the usage on the failure of the consignee to receive the cargo. To dispense with this, there is no finding of the jury of any readiness on the part of master, to deliver the tobacco; unless the finding of the jury, that between the 19th of January, 1810, and the 1st of March following, Hackley received the flour, is to be considered as sufficient. But, this is too uncertain. If Hackley received the flour, before he was agent for the tobacco, when he informed the master of that fact, it was the duty of the master to give him notice, that he was ready to deliver it also, though he (Hackley,) had given no directions respecting it. The general notice given by the master of his arrival, &c. applied to the flour; as to which, Hackley was their agent, and not to the tobacco, as to which there was no agent at the time. If, on the contrary, the flour was received by Hackley after he was agent for the tobacco, the general notice might be made to apply to both. But, the jury have not so found it; nor can the Court infer the fact either way.

The verdict is uncertain in another respect. If, owing to the state of things found by the jury, at the port of Cadiz, it was impracticable to land the cargo (according to the usage of the port, which is found by the jury,) it would repel the allegation of delay charged in the declaration, taking it in its broadest sense, and making it apply to the time, after which there was an agent to receive the

whole cargo. The finding of the jury, that all the boats and lighters were subject to impressment by the Spanish government: that many of them were impressed; and also that many vessels remained in the port unloaded; are facts from which it might have been inferred by the jury, in connection with other facts found, that it was either impracticable or not, to land the cargo. But, the verdict has done neither. The finding that it was difficult to procure boats and lighters, and that when procured, they were liable to impressment, is only evidence one way or the other. Upon a demurrer to evidence, the Court might

536 do it; but not *on a special verdict.

But, there are other facts found by the jury, that leave the mind in some uncertainty as to the cause of delay. The jury find that it was not the intention of the shippers of the cargo to land it at Cadiz, unless a certain price could be gotten for it. The contract stipulates for twenty lay days, which must be paid for in the freight, and an indefinite demurrage after the expiration of the lay days at \$50 per diem. They might have inferred from these facts, and from the disturbed state of thing at the port, that the cargo remained on board with the assent of the master and the agent; and if so, there was no default in the agent.

I think, therefore, that the verdict is imperfect in several respects: that it is uncertain as to the fact of notice from the master, that he was ready to deliver the tobacco, after the agent notified him that he was agent as to that part of the cargo; and defective in not finding the fact one way or the other, deducible from the evidence in relation to the practicability of landing the cargo, under the circumstances of the case.

On these grounds, I think the judgment ought to be reversed, the verdict set aside for uncertainty, and a venire de novo awarded."

537 *Vanlew v. Bohannon, &c.

November, 1826.

Chancery Practice—Defence Available in a Court of Law.—It is a general rule, that a Court of Equity will not allow a man to make a defence which he might have made in a Court of law, unless he shews some good reason why he did not make that defence in the Court of Law.

Same—Same.—But, if the defendant in Equity does not insist upon that objection, but voluntarily goes into the merits of the case, and in his answer admits facts, which, if they had appeared to the Court of Law, would have produced there a different result, a Court of Equity ought to grant relief.

Vanlew filed a bill in the Richmond Chancery Court, stating the following case: that a certain John P. Shields, executed his note in favor of Samuel G. Adams and the complainant, then merchants and partners, trading under the firm of Adams & Vanlew, for the sum of \$106 87: that after the said firm was dissolved, the said note was transferred to Bohannon in blank, in the name of Adams

*JUDGES CABELL and COALTER absent.

†See monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457. The principal case is cited in Hudson v. Kline, 9 Gratt. 308; Dey v. Martin, 78 Va. 5, and distinguished in Collins v. Jones, 6 Leigh 583.

& Vanlew, by the said Adams: that it was understood and agreed between Bohannan, Adams and Vanlew, that the said note was taken by Bohannan for as much as it was worth, and that he was not to consider Adams and Vanlew responsible to him, if the money could not be recovered of Shields: that suit was instituted by Bohannan, as assignee of Adams & Vanlew, against Shields, and judgment obtained; upon which judgment a Ca. Sa. issued, and the defendant took the oath of insolvency: that the said note was passed to Greenhow, and came to the hands of Diddep, without any endorsement by Greenhow: that suit was brought on the said note against the complainant, as surviving partner of the firm of Adams & Vanlew, upon the endorsement by Bohannan, for the benefit of the said Diddep: that no defence was made at law, in consequence of the absence of a witness who had left Richmond, without his residence being known: that when the cause was tried, neither the complainant nor his counsel was present, to move for a continuance, on account of the absence of the said witness. He therefore prayed for an injunction to the said judgment.

538 *The injunction was awarded.

The answer of Bohannan and Diddep admits, that the note in question was assigned after the dissolution of the partnership of Adams & Vanlew; the said Adams then acting with full authority, as the agent of his co-partner, Vanlew: that it is not true, that it was expressly agreed and understood between Bohannan and Adams, that the former was to take the note without any liability on the part of Vanlew, if Shields should prove unable to pay it: that the note was assigned to Bohannan, by Adams, in part payment of a debt due by him to Bohannan, who did not consider Vanlew as bound for the payment, at the time of the assignment: that before the note was transferred to Diddep, he applied to Vanlew, who did not then deny his liability; and, although he afterwards refused to pay it, he never alleged that the note was assigned without recourse to him. As to the surprise alleged, in the trial at law, the defendants call for proof of the allegation, &c.

The injunction was dissolved, and an appeal was allowed by a Judge of this Court.

J. Myers, and the Attorney General, for the appellant.

Scott, for the appellees.

The counsel for the appellant made four objections to the decree:

1. That the note was endorsed to Bohannan by Adams, as agent of the firm of Adams & Vanlew, subsequent to the dissolution of the partnership, and for the payment of Adams' individual debt, which was known to the said Bohannan, at the time of the transfer of the said note.

2. That the note was endorsed long after its maturity, and consequently, subject, in the hands of the subsequent holders, to all the equity of the complainant against the said Bohannan.

539 *3. That if endorsed before its maturity, Vanlew was exonerated, by

reason of the failure to place the note, (which was a negotiable note,) in bank, and to protest the same.

4. That the judgment at law, was obtained by surprise against the complainant.

For the appellees, it was contended, that a judgment having been obtained at law, and no sufficient excuse being offered why the defence was not made there, (the matter of defence being purely legal,) a Court of Equity cannot now grant relief, according to established principles.

November 9. JUDGE CABELL delivered the opinion of the Court.*

John P. Shields, being indebted to Samuel G. Adams and John Vanlew, merchants and partners, trading under the firm of Adams & Vanlew, executed his note to the said Adams & Vanlew, for the sum of \$106 87, on the day of in the year 1816. The said note was, some time thereafter, and after the expiration of the partnership of Adams & Vanlew, transferred by the said Samuel G. Adams, in the name of Adams & Vanlew, to a certain Thomas Bohannan, in payment of an individual debt, due from the said Samuel G. Adams to the said Bohannan. The said note was transferred by the said Bohannan, but without his endorsing the same, to George Greenhow, and afterwards came into the hands of Thomas Diddep, without any other endorsement than that of Adams & Vanlew to Bohannan. Suit was brought on the said note, in the name of Bohannan, assignee of Adams & Vanlew, against John P. Shields, who took the benefit of the insolvent laws. It being thus ascertained that nothing was to be made from Shields, an action was instituted in the name of Thomas Bohannan, for the benefit of Thomas Diddep, against John 540 Vanlew, surviving partner of Adams & Vanlew, for the purpose of subjecting him to the payment of the said note, in consequence of the endorsement aforesaid, by Samuel G. Adams, in the name of Adams & Vanlew; and a judgment was obtained for \$116 89. The object of the bill is to be relieved against this judgment.

It is incontrovertible, that if the facts above stated, had been exhibited at the trial at law, no judgment could have been obtained against Vanlew. But as that defence was not made in the Court of law, the question is, whether a Court of Equity can grant the relief now sought.

The rule has been long established, that a Court of Chancery will not entertain a bill for the purpose of allowing a man to make a defence, which he might have made in the Court of law; unless he shews some good reason why he did not avail himself of that defence in the Court of law. This rule is founded on the principle, that there ought to be an end of litigation; and that, consequently, where a matter has been once fairly investigated and decided in one forum, it shall not again become the subject of controversy in another. It was intended as a shield for the party who had prevailed at law. But, if he does not choose to avail himself of its benefit, if he

*Absent, the PRESIDENT and JUDGE COALTER.

voluntarily goes into the merits of the case, and in his answer, admits facts, which, if they had appeared to the Court of Law, would have there produced a different result, neither the rule, nor the principle of the rule, is violated by pronouncing a decree, justified by his own admissions.

This view of the subject, is decisive of the case before us, and supersedes the necessity of determining whether Vanlew has proved a sufficient excuse for not having defended himself at law. The plaintiff, in the judgment at law, has admitted in his answer, that the note due to Adams & Vanlew, was assigned to him by Adams, for an individual debt due to him by Adams, and that at the time of the assignment, he did not consider Vanlew bound. *This unauthorised and improper act of Adams, could not impose any obligation on Vanlew.

The order of the Chancellor, dissolving the injunction, should be reversed, and the injunction perpetuated.

Shields v. The Commonwealth.

November, 1826.

Contract with Executive—Refusal of Executive to Give Orders under—Remedy.—A contract is made with the Executive, under an authority given them by law: which directs, that the Auditor shall issue warrants upon the orders of the Executive. The Executive refuse to give such order. The party aggrieved may resort to the Courts, by original petition, and have his rights enforced by their judgment.

Same—Same—Same—Equity Jurisdiction.—It seems, that in such cases, the party may obtain redress either in Courts of Law or Equity, as the circumstances of the case may give jurisdiction to either tribunal. Per GREEN, Judge.

Equity Jurisdiction—Lost Instrument.*—Equity has jurisdiction wherever a lost instrument is to be set up, notwithstanding that the Courts of Law now exercise jurisdiction in the same cases.

This was an appeal from the Richmond Chancery Court. The case was submitted in this Court without argument; and the following opinion gives a complete history of it.

November 13. JUDGE GREEN delivered the opinion of the Court.†

The act of February 28, 1816, enacted, "that the Executive be, and they are hereby authorised to contract with some person or persons, for regulating the surface of the public square, in the city of Richmond, and for enclosing, planting, and improving the same," &c. The second section, authorises the Executive to sell certain public property; and the third section, constituted the proceeds of

542 *the sales, a fund for defraying the expenses authorised by the first section of the act, as far as the same may be necessary, and directed the disposition of the balance. The act did not direct how these expenses should be liquidated

and paid; leaving those matters to be disposed of according to the general laws.

At the instance of the Executive, a Mr. Godefroy prepared a plan, for regulating and improving the public square, and on the 13th day of September, 1816, a contract, between the then Governor and Thomas Strode, was entered into, which was afterwards approved and adopted by order of the Executive Council, by which Strode, for the consideration of \$24,000, agreed to execute a specified portion of Godefroy's plan. It seems that this plan, required a ravine between the Capitol and Governor's house, to be in part filled up; and that the hands of the city of Richmond, and some at work on the Governor's yard, were throwing dirt into that ravine.

The second article of the contract stipulated, "that the parties agree, that if the corporation of the said city of Richmond, and the hands now at work on the Governor's yard, fill more than half the bottom below the Capitol and the Governor's house, according to the said design or plan of the said Godefroy, the said Strode is to be paid in proportion for the said deficiency." It is difficult to understand the effect of this article. It seems, however, to have been understood, that there might be some deficiency in work, to be done by others; for doing which, Strode was to be compensated; and the work so to be done by others, seems to have been filling half the bottom.

The appellant in his petition alledges, that in 1817, he purchased from Strode a portion of his contract, with the assent of the Executive, and was formally substituted by Strode by a written agreement entered into between him and the then Governor of Virginia, which was lodged with the Executive; but which, as he is informed, cannot now be found. That

543 there was some such supplemental contract, "appears from two orders of Council; one of June 13, 1820, directing the Attorney General to sue both on Strode's and Shield's contracts; and another of May 4, 1820, in which they state, that the contracts made with them by T. Strode and J. P. Shields, have not been complied with; and in that of June 13, 1820, they request the opinion of the Attorney General, whether the execution and acceptance of Shields' contract, impairs or destroys the liability of T. Strode and his sureties. The purport of this contract, as stated by Shields in his petition, was, that he should complete the graduation of the ground: that he should turf certain parts of it; and plant certain trees, according to a plan specified; for which he was to receive \$17,000 in instalments; payments to be made by order of the Executive, who were to superintend the work, and direct the payments. Shields proceeded to execute his contract, under the superintendence of Orris Payne, A. S. Brockenbrough, and Wilson Bryan, who were successively appointed by the Executive to superintend the execution of the improvements on the Capitol square. Shields alleges, that he has executed his contract, and that \$400 of the \$17,000 remain due to him; and that under the di-

*Equity Jurisdiction—Lost Instrument.—In Hickman v. Painter, 11 W. Va. 395. It is said: "It is well established that 'equity has jurisdiction whenever a lost instrument is to be set up, notwithstanding that the courts of law now exercise jurisdiction in the same cases.' *Shields v. Com., 4 Rand. 541*, and the facts of the case may be ascertained by reference to a commissioner, or by issues to be tried by a jury, according to the common course of the court: Idem, 546, opinion by GREEN, J." See the principal case also cited in Thompson v. Clark, 81 Va. 428.

See further, monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt 457.

†The PRESIDENT and Judge COALTER, absent.

rections of the several superintendents, he did a great deal of extra work not in the contract; of which he exhibits an account, as to some of which there are proofs of particular prices agreed on, and as to other parts, there appears to have been no agreement as to price. He particularly charges a very large sum for filling up the gully mentioned in the second article of Strode's contract, estimating the work at 42,591 cubic yards; of which he states, that the corporation finished 13,666, leaving 29,225 cubic yards, for which he charges.

If the effect of the contract is such as I have supposed, and this were a true account of the quantity of the work, then he should have charged only the half of 42,591 yards less, 13,666, viz. 7,629½ yards. Of this and many other items, proofs were offered by Shields. No proof is offered

544 *on the part of the Commonwealth, except the report of a committee of the Executive, who say that the work contracted for was not properly done. These details are not referred to, for the purpose of giving any opinion on the merits, but for the purpose of ascertaining the nature of the case; as the question of jurisdiction may be affected by them.

Shields, having applied to the Executive for an order to the Auditor to issue a warrant according to his account, which was refused, presented the account to the Auditor, who refused to issue a warrant; and Shields thereupon filed in the Chancery Court, his petition, which was both an original petition, and an appeal from the decision of the Auditor. The Attorney General, in his answer states, that a suit is brought against Shields, to recover damages for the non-performance of his contract, which, in effect, puts in issue the matters stated in his petition, when they can be tried by a jury, the proper tribunal; and he objects to the jurisdiction of the Court.

The pendency of this suit at law against Shields, is no impediment to the remedy he is pursuing. No one matter which is the subject of his petition, can be decided in that suit, except the question whether he has completely performed his contract, or not; and whether he has, or not, he can neither recover nor discount in that suit, the \$400 which he alleges to be unpaid, of the contract price of \$17,000; nor can his claim under the second article of Strode's contract, or for the work not embraced in the original contract, be discussed or settled in that suit.

The only questions are, whether this is such a case as entitles the petitioner to prosecute his claim, either in the Court of Chancery, or the Superior Court of Law held at Richmond; and if it is, in which of those Courts he ought to have proceeded?

In the case of the Commonwealth v. Pierce's adm'r ante 432, it was held that the petitioner was entitled to no relief, because he had no claim upon the Commonwealth, *but for what the Executive should allow; the law, under which he claimed, giving him a right only to what the Executive, in their discretion, should deem just and necessary; and, if he claimed independent of that act, that there was no law, or resolution of the

Assembly, which authorised such a claim against the Commonwealth.

This case is not like that. The act of 1816, authorised the Executive to contract for all the work which was done; made an appropriation for the payment of the expense, and prescribed no mode of adjustment and payment, but that prescribed by the general laws for liquidating and recovering all other legal claims against the State. The contract, as it is said, provided that the warrants for the payments, should issue upon the orders of the Executive. The Auditor could not, therefore, lawfully issue a warrant without such order. But upon the refusal of such order, if, in justice, it ought to have been given, the party might resort to the Courts by original petition, under that clause of the general law, prescribing the duties of the Auditor, which allows such a petition, in case where the party has a claim, in law or equity, against the public, which is not proper to be presented to the Auditor. The refusal of the Executive to give orders for payment, did not destroy Shields's legal right, if he was entitled to claim under his contract or contracts, since they had no discretion to determine, finally, the extent of his rights, as they had in the case before mentioned.

Although the statute is in general terms, and seems to give an election to the party in all cases, to petition either the Chancery or Superior Court, (and I believe it has been the practice to exercise that discretion without objection,) I should incline to think, that the effect of the statute was, to refer cases, which, if they concerned individuals, would be most proper for a Court of Law or of Equity, according to their circumstances, either to the one or the other, as might be most proper upon that principle. It is, however, unnecessary in

this case, to decide that question; 546 *since, if this case were, from its general character, most proper for a Court of Law, there are circumstances in it, which make it proper for a Court of Equity.

The contract upon which Shields must have proceeded in a Court of Law, for a part of his demand, was either lost, or not in his power; and, although a party may now proceed on a lost deed, at law, that does not impair the original Chancery jurisdiction in such cases. The Court of Chancery, therefore, had jurisdiction, and the facts of the case might have been ascertained by reference to a commissioner, or by issues to be tried by a jury, according to the common course of the Court. The Attorney General, in his answer, suggests a doubt, whether the extra work ordered and contracted for by the superintendents, was duly authorised. Whether these superintendents were, or were not, authorised by the Executive to contract for this part of the work, was a fit enquiry to be made in the Court of Chancery. The Court does not appear to have decided upon the merits, but to have dismissed the bill for the want of jurisdiction.

The decree should be reversed, and the cause remanded, to be proceeded in upon the merits.

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*Riddick v. Cohoon.

November, 1826.

Limitations over—When Too Remote.—A limitation over after an indefinite failure of issue in the first taker, is too remote and void.

Will—Devise with Power of Disposition—Effect.—Where an estate is given by will to A. and his heirs, and if he should die without issue living at his death, then so much of the estate as may remain undisposed of by A. to B.; the limitation over is void for uncertainty, and because the power to dispose of the property, gives A. an absolute estate.

Appeal from the Superior Court of Nansemond, where Cohoon brought an action of detinue against Riddick, for a slave. Upon the plea of non detinet, the jury found a special verdict, and the Court gave judgment for the plaintiff, and the defendant obtained an appeal. The points in controversy are fully set forth in the following opinion.

Wickham, for the appellant.

Scott, for the appellee.

November 16. JUDGE GREEN delivered the opinion of the Court.†

James Cole, in 1799, made his will, by which he gave several specific legacies to his three sisters, Christian Cole, Esther Cole, and Mary Cole, and to his daughter, Betsey Cole, he gave him manor plantation, and lands of all kinds, and four slaves, males and females, and the increase of the females, "to her, and her heirs and assigns,

***Wills—Devise with Powers of Disposition—Effect.**—It is settled that, if a testator gives property to a devisee or legatee, to use or dispose of at his pleasure, that is, to consume or spend, sell or give away, at his pleasure, such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate, and there be a provision in the will whereby what may remain of the property at the death of the devisee or legatee, is given to another person. *Milholten v. Rice*, 13 W. Va. 519, citing the principal case as authority.

After an absolute property given to one, with an unlimited power to dispose of it, express or implied, a disposition by the donor of so much of the property as may not be disposed of by the donor or legatee to another is void, because of the inconsistency and the uncertainty as to what part of the property is intended to go over. *Cole v. Cole*, 79 Va. 253, citing the principal case as so holding. To the same effect, the principal case is cited in *Madden v. Madden*, 2 Leigh 385; *Elican v. Lancasterian School*, 2 Pat. & H. 58; *foot-note* to *Missionary Society of M. E. Church v. Calvert*, 52 Gratt. 358; *foot-note* to *May v. Joynes*, 26 Gratt. 692; *Carr v. Emfinger*, 78 Va. 206; *Hall v. Palmer*, 37 Va. 356, 12 S. E. Rep. 618; *Farish v. Wayman*, 91 Va. 485, 21 S. E. Rep. 810; *Wilmoth v. Wilmoth*, 84 W. Va. 482, 12 S. E. Rep. 733.

In *Johns v. Johns*, 86 Va. 333, 10 S. E. Rep. 2, the will read: "I will and desire that my wife Rebecca, shall have and hold all my estate during her natural life, for the benefit of herself and children, to be used as she may think proper." The testator left surviving him, his wife and eight children. He left no real estate but a small personal estate. The court held that the wife took a life estate, with remainder to her children free from her debts. The court, at p. 336, said: "In the case of *Randolph v. Wright*, 81 Va. JUDGE LACY says that the case of *May v. Joynes*, is authority for itself alone, and commenting upon the cases of *Riddick v. Cohoon*, 4 Rand. 547; *Burwell v. Anderson*, 3 Leigh 348; *Melson v. Cooper*, 4 Leigh 408; *Brown v. George*, 6 Gratt. 424; *Cole v. Cole*, 79 Va. 253; *Carr v. Emfinger*, 78 Va. 147, he shows that in all these cases, either expressly or by necessary implication, authority was conferred on the first taker of the estate to consume it or dispose of it absolutely; but in the case under consideration, the words, 'to be used as she thinks proper,' are only apt and proper words to describe the use of the life estate given to Mrs. Johns by the clause of which they are a part." See further, monographic note on "Legacies and Devises" appended to *Early v. Early*, Glim. 124; monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

†The President and JUDGE CABELL, absent.

forever." He then directed all the residue of his property to be sold, and after the payment of his debts, he gave all the balance of the money arising from the sales, to his daughter Betsey, her heirs and assigns. He devised, that the surplus money should remain in his executor's hands, and not be put to interest, until his daughter came to lawful age to receive it: 548 and then proceeds: "Item. It is my will and desire, that if my aforesaid daughter, Betsey Cole, shall die without lawful heir or issue of her own body, that then, all the lands, and all the other estate, I have herein given to my said daughter, Betsey, that shall be left remaining at her death, be equally divided to and between my aforesaid three sisters, namely, Christian Cole, Mary Cole, and Esther Cole, to them, and their heirs and assigns, forever." Betsey Cole died without issue, never having been married; and the slaves bequeathed to her, and the increase of the females of them, were divided among the three sisters of the testator, before there was any administration on her estate. The appellee afterwards took administration on her estate, and brought an action of detinue against the appellant, for the recovery of one of the said slaves, purchased by the defendant from John Mahan, the husband of Esther, the testator's sister; and recovered a judgment for the slave, from which judgment this appeal is taken.

The question is, whether the limitation over to the testator's sisters is good, as an executory devise?

It is clear, and admitted, that such a limitation, after a general failure of the issue of the first taker, is void, and can only be made good by some expression or provision of the will, or some circumstance shewing that the intention of the testator was to give the property over, only in the event of the first taker dying without issue living at the time of her death. In respect to such limitations of personal property, the Courts have been always anxious, and even astute, to find expressions in the will, or circumstances in the case, to have that effect; for otherwise, the intention of the testator, towards those who are intended to be substituted to the first taker, would be unavailing. This anxiety, however, ought not to induce us to resort to any forced construction of the will. If, upon a fair construction of the instrument, it is found that the testator, in reality, designed that the substitution should take place, whether the event, upon which the 549 limitation was to take effect, *happened within the period allowed for executory devises, or afterwards, that intent being contrary to law, the Court cannot afford any relief, upon the supposition, that if the testator had known the law, he would have limited the contingency to the allowed period.

In this case, the property being given to the daughter absolutely, and in the strongest terms, and to the sisters and their heirs and assigns, if the daughter should die without lawful heir or issue of her own body, there is nothing to restrain the generality of the expressions to a dying with-

out issue living at the death of the daughter, or in the life-time of the sisters, or any of them, unless the expression, "that shall be left remaining at her death," can have that effect. What did the testator mean by these words? Did he mean that all the property given to his daughter, which did not perish in her life-time, should immediately upon her death, go over, if she had no issue then living? Or, did he mean that all the property which she had not previously disposed of, should go over upon the failure of her issue, whenever that event might happen? The first is the construction insisted on by the appellant; the latter, I think, is the true construction. The property given to the daughter, was land, slaves, and money. The expression, "that shall be left," &c. applies to all the property. The land and money must be left at her death, unless disposed of and alienated during her life. As to these, the expression used, can only refer to that part not disposed of by her. The slaves might have perished; but it would have been perfectly idle to except such as had perished, from the operation of the devise over. That which does not exist, cannot pass. The testator had given to his daughter, and her heirs and assigns, forever, an absolute estate, and intended, not to restrain the unlimited power of alienation, incident to that estate, but to control the future disposition of so much of the property, as she might not dispose of in her life-time; and that it should go to her issue, if she had any, as long as

550 they existed, and *upon the failure of issue, to his sisters or their representatives.

If, however, the conclusion last stated is not correct, and the testator intended to give over the property left, only in the event of his daughter's dying without issue living at the time of her death, it is clear, that he intended to give to his daughter an absolute power of alienation; and in that case, could not control the property not disposed of by her, as such control would be inconsistent with the nature of the estate given to her, and the limitation void, for uncertainty as to what property was to go over.

The case of *Guy v. Montague*, decided by Lord Chancellor Northington, in 1764, and his decree affirmed in Parliament, in 1770. 3 Bro. Parl. Cas. 314, is in point. In that case, Elizabeth Rogers having a power to dispose of 3000l. by her will, and having an only son her heir at law, and whom she appointed her executor, devised as follows: "I do hereby appoint and order, that upon the death of my said son without issue, or in case my said son does not dispose (of the said sum of 3000l.) either by deed or will, which shall first happen, that the sum of 500l., part thereof, be paid to my nephew, J. C. for his own use, and 500l. to A. G. for her own use, and 900l. to A. C. to her own use, and to E. P. 300l., to her own use, and E. P. 100l.; to four Churches, 100l. each; 50l. to the parish of N.; to the poor of E. 100l.; and the remaining 150l. among my son's servants, according to their deserts." The son died without issue living at his death, and

made no disposition of the 3000l. by deed or will. The legatees over filed their bill against the son's representatives, claiming the 3000l. under the limitation, as a valid executory devise; and the bill was dismissed.

This case was much stronger in favor of the claimants under the limitation over, than the case at bar. The fact whether the son disposed of the fund by deed or will, was necessarily to be ascertained at the time of his death. The limitations over, were to sundry persons, without any
551 *words of inheritance, and for their own use; and a part was limited to the son's deserving servants. But all these circumstances, which tended to shew an intent to give over the property upon the death of the son without issue then living, or in the life-time of those to whom it was limited, could not prevail against an estate in him, to go over only on a general failure of issue, coupled with an absolute power of disposition. If he had had no estate, and only a naked power of disposition, it might have been otherwise.

There are other cases to shew that after an absolute property given to one, with an unlimited power to dispose of it, express or implied, a disposition by the donor of so much of the property as may not be disposed of by the donee or legatee to another, is void, because of the inconsistency, and the uncertainty as to what part of the property is intended to go over.

In *Pushman v. Filliter*, 3 Ves. 7, the bequest was, "Lastly, all my household goods and furniture, plate, linen and china, ready money and securities for money, stock in trade, together with the residue and remainder of my personal estate, I give, &c. to my wife Mary Pushman, desiring her to provide for my daughter Ann out of the same, as long as she my said wife shall live; and at her decease to dispose of what shall be left among my children, in such manner as she shall judge proper." The children claimed after the wife's death the property so devised to her against her executor. The Master of the Rolls dismissed the bill, upon the ground that it was an absolute gift to the wife of the whole property, to any use she might think fit; so that she might have made a valid disposition in her life-time, of all, leaving nothing to pass by the devise over; and no valid limitation could be made after such an absolute power to dispose, coupled with an interest. This I take to be the effect of that case.

Again, in *Bull v. Kingston*, 1 Meriv. 314, the effect of a confused will is stated by the Master of the Rolls, to be this: "I give to Charlotte
552 Williams the residue of *my estate, together with the right of disposing of the same by will, except to E. P.; and if she dies without a will, then I give whatever may remain at her death, to William Ashby." The Master of the Rolls proceeds: "This makes the whole intelligible and consistent. She, the testatrix, gives to Charlotte Williams, as a married woman, the right of disposing by will, of the property vested in her, independently of the control of her husband,

and she intended, at the same time, that if any thing was left undisposed of by her, it should go to William Ashby. But this is an intention which must fail, on account of its uncertainty. Charlotte, therefore, took the absolute interest in the property, which, as to all the parts which were not specifically disposed of by her will, passed to her husband, and from him to the present plaintiff, his personal representative." The contest was between the husband's personal representative and William Ashby, as to a part of the property not disposed of by the will of Charlotte Williams.

Other cases to the same effect are to be found. *The Attorney General v. Hall*, 8 Vin. Abr. 103, pl. 50; where the devise of real and personal estate was, in effect, to A. and the heirs of his body, and if he should die leaving no heirs of his body living, then so much of my real and personal estate as my said son shall be possessed of at his death, to the Goldsmith's Company. Here the limitation as to the personal property was expressly to take effect within the term allowed by law for executory devises. But it was held to be void, on account of the power to the first taker to dispose of the whole, so as to leave nothing to go over certainly, if the contemplated event happened. This case is cited and approved by Lord Hardwicke, in *Flanders v. Clarke*, 1 Ves. 9; which case was decided on the same principles.

The same doctrine is asserted in the case of *Miller v. Moor*, 8 Vin. Abr. 248, pl. 21; where a devise was to three daughters and their heirs and assigns forever; and 553 if "they should happen to die, and leave no issue of their bodies to inherit such estate, or not be of age, or make no other disposal thereof, then to S. B. and his heirs and assigns, forever. This was held to give a fee simple to the daughters. This would have been a fee tail in the daughters, but for the expression, "or make no other disposal thereof."

The judgment should be affirmed.

Farmers' Bank, &c. v. Vanmeter.

November, 1826.

Equity Practice—Injunction to Judgment—Mistake.*

—A Court of Equity will never injoin a judgment at law, on the ground that it would have been reversible if the proper steps had been taken in the Court of Law, but by mistake, a confession of judgment had been entered.

Bills of Exchange—Fraud—Arrangement with Endorsers.—It is no fraud in the holder of a bill of exchange, to make an arrangement with one of

***Equity Practice—Injunction to Judgment—Judgment Stands as Security.**—Where a party is proceeding at law to get a judgment for more than is due, and the defendant appeals to the court of chancery for relief by way of injunction, the settled rule is, that it will only be granted on terms of confessing a judgment and executing a release of errors at law. And a judgment is always suffered to stand as a security for what may be really due, though obtained by fraud, accident or surprise. And although what may be due be the whole or a part only of the debt recovered. *Bank of Washington v. Hupp*, 10 Gratt. 33, citing opinion of JUDGE GREEN in the principal case as authority.

And in *Grafton, etc., R. Co. v. Davisson*, 45 W. Va. 17, 29 S. E. Rep. 1030, it is said: "The court must not at once set aside the judgment, and grant a new trial, when it determines that a retrial should be had, but must await its result, as the judgment ought to stand as security until it is finally determined whether it shall be perpetually enjoined or not. *Knifong v. Hendricks*, 2 Gratt. 213; *Bank v.*

the endorsers, by which it is agreed that the whole burthen shall be thrown upon the other endorsers, and that the endorser first mentioned, is to be liable only in case they should be unable to pay.

Same—Refusal to Accept—Notice to Endorser.—Where a bill of exchange is presented to the drawee, who refuses to accept or to pay, notice need not be given to the endorser, if the bill was drawn and endorsed for the accommodation of the drawer, with the knowledge of the endorser, and there was no expectation that bill would be paid by the drawee.

Same—Endorsers—Contribution—Right to.—One endorser has no right to contribution against the other endorsers, where the several endorsements were made for the accommodation of the drawer, unless there is a stipulation to that effect.

Appeal from the Staunton Chancery Court. The case was this:

William Lane, drew three drafts on Bryan Hampson & Co. and prevailed on William Vanmeter, James Marshall, and W. H. Triplett to endorse the same, in the order in which their names are here set down. These drafts so endorsed, were discounted at the Bank, and they 554 *were presented to Bryan Hampson & Co., noted for non-acceptance, and protested for non-payment.

The Bank brought suits against the drawer and endorsers, and took judgment

Hupp, 10 Gratt. 33; *Wynne v. Newman*, 75 Va. 811; *Bart. Ch. Prac.* 58; 2 Story Eq. Jur. § 1574. The judgment ought to be allowed to stand as security until the final decree, as its lien is good for what may be found to be really due, though obtained by fraud, accident or surprise, and though what may be due be the whole or only part of the debt recovered (*Bank v. Vanmeter*, 4 Rand. 553, JUDGE GREEN'S opinion; *JUDGE LEE'S* opinion, *Bank v. Hupp*, 10 Gratt. 33); just as a judgment reversed in part is all the while a lien (2 Bart. Ch. Prac. § 236; *Moss v. Moorman*, 24 Gratt. 97). There are cases where at once the judgment was set aside and a new trial granted; but it is improper, as cases above show." To the same point the principal case is cited in *Smith v. McClain*, 11 W. Va. 672.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

†Bills of Exchange—Nonacceptance—Notice to Indorser—Necessity of.—The drawer of a bill of exchange, or order, is not directly liable to the payee or indorser, but his implied obligation or contract is to pay, in the event the amount is not paid by drawee. And the general rule is well established, that the drawers and indorsers are entitled to prompt notice of the nonacceptance or nonpayment in order that the former may look after his funds and withdraw or secure the same, and that the latter may take the necessary steps to secure himself; and that upon the failure to receive such notice they are discharged from liability; and the bill or order, as between the drawer and payee or indorser, will be considered paid. *Ford v. McClung*, 5 W. Va. 166, citing principal case as authority. To the same effect, the principal case is cited in *McClain v. Lowther*, 35 W. Va. 299, 18 S. E. Rep. 1003. Each of these cases say that there are well defined and numerous exceptions to this rule.

In the principal case, the indorser was not released because he could not possibly suffer any damage by failure to give him notice; since the only purpose of notice would be to inform him of the necessity of resorting to the drawer for indemnity, which, in this case, is unnecessary, as he already has indemnity in his hands. *Turner v. Stewart*, 51 W. Va. 498, 41 S. E. Rep. 927.

†Negotiable Paper—Successive Indorsements—Effect.—The legal effect of several successive indorsements is, that each indorser has a right to look for indemnity to all the indorsers who precede him, whether they indorse for accommodation of the drawer or for value received; unless there be an agreement *alibi*, different from that evidenced by the indorsements. *Bank of United States v. Beirne*, 1 Gratt. 265, citing the principal case as its authority. Again in *Willis v. Willis*, 42 W. Va. 524, 26 S. E. Rep. 515, it is said: "1 Daniel Neg. Inst. § 703, says: 'When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them, as to each other, in the order they indorse. The indorsement imports a several and

against Lane and Vanmeter by confession. Lane proved insolvent, and Vanmeter filed a bill to injoin the said judgments. The Bank, Isaac Baker the Cashier, James M. Marshall and William H. Triplett, were made defendants.

The bill states four grounds of relief: 1. That the drafts were drawn and endorsed, purely for the accommodation of Lane, and for the purpose of raising money by discounting them at Bank; and therefore, all the endorsers are jointly bound to contribute their proportion in the event of Lane's insolvency. 2. That the Bank had made a fraudulent agreement with Marshall, one of the endorsers, to proceed against Vanmeter alone, upon the assurance of the said Marshall, that he would ultimately see the money paid, if it could not be obtained from Vanmeter. 3. That the judgments were entered by confession, without any authority given by Vanmeter for that purpose; and if they had not been so entered, he could have defeated the plaintiff at law. 4. That notice of protest was not given to Vanmeter or any of the endorsers.

The Cashier of the Bank answered, denying that the judgments were confessed without authority, &c.

Marshall averred in his answer that he had no suspicion, when he endorsed the bills, that it was not intended that they should be paid when at maturity, and that he was assured, that Lane had flour in Alexandria, or on the road, amply sufficient to discharge the said bills: that he would not have endorsed them, if he had not believed that they would be paid when due, inevitable accidents only excepted. As to the charge of collusion, he admits the statement in the bill, to be substantially true, and denies that there is anything illegal in it.

555 *The injunction was granted; and at a subsequent day, on a motion to dissolve, the Court over-ruled the motion, and the defendants appealed.

Nicholas, for the appellants.

No Counsel, for the appellee.

Nicholas, having stated the case, was stopped by the Court, and informed that

successive, not a joint, obligation, whether the indorsements be made for accommodation, or for value received, unless there be an agreement *alimunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them." This clear statement is sustained by authority in almost all quarters, including authority binding us. *Hogue v. Davis*, 8 Gratt. 4; *Bank v. Belrne*, 1 Gratt. 265; *Bank v. Vanmeter*, 4 Rand. 558; *Shields v. Reynolds*, pt. 2, 9 W. Va. 483; *Hoge v. Vintroux*, 21 W. Va. 1, pt. 2. It would be different in the case of an ordinary surety on nonnegotiable paper. But while an indorser on negotiable paper is, in a sense, surety, as regards payee and maker, he is not as to a prior indorser, for the benefit of that indorser. *Edmiston's* opinion. *Shields v. Reynolds*, 9 W. Va. 487; *Ross v. Jones*, 22 Wall. 576." To the same effect the principal case is cited in *Bank of United States v. Jackson*, 9 Leigh 289; *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. Rep. 917; *Young v. Schon* (W. Va.), 44 S. E. Rep. 139.

See further, monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

no argument was required on that side of the question.

November 28. JUDGE GREEN delivered the opinion of the Court.

The object of this suit was to injoin three judgments recovered by Baker for the use of the Farmers' Bank, against the plaintiff and Lane. These judgments were entered as confessed by those defendants, and were so entered by some mistake; Vanmeter never having employed counsel, or authorised the confession of judgments.

There are several grounds for relief asserted by the appellee. The first is, that such judgments could not have been had, or if had, would have been erroneous and reversible, if they had not been entered as by confession; the actions being joint against the drawer and endorsers of an inland bill of exchange, not upon its face negotiable at any of the chartered Banks of Virginia. This objection to the form of the actions, and the fact that the judgments would have been erroneous and reversible, if they had not been entered by mistake, as confessed, can have no weight in a Court of Equity. There the rule is, that whosoever asks equity must do it, as a condition of relief; and a judgment at law, however obtained, no matter by what fraud, accident or surprise, is allowed to stand as a security for what is justly due, whether that be a part or the whole of the debt recovered. The enquiry in a

556 Court of Equity is never, "whether the judgment is erroneous or unduly obtained; but whether it be for a debt justly due or not. If Vanmeter was responsible for these debts, in actions brought against him individually, he cannot complain in a Court of Equity, that he is injured by judgments rendered against him jointly with another.

The next objection taken to these judgments, is on the merits. The plaintiff alleges that the three endorsers, himself, Marshall and Triplett, were joint sureties, by virtue of their endorsement of the bills drawn by Lane, and discounted at the Bank for Lane's accommodation: that each was bound to bear a due proportion of the loss, Lane being insolvent; and that the Bank, who is not charged with notice of that fact, had concluded with Marshall to throw the whole burthen upon him, by dismissing the suit as to Marshall, upon his agreeing to hold himself bound for the debts, and to pay them immediately, if Lane and Vanmeter should be unable to pay.

If all this were true, and the endorsers were mutually bound to each other for contribution, and the officers of the Bank had full knowledge of the facts, they would have been guilty of no fraud or wrong to the plaintiff, by making such an arrangement with Marshall, and carrying it into effect. The drawer and endorsers were severally liable to the Bank for the whole amount of the bills in solido. The Bank had a right to pursue any one or more, or all, in several actions; and to have coerced the payment of the whole from either of them. The legal or equitable rights of securities to contribution among themselves, can never affect the rights of the creditor, or bind him to proceed against each for his propor-

tion of the debt: unless, indeed, were the obligations of the parties are in the form of a joint contract, in which case, all must be sued together, but either may be compelled by execution to pay the whole.

The remaining objection is also on the merits.

The bills were presented before they were due, and the drawee refused to accept; and Vanmeter alleges that no
557 *notice was given to him, he being the first endorser, either of the non-acceptance, or non-payment. This is probably true, and in the present stage of the cause, must be taken to be so. If he was entitled to notice, he was not liable to the claim of the Bank, and would be entitled to relief; for, he was precluded from making this defence at law, by the mistaken entry of judgments by confession.

The facts, upon which the question, whether Vanmeter was or was not entitled to notice, are stated by himself in his bill. He says, that the bills were drawn and endorsed for the accommodation of Lane, the drawer; and for the purpose of getting them discounted at the Bank: that no consideration, whatever, passed between the parties, or any of them; and that there was no expectation that they would be paid by the drawee.

It is a general rule, that the drawer or endorser of a bill of exchange, is discharged from responsibility, unless he has due notice of the dishonor of the bill, by non-acceptance or non-payment. This notice was required originally, for the purpose of enabling the party to take promptly such measures for his security, as might be in his power; and it seems to have been originally required of him, if he complained of the want of notice, to prove, that for the want of it, he had suffered some injury. The modern doctrine, however, is perfectly well settled, that the law implies an injury, from a want of due notice; and this presumption is so strong, that in order to repel it, proof is required to shew that it was impossible for the party to suffer any damage or inconvenience. Thus, in the case of a drawer; if the bill be drawn without funds in the hands of the drawee, and the drawer had no reason to expect that the bill would be accepted; this is considered as a case in which it is shewn that no possible prejudice can result to the drawer from the want of notice; since he knew, when he drew the bill, that it would devolve on him to take it up, as well without as with notice of its dishonor; and having no reason to expect the bill to be ac-

558 cepted, it cannot be *supposed that he would make any arrangements for putting funds in the hands of the drawee to take it up. But, if the drawer, without funds in the hands of the drawee, has any just ground to believe that the bill will be accepted, he ought to have notice; for in that case, it is to be presumed that he will so arrange his funds as to place the means of paying the bill at maturity, in the hands of the drawee. Such arrangements, if unnecessary and fruitless, would be prejudicial to the party; and to enable him to avoid this mischief, immediate notice should be given.

The case of an indorser is still stronger than that of a drawer; for he has, in general, a right to resort to the drawer for indemnity, and to enable him to assert this right with the greatest possible effect, he ought to have immediate notice. But, even as to an endorser, a case may occur, in which it may be shewn to be impossible for him to suffer any inconvenience for the want of notice. As in the case of a note endorsed by the payee for the accommodation of the drawer, who should place in the hands of the endorser funds sufficient to discharge it. The latter would not be entitled to notice of the non-payment; because he could not possibly suffer any damage by the failure to give him notice, *Carnay v. Da Costa*, 1 Esp. Rep. 303; since the only purpose of a notice, would be, to inform him of the necessity of resorting to the drawer for indemnity, which, in this case, is unnecessary, as he already has that indemnity in his hands.

With the exception of the cases, in which it can be shewn, that they could not, by possibility, suffer an injury by the failure to give them notice, the drawer and endorser have in all cases a right to strict notice, unless they waive that right, or forfeit it by their own fraud. I do not find this ground of fraud, very distinctly laid down as a reason for dispensing with the necessity of notice. But, there are many cases in which it appears to have been the sole ground of the judgment, and in which, the principle is distinctly alluded to.

559 *In *De Bert v. Atkinson*, 2 H. Black. Rep. 336, the endorser of a note for the accommodation of the drawer, who knew that he was insolvent, was held not to be entitled to notice of non-payment. If this case proceeded upon the supposition, that the knowledge of the drawer's insolvency made it impossible that the endorser could suffer any injury for the want of notice, then it contradicted many other cases, in which it has been determined, that the insolvency of the acceptor, whether he accepted for the accommodation of the drawer or of himself, did not dispense with the necessity of notice; for, it is not impossible to procure payment from an insolvent man, through his friends or otherwise; and the drawer is entitled to notice, in order to enable him to take this chance. The drawer of the note in this case, was in the situation of an acceptor, for his own accommodation; and the endorser, in the situation of the drawer of the bill so accepted. If it was decided upon the ground of fraud, the decision was equally objectionable; for, no fraud or imposition was practised on the holder, since he got the security of the very names, which he expected to get when he contracted. This case has been virtually over-ruled in *French's ex'r v. Bank of Columbia*, 4 Cranch, 161. I mention it only to shew, that Lord Ellenborough considered it as decided on the ground of fraud; and upon the authority of that case, decided *Sisson v. Thomlinson*, Selw. N. P. 324, n. 31; in which he ruled, that when an endorser had not given any consideration for a bill, and knew at the time that the drawer had not any effects in the hands

of the drawee, he was not entitled to notice of non-payment. In this case, the decision could not have been founded upon the principle that the endorser could not suffer any detriment for want of notice, since it was a bill accepted; and although none of the parties had given any value, and it was to all the parties an accommodation bill; yet the endorser had a right, if he paid it, to resort to the acceptor; a right, which might have been rendered of no avail, for *the want of

timely notice of non-payment. The only ground, upon which this case was decided, was, the fraud upon the public, practised by the endorser, by endorsing a bill which he knew to be drawn without funds. This case was totally different from that of an insolvent's note, endorsed for his accommodation; the holder of which got all he contracted for. Every drawer of a bill, virtually represents to all dealing for it, that it is drawn upon sufficient funds. The holder deals upon the faith that he shall have the additional security of the drawer; and if he fails in this, he is disappointed by the fraud of the drawer; and if the endorser, with a knowledge of the facts, endorsed for the purpose of promoting the object of the drawer, he would be a participator in the fraud. If, therefore, in *Sisson v. Thomlinson*, the bill had not been accepted, there would have been better reason to hold, that the endorser was not entitled to notice; for, that would have corroborated the presumption, that the endorser knew that the bill was not only not drawn upon funds; but also, that it would not be accepted. So that the holder would be disappointed in the expectations raised by the fraudulent misrepresentations of the drawer and endorser. Neither would the endorser, in that case, have any acceptor to resort to; nor could he claim against any one but the drawer. If he knew that the bill would not be accepted, then he knew the necessity of looking to the drawer from the moment he endorsed; and therefore, wanted no notice to put him on his guard. The bill, however, being accepted, the holder got all he contracted for; and the fact of acceptance indicated, that although the endorser knew that the drawee had no funds of the drawer, he had reason to expect an acceptance, and would be entitled to notice. In such a case, the holder can hardly be said to be deceived or defrauded. The actual decision of this case cannot be supported, but upon the ground, that if the endorser acted in the beginning with an intent to deceive others, he cannot insist upon notice, even if no one be deceived.

561 *In *Brown & al. v. Massey*, 15 East. 216, it was held, that when a bill was drawn, accepted and endorsed by several, for the accommodation of the last endorser, and the acceptor had no effects of the drawer in his hands, but that fact was unknown to one of the endorsers, who was the defendant, he was entitled to notice of the non-payment, having a right to resort to the last endorser for indemnity. This case seems to turn upon the bona fides of the endorser. If he had known the fact that there were no funds in the hands of

the drawee, he would probably have been considered as having participated in the fraud of putting a bill purely for accommodation, into circulation.

In *Leach v. Hewitt*, 4 Taunt. 731, the defendant had endorsed a bill for the accommodation of a third person, whose name was not on it. The bill purported to be drawn by one firm, which had no existence, and accepted by another fictitious firm; but this was unknown to the endorser. The instruction of Mansfield, Justice, to the jury, afterwards approved of by the Court, was, that the endorser was entitled to notice, if he was not privy to the fraud. If the endorser in that case, had been privy to the fraud, he would not have been entitled to notice. Not being privy, he was entitled to claim against the person, for whose accommodation he had endorsed; and the want of notice might have impaired his remedy.

These cases are referred to, for the purpose of shewing that an endorser, who unites with the drawer to deceive the holder, by representing a bill as one that will probably be accepted, with a knowledge that it will not, is guilty of a fraud, which deprives him of the right to insist upon notice. The principle, although perhaps pushed too far in its practical application in some of those cases, is just. If a bill were drawn upon a fictitious person, and was endorsed with a full knowledge of that fact, for the purpose of enabling the drawer to raise money by getting it discounted, it could not for a moment be doubted, that the holder could recover against the endorser, without giving 562 him notice *that he applied at the place to which the bill was directed, and found no person to present it to, answering the description of the bill. This would be a gross and palpable fraud, in both drawer and endorser. I can perceive no difference between that case, and one in which the bill was drawn and endorsed, with full knowledge on the part of the endorser, that the drawer not only had no funds in the hands of the drawee, but that he had no right to draw upon him, or reason to expect that he would accept; except that in one case, the non-existence of the nominal drawee would be complete proof of the fact, that there was no expectation, or ground for expectation, that the bill would be accepted; and in the other, it might be fairly inferred, in the absence of proof to the contrary, that the endorser, from the representations of the drawer or otherwise, did bona fide expect that the bill would be accepted; an inference which it might be difficult, and almost impossible, to disprove.

But, the case under consideration, is precisely the case last supposed, and the proof is full. Vanmeter, in his bill sworn to, states that the bills were drawn and endorsed for the accommodation of the maker, for the purpose of procuring a discount at the Bank; and that there was no expectation that they would be paid by the drawee; and the answer of the Bank, sworn to by the Cashier, states, that if the facts so stated by plaintiff, had been known to them, they would not have discounted these

bills. I think this was a fraud upon the Bank, and that Vanmeter was therefore entitled to no notice.

It is not necessary to enquire whether, if Vanmeter would have had a right to claim contribution from the other endorsers, if they had had due notice of the non-acceptance or non-payment, he was therefore entitled to notice, in order that he might give them notice, and so secure his recourse against them. For, he had no right to claim contribution from them. There was no agreement amongst them, that each should bear a part of the loss as joint sureties, *either expressed or to be implied from the circumstances of the case, but the contrary. Each of the endorsers defendants, deny that there was any such agreement, and say, that although they endorsed for the accommodation of Lane, they did so under the full persuasion that the bill would be accepted and paid. I at one time doubted, whether several endorsing for the accommodation of another, ought not to be considered as joint sureties, and bound to contribution amongst themselves. But, I am satisfied, that this cannot be the effect of such a transaction, unless there be a stipulation to that effect. Sureties may bind themselves severally in succession; so that each may be a supplemental surety, in respect to another. *Craythorne v. Swinburne*, 14 Ves. 160. In this case, they have bound themselves by an instrument, the legal effect of which is to subject them, in respect to each other, in succession in the order in which they endorsed; and they must be taken to have intended to be bound according to the legal effect of the instrument, until the contrary appears. If several endorsers, in such circumstances, were liable to contribution as a matter of course, the books would have teemed with cases on the subject. But, I cannot find that the question has ever been raised.

The order refusing to dissolve the injunction upon the merits, must be reversed, and the injunction dissolved.

564 *M'Kay v. Hite's Executors.

November, 1826.

Appeal—Dissolution of Injunction—Appeal Bond.—A party appealing from an order dissolving an injunction can only be required to give security to perform the decree of the Inferior Court, and to pay the costs and damages awarded in the Appellate Court, if the decree shall be affirmed.

Same—Appeal Bond—Discharge of Surety.—Quære whether, where bond and security have been given to perform the decree of the Court below, and further security is required in the Appellate Court, which the party cannot give, the surety in the first bond is discharged?

This was an appeal from the Winchester Chancery Court, from an order dissolving an injunction. The appellant had obtained an injunction, which was afterwards dissolved, and appealed, giving an appeal bond in the penalty of \$6000. The Court of Appeals, upon motion of the appellees, required further security, and in a larger sum.

Johnson, for the appellant, moved the Court to set aside their former order, and

to permit the appellant to appeal, upon giving bond and security, in a sum sufficient to cover merely the costs and damages awarded here, and to perform the decree of the Court below.

November 29. JUDGE COALTER delivered his opinion, in which the other Judges concurred.

Since the order made in this cause at a former term, requiring the appellant to give better security than had before been given, to prosecute this appeal, and in a larger sum, which was made in haste, and in which the question was not made or considered, whether a party appealing from an order dissolving an injunction, was bound to give security for the payment of the debt, as on the grant of an original injunction, that question has been solemnly considered by the Court, and it has been decided that such an appeal must be allowed on the appellant giving security merely to perform the decree of the Inferior Court, and to pay costs and damages awarded here, if the decree shall be *affirmed.

This will be a small sum sufficient to cover the costs in the Court below.

In this case, the appellant had entered into bond with surety, in the penalty of \$6000; perhaps ten times the sum necessary for that purpose, conditioned as above stated. It is possible the security originally given will not be objected to as sufficient for the purposes above. If it is, the Court will hear the appellants on that point. But the appellant petitioned to be permitted to appeal, on giving security for costs here, under the late Act of Assembly. This, it is presumed, he would not have done, but for the large sum, in which this Court, by mistake, required him to enter into bond. That order must, therefore, be set aside; so that the appeal will stand on the bond first given, unless that is now objected to as aforesaid.

That order must also be set aside for another reason. This Court is not perfectly satisfied, on re-consideration, that an appeal can be taken under the act aforesaid, after an appeal, on bond being given to perform the decree below, when further security is required here, which the party cannot give; in consequence of the possible effect, that in this way, even the security given may be discharged; a question, which this Court wishes to keep open for more deliberate consideration, whenever it shall arise.

566 *Knight v. Yarborough.

December, 1826.

Power of Appointment—How Appointment to Be Made.—Where an appointment is made, in pursuance of a general power not prescribing the mode of appointment, it must be made in such a way as would pass the title, if the property belonged to the person making the appointment.

Same—Same—Case at Bar.—Therefore, where an appointment is made of slaves, under such a general power, by an oral declaration that the trustee gives them to the appointee, without a delivery of possession, the appointment is void.

Same—Rights of Appointees.—Where an appointment is made to several persons at different times, or in unequal portions, and a residue of property is left unappointed: the appointees shall be allowed to participate in the unappointed surplus, upon bringing the value of their several appointments, at the time they were made, into account, without

*See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 263.

The principal case is cited in *Jeter v. Langhorne*, 5 Gratt. 200.

accounting for interest, profits or increase, since they receive their several appointments.
Same. — Same. — But the appointees must account for interest, profits, &c. after the death of the trustee having the power of appointment, before they can participate in the unappointed surplus.
Executor's Right to Sell Testator's Effects. — An executor may make a valid sale of his testator's effects, whether they be necessary for the payment of debts or not, if there is no fraud or collusion in the purchaser.

This is the same case reported in *Gilm. Rep. 27*. The questions now made arose out of the interpretation of the decree rendered in that case, by the Chancellor. The particulars of that decree, and the relation of the several parties, may be found by referring to that report. They are not necessary here.

Leigh, for the appellant.

No Counsel, for the appellee.

December 5. JUDGE GREEN delivered his opinion.

The first objection taken to the decree appealed from is, that it affirms the appointment to Nancy H. Knight of four slaves, Ned, Matt, Belinda and her child, to be valid; and this objection is well founded. To the validity of an appointment in pursuance of a general power, not prescribing the mode of appointment, 567 it is necessary that it be "made in such a way, as would, if the property belonged to the person making the appointment, effectually pass his title. In this case, the only proof of the appointment is, that Nancy H. Knight, a married woman, separated from her husband, lived with Mrs. Walton, her grand-mother, before and after her divorce, and until her grand-mother's death: that when information of the divorce was received in 1812, Mrs. Walton observed to a witness, as he be-

lieves in the presence of Mrs. Knight, "that she had heretofore conveyed certain negroes, to wit: Belinda and her child, Matt, Elsey, and a boy named Ned, to trustees for the benefit of the said Nancy; but now, in consequence of the law aforesaid, I give them directly to Nancy. They are now hers." There was no delivery of possession to Mrs. Knight, nor does it appear that she ever exercised any act of ownership over the slaves; nor is there any further account given of the existence of the deed of trust spoken of. And in Mrs. Walton's will, whilst she gives to several of her descendants, property specified by name, and adds that it is the same before given to them, she gives these negroes to Nancy H. Knight, without intimating that she had given them to her before.

Independent of the Act of Assembly, I should think that such a transaction did not amount to a gift, but only to a declaration of an intention to give at a future period. The Act of Assembly, however, declares that no parol gift of slaves shall pass any estate in them, if the donor has continued in possession, or unless the slaves have come to the actual possession of, and remained with, the donee. This, if it was intended to be a gift or appointment, was therefore void.

Another objection taken to the decree is, that it does not conform to the former decree of the Court of Appeals, in respect to the manner in which the valid appointments made by Mrs. Walton, were to be accounted for by the appointees, if they claimed to participate in the subjects which were unappointed. The declaration 568 of the decree of the Court of Appeals on that point, was, that such parties, to whom valid appointments had been made, could not claim any part of the unappointed subject, "without bringing into account the subject so appointed;" equality being the rule adopted by the Court, in such cases. The Chancellor understood this part of the decree as directing that the parties liable to account, should account for the value of the property appointed, as it was at the time of the appointment; and in this I think he was right. If the Court of Appeals had intended to decide, that the appointee should be placed in the same situation as if he renounced the appointment altogether, so that the property was to be considered as always continuing a part of the estate, they would have directed that the property and its increase, remaining in kind, should be brought into the distribution, and the party held to account for what he had disposed of, so as that it could not be returned in kind. But they direct that the whole subject appointed should be accounted for, without regard to the circumstance whether it remained in kind or not. The Court did not intend to prescribe the manner of accounting, but to leave that to be done upon the ordinary principles applicable to such and analogous cases.

In cases of intestacy, when one of the children had been advanced, if he chooses to bring his advancement into hotchpot, he does not thereby renounce his title, but

*Advancements — Valuation — At What Time. — In *Kyle v. Conrad*, 25 W. Va. 780, it is said: "Unless under peculiar circumstances, as when perhaps the advancement is a remainder (see *Chinn v. Murray*, 4 Gratt. 379), the rule is established in Virginia as well as elsewhere, that all advancements are to be accounted for as of the value they bore when received, and that during the life of the intestate, rents, issues and profits should be charged against the heir or devisee. (*Beckwith v. Butler*, 1 Wash. 224; *Hudson v. Hudson*, 3 Rand. 120; *Williams v. Stonestreet*, 3 Rand. 559; *Christian v. Coleman*, 3 Leigh 30; *Knight v. Oliver*, 12 Gratt. 33; *Purveyar v. Cabell*, 24 Gratt. 260.) The reasons for valuing advancements as of the time they were received and not as of the time of the death of the intestate are several, first: Because from the time that the real or personal property is received as an advancement, it is the property of the party receiving it, and if it is lost in whole or in part by destruction or deterioration, it is the loss of the party by whom it is owned, and it is but fair, to compensate the party, to whom such property is advanced for this risk of loss, that, if the property is increased in value, he should have the benefit of the increase. (*Beckwith v. Butler*, 1 Wash. 225; *Kean v. Welch*, 1 Gratt. 406; *Knight v. Yarbrough*, 4 Rand. 569); second: Interest during the lifetime of the intestate ought not to be charged; for if charged it would defeat the main object of the statute requiring advancements to be brought into hotchpot, which is to produce equality among all the children of an intestate father. Advancements are generally made to enable the child to engage with advantage at the proper age in the occupation by which he expects to make his living. If each child is advanced at the same age to the same amount, each is advanced equally, although one be advanced twenty years before the other, each having the same capital advanced for his establishment in life." (Judge Green's opinion in *Knight v. Yarbrough*, 4 Rand. 569.) To the same effect, the principal case is cited in *Chinn v. Murray*, 4 Gratt. 379, 387; *Kyle v. Conrad*, 25 W. Va. 784; *Hays v. Freshwater*, 47 W. Va. 217, 84 S. E. Rep. 684.
 See further, monographic notes on Advancements" appended to *Watkins v. Young*, 31 Gratt. 84.

retains it, and is entitled to have so much of the intestate's estate as will, with what he has already received, make his part equal to that of the other children; and in such case, his advancement is valued at what it was worth at the time it was made; which value is added to the distributable fund, without interest or any account for profits. This was the rule adopted in *Beckwith v. Butler*, 1 Wash. 224, and has been adopted also in Massachusetts and Pennsylvania; and this seems to be the rule in England.

In *Kircudbright v. Kircudbright*, 8 Ves. 51, it was held that an annuity granted by the father to a son, was to

569 *be brought into hotchpot at its value at the time it was granted; or that the son, at his election, might account for the sums actually received under the grant; and I think these decisions are founded on the best reasons. By the advancement, the property vests in the donee, and it is afterwards at his risque. The profits and increase are the profits and increase of his own property; and the donor can only be considered as having parted with the real value of the thing when given. If the property perishes, or in any way depreciates in value, it is the loss of the donee. He accounts for the value when received, because he has taken so much out of the estate of the donor. The interest, profits and increase, never were a part of the estate of the donor. They are in all cases the fruits, in part at least, of the care and attention of the owner; and if any expense is incurred in securing them, it falls upon the owner of the property. It is a fundamental principle, that the person who has the title to property, bears the loss arising from its destruction or deterioration, and is entitled to its increase and profits. This rule, in cases of advancement and intestacy, and in all cases falling within the same reason, is just and equal. Advancements are generally made to enable the child to engage with advantage, at the proper age, in the occupation by which he expects to make his living. If each child is advanced at the same age, to the same amount, each is advanced equally, although one be advanced twenty years before the other; each having the same capital advanced for his establishment in life. If the eldest son, in such case, had to account to the youngest son, in the partition of the residue of their father's estate, for the interest, increase, and profits, of the money or property advanced to him, he would, in effect, be giving to his younger brother a moiety of the fruits of his care, labor and expense, in the management of the fund advanced to him. The general rule, although it does not give an equality in amount, at the time of the final distribution, if we take into the con-

570 sideration, the interest, profits, and increase *of the advancement; yet it gives, as nearly as any general rule can give, an equality of benefit, considering the circumstances of the parties. To attempt a more perfect equality, by taking into the estimate the interest, profits and increase of the property, in part or in whole, according to the circumstances of

each particular case, would be attended with great difficulty and uncertainty, and be the source of infinite litigation. For this reason, by the custom of London, a daughter advanced in marriage, no matter to what amount, is considered as fully advanced, and barred from claiming any benefit of the orphanage part, unless the father declare, in writing, the amount of the advancement, so that it may appear what sum is to be brought into hotchpot. *Civil v. Rich*, Vern. 216.

It is said, however, that this is not like the case of advancement and intestacy, but rather like the case of a legacy to be equally divided among the legatees; the parties to whom valid appointments have been made, as well as the others, claiming under the will of Walton; and that in case of such a legacy, if the executor delivered to any one of the legatees any portion of the property, before a division was made, the property, and its increase and profits, must be brought into the division. This is true, because such a delivery by the executor could not give a title to the legatee, to the property so delivered. It would remain a part of the original fund, to which each legatee was equally entitled, and its profits, and increase, would, therefore, be a part of the common fund; and if it perished, it would be a loss to the joint fund, unless it perished by the default of the legatee to whom it was delivered.

But, in this case, the parties were not entitled to an equal partition, nor to have their proportions at the same time. Mrs. Walton was empowered to vest the legal title to any part of the property, in any one of the objects of appointment, at any time before her death, by an appointment at her pleasure, no matter how unequal, so that it did not exceed the bounds of a reasonable discretion. She was, in

571 *fact, put into the place of the testator, and authorised to make such advancement within reasonable limits, as he might have made if in life, and to have the same effect as if he had himself made them, to pass the legal title subject to account, in the same way as if they had been made by him, and he had died intestate, or had directed an equal division of the residue, those who had received advancements accounting for them, if they claimed to participate in the residue, as if he had died intestate. This case is, therefore, substantially the same as the case of advancements and intestacy.

Whilst the Court of Chancery rightly decided, that the parties to whom valid appointments were made, if they claimed to participate in the unappointed residuum, were bound to account for the value of the subject so appointed, as it was at the time of appointment, the decree is erroneous in not requiring them to account for interest on that value, from the death of Mrs. Walton. At that time, the rights of the parties to the unappropriated residuum, and an account of the subjects appointed, according to their value when appointed, accrued and vested. The appointees were then entitled, subject to such accountability, to a portion of that residuum, and are of course entitled to participate in the subsequent profits and

increase of the property composing that residuum. They ought, therefore, to account for interest on the value of the subjects appointed, from that time. That value is to be considered as a part of the residuum, to be distributed at that period.

There is another error in the decree of the Court of Chancery, which may affect the interests of the parties very materially, in the distribution of the fund in question.

The effect of the original decree of the Court of Appeals, was, that any appointment made by Mrs. Walton, whenever made, or however unequal, was valid, if enough was left to give to every other object of appointment a reasonable share; a rule, which left a considerable latitude of discretion, as the testator intended, to

572 Mrs. Walton, both as *to the time and value of the appointments. This reasonable share was to be judged of, whether the appointment was made to a child or grand-child, by looking to the whole number of children to share in the fund, whether they were dead or alive at the time of the appointment; the grand-children representing their deceased parents, and entitled to such reasonable share, as their parents, if alive, would have been entitled to, to be reasonably divided amongst them, according to Mrs. Walton's discretion, fairly exercised. So that an appointment made to a grand-child, after the death of his parent, was not only to conform to this rule, as to its amount, in respect to what would be reasonable, in relation to his parent and the other children; but in respect to what would be reasonable in relation to the interest of the brothers and sisters of the appointee, in the division of the reasonable share of the parent amongst his or her children. Upon these principles, the question whether any appointment was valid or not, could only be determined by considering its value at the time it was made, in reference to the value of what remained to satisfy the reasonable share of all others entitled. If the appointment was upon these principles, good, when made, no subsequent increase in the value of the subject appointed, or diminution in the value of what remained, could affect the validity of the appointment, nor influence the subsequent distribution of the remaining subject, except so far as to consider so much as the value of the appointment when made, as appropriated to that child, if appointed to a child, or if appointed to a grand-child, then as so much advanced to the stock of that child's parent, and also to that child in respect to his brothers and sisters; and to be regarded and accounted for accordingly, in the distribution of what remained, either by Mrs. Walton exercising the discretion allowed to her, or of any residue not appointed, or not duly appointed, by her.

To illustrate and simplify this idea, let it be supposed that there had been only two children at the time of Walton's death, and one of those children should
573 have died *immediately after the death of the testator, leaving two

children; and the property subject to appointment, upon the principles aforesaid, to have consisted of four young female slaves of equal value; and Mrs. Walton to have appointed one of these to the surviving child, and another to one of the grand-children. These appointments would be unquestionably good; for, as between the stocks, they would be perfectly equal, and enough would be left to provide for the other grand-child a reasonable share. Suppose Mrs. Walton to have made no other appointment, and after many years, to have died; one of the unappointed slaves having died, without any increase, in her life-time; the slave appointed to the grand-child having had a great increase, and that to the child, having had none; and the other having increase, which, together with the original slave, and the value of that appointed to the child, when appointed, were of the precise value of the slave and her increase, appointed to the grand-child. According to the principles above stated, if both the child and grand-child appointees come into the partition, accounting for the value of the subjects appointed to them, the subject to be divided would be the value of the appointments when made, with interest thereon from the death of Mrs. Walton; and the slave not appointed, and her increase, and their profits accruing after Mrs. Walton's death. The whole subject thus ascertained, would be divided into moieties, and the child would have so much in value of the unappointed property, as would, with the value of what was appointed to him and interest, make a moiety of the whole. The grand-child appointee would receive so much as, with the value of the subject appointed to her, with interest as aforesaid, would be equal in value to the fourth part of the whole subject. If the grand-child appointee claimed no part of the unappointed subject, the only difference would be, that whilst the child would get precisely the same proportion of the unappointed property, the other grand-

574 child would get all the residue, which would *be greater or less than she would get in the other case, as it happened that the value of the unappointed slave and her increase was greater or less. On the other hand, if the increase of the slave appointed to the grand-child, were taken into the account for the purpose of ascertaining what proportion of the unappointed property was to go to the child, and what to the children of the deceased child, and the grand-child appointee claimed no part of the unappointed property, then the other grand-child would get nothing for the slave and her increase appointed to the grand-child; being of the full value of the unappointed slave and her increase, added to the value of the slave appointed to the child. That child would be entitled to the whole of the unappointed property, to make his share equal to that which has gone to his brother's or sister's family.

This consequence and inequality will occur, if the increase of the property appointed is brought into account, either for the purpose of ascertaining when the appointee

disclaims any participation in the unappointed fund, the proportion to which the respective stocks are entitled in the unappointed property; or, for the purpose of ascertaining to what the appointee accounting is entitled, out of that fund. This is sufficient to shew, that such increase or additional value from any cause or profits, cannot be brought into account, without over-turning the whole scheme of the original decree of the Court of Appeals.

The decree of the Court of Chancery directs, for the purpose of ascertaining the funds to be divided amongst the stocks, (so as to shew to what proportion of the property not appointed, each stock is entitled,) that the property appointed, whether the appointee claims a portion of the unappointed property or not, shall be charged, with its increase, at its present value, to the stock of which the appointee is a member. This is done particularly as to the family of Susan, one of the children of the testator; to whose daughter Sally Moore, (who renounces all participation in the unappointed residue,) Mrs. Walton appointed
575 pointed *a slave named Dorcas. The decree directs, that this slave and her increase should be estimated at their present value, as a part of the fund devisable amongst the stocks, and should be thrown into one of the nine parts, into which the whole was to be divided; there being nine stocks to come into the division: that this share, including the value of Dorcas and her increase, should be assigned to the children of Susan Morton, one of whose children Sally Moore was; and that, in the division of that ninth part, amongst the children of Susan Morton, the value of Dorcas and her increase, should be left to Sally Moore, as in full satisfaction of her interest in the fund, and the balance of that share divided equally between the three other children of Susan Morton, the brothers and sisters of Sally Moore.

The principle of this part of the decree is clearly wrong, as it has the effect of diminishing the shares of the brothers and sisters of Sally Moore, by the amount of the value of the increase of Dorcas, since the appointment to Sally Moore, although they belong exclusively to her; and may have the effect of precluding them from any participation whatever in the fund.

This erroneous principle is applied to the slaves well appointed to Mrs. Dupuy, which are brought, with their increase, into the account, to the prejudice of Mrs. Dupuy. The errors of the first decree on this point, were probably intended to be corrected by the last.

There is, also a mistake in the decree, in stating that Polly Jenkins had admitted that two slaves had been advanced to her; and that she had, by her answer, agreed to come into the partition, accounting for this advancement. She admitted only one slave Tilla to have been appointed to her; and stating that the slave had two children, declares that she does not choose to bring those slaves into hotchpot. This refusal was probably owing to the belief, as the

expression of the answer indicates, that she could only come into partition upon accounting for all the slaves, Tilla
576 and *her increase. She ought now, therefore, to have her election to come into the partition or not, upon the condition of accounting for the value of Tilla when appointed.

There is another error in the decree. Thomas Scott purchased a woman and child of the testator's estate from Mrs. Walton, the trustee and executrix, for \$400, which he paid her. The increase of this sale is considerable; and the whole stock of negroes is declared to be a part of the subject to be distributed, upon the ground, that Mrs. Walton could not transfer a greater interest in the slaves, than for her life. That is true, if she had only been a trustee; but she was also executrix, with power to dispose of the property for the payment of debts. Whether it was necessary to sell those slaves for that purpose, does not appear. But, as no fraud or collusion is charged upon the purchaser, he is entitled to claim those slaves as a purchaser from the executrix.

The decrees, in these particulars, must be corrected.

JUDGE CARR, concurred.

JUDGE COALTER.

As to the principal question made in this case, to wit: whether, in cases of valid appointments, and where the subject is to be brought into account for any of the purposes mentioned in the decree, it is to be estimated at its value at the time of the appointment, or at the time of the division, I think the decree is correct in confining it to the value at the time of appointment. I am the more inclined to this opinion, because this Court would not have been without the support of British authority, had it directed the unappointed surplus to be equally divided amongst all the objects of the testator's bounty, without regard to appointments made, provided the dividend so to be made, would have given to each
577 *a share which, if it had been given by the trustee, could not have been declared void as illusory.

This Court seems to have proceeded with analogy to the Statute of distribution and hotchpot, and, taking equality as equity, may well be presumed to have intended that kind or rule of equality, which the Courts have adopted in cases of that kind, and which, if not fully effecting that object, comes nearer to it than any other rule that could be adopted. The parties benefited by this liberal extension to them of the principles governing in such cases, ought not to complain, especially as if the analogy could not hold throughout, the Courts, rather than encounter the difficulties, and perhaps great injustice, resulting from a contrary course, might be driven to the mode of division first above-mentioned.

On the other points I also agree with the Judge who has preceded me, and in the decree prepared to be entered.*

*The PRESIDENT and JUDGE CABELL, absent.

578 *Grays v. Turnpike Company.

December, 1886.

Corporations—Suits by—Proof of Incorporation.—When a corporation sues, they need not set forth in their declaration, by way of averment, how they were a corporation; but they must prove it on the trial.

Same—Same—Same.—This doctrine is equally applicable to motions by a corporation, as to suits brought by them.

Same—Corporate Existence—Evidence of.—What evidence will be sufficient to prove the existence of a corporation, and the regularity of their proceedings. The books of the corporation are proper evidence of that fact.

Same—Rights against Delinquent Subscribers.—If the law authorises a sale of the stock of delinquent subscribers, and if the sale shall not produce the sum due, then a motion against such subscriber for the deficiency; and under this power the corporation exposes the stock for sale, which is not sold for want of bidders; they may then maintain a motion against the delinquent subscriber, under the spirit of the law.

These were two appeals from the Superior Court of Bedford county. The two cases are essentially the same in principle; and the following opinion gives a full view of the questions arising out of them, and of the topics of argument.

Leigh, for the appellants.

Johnson, for the appellee.

December 8. JUDGE CARR.

These were motions made in the County Court of Bedford, by the Lynchburg and Salem Turnpike Company, against the Grays, for failing to pay three requisitions on their shares. The Court gave judgments on the motions for the plaintiffs; and the defendants stated all the evidence, and excepted to the opinion of the Court in giving judgments against them on this evidence.

The two cases were admitted in argument to be the same; except, that in the case against J. P. Gray, there was a motion for a continuance by the defendant, over-ruled, and an exception taken. This may be thrown at once out of the case, with this single remark, that Gray
579 *having had four continuances, and shewing no good ground for a fifth, the Court were perfectly right in ruling him to trial.

Many objections were taken in the argument to the judgment of the Court below. I will consider them in the order in which they were made.

1. It is said that there was no evidence in the record, that the Company was ever incorporated. I find, on examination, that it is laid down in many cases as settled law, that when a corporation sues, either on

***Corporations—Suits by—Proof of Incorporation.**—When a corporation sues, it is not necessary to set forth in the declaration how the company was incorporated, but it is sufficient for the plaintiffs, on the general issue, to prove their incorporation. *Taylor v. Bank of Alexandria*, 5 Leigh 475, citing principal case as authority. To the same effect, the principal case is cited in *Jackson v. Bank of Marietta*, 9 Leigh 240, 245, and *foot-note*: *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 247, 350; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 587; *Central Land Co. v. Calhoun*, 16 W. Va. 875. But see *Va. Code*, 1887, § 3280; monographic *note* on "Corporations (Private)" appended to *Slaughter v. Com.*, 18 Gratt. 167.

+Same—Corporate Existence—Evidence of.—The corporate existence of a corporation may be proved, by the introduction of its charter and of the minute book of the corporation showing organization under the charter. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 726.

The principal case is also cited in *Pryor v. Kuhn*, 12 Gratt. 623; *Vanderwerken v. Glenn*, 85 Va. 13, 6 S. E. Rep. 806.

a contract or to recover real property, they must, at the trial, under the general issue, prove that they are a corporation. *Hob.* 64, 211. 2 *Ld. Raym.* 1335. 1 *Kyd on Corp.* 292. *Bull. N. P.* 107. 8 *Johns. Rep.* 295. 14 *Johns.* 216. 10 *Johns.* 162. 19 *Johns.* 300. 2 *Cow. Rep.* 770. They need not indeed set forth in their declaration, by way of averment, how they were a corporation, but they must prove it on the trial; as it is considered a part of their case, to be made out by evidence to the jury. I have found no decisions, either in the English books or those of our sister States, arising on motions made by corporations; but this I presume, is because they have not there the privilege (given to some of them by us,) of recovering debts due them, by this summary remedy. The doctrines, however, which govern suits brought by them, will unquestionably apply as strongly, if not a fortiori, to motions. It is clear then, that to support their motion, it was incumbent on the plaintiffs below, to shew that they were a corporation; and we must examine the record to see, whether it contain such proof. In doing this, I consider the Court as occupying precisely the same ground they stand on, in considering a demurrer to evidence in common actions; and the reason is strong for going to the same extent in drawing all fair inferences. Indeed, there seems to be something of professional management, unfriendly to truth and justice, in counsel's standing by during the progress of the trial, making no specific objection for defect of evi-

580 dence as to "any particular point, (which, if objected to, could be supplied at once,) but excepting to the sufficiency of the whole evidence; and thus taking the chance of all defects or omissions, which forgetfulness or want of skill in the adversary, may present. I do not mean to say, that this is unfair practice; but that it is a course, which (as is said of demurrers to evidence,) ought to be discouraged; and in which, as the adjudged cases shew, Courts will be extremely liberal in supplying positive proof by intentment and inference. The corporation produced, first, the law creating them, which directed that books should be opened at certain towns, to receive subscriptions for making the contemplated road, to the amount of \$100,000, and refers to the General Turnpike law, for the manner in which they shall proceed to organize themselves into a corporation. That law enacts, that the books shall remain open, until half of the capital stock be subscribed; public notice of which shall be given by any three of the commissioners, who shall have power at the same time, to call a general meeting of the subscribers, at such convenient place and time as they shall name in the notice. To constitute such meeting, a number of persons entitled to a majority of all the votes, which could be given on all the shares subscribed, shall be present, in person or by proxy; and if a sufficient number do not attend on that day, those who attend may adjourn from time to time, until a meeting is formed. If it shall appear to this meeting, that half the stock is sub-

scribed, then the subscribers, from that time, shall be incorporated into a Company, with all privileges, &c., and shall elect officers, make by-laws, &c. To prove that they have pursued the course pointed out by this law, the plaintiffs produced a book, which J. Bonagh, the clerk of the corporation, proved to be the original corporation book. The book, thus authenticated, was no doubt proper evidence. This is laid down in many cases.

In *Owings v. Speed*, 5 Wheat. 420, Chief Justice Marshall, speaking on this subject, says, "The books of such
581 "a body are the best evidence of their acts, and ought to be admitted, whenever those acts are to be proved." This book states that, "at a meeting of the Lynchburg and Salem Turnpike Company, at the Franklin hotel in the town of Lynchburg, on Wednesday the 1st of July, 1818, the commissioners having produced the books of subscription for the towns of Lynchburg, New London and Liberty, and it appearing that 876 shares of stock, of \$100 each, have been subscribed, amounting in the whole to the sum of \$87,600; and it further appearing, that a majority of the stock-holders, either in person or by proxy, are present," &c. proceeding to elect officers, appoint a committee to prepare by-laws, &c.

It is objected, that this evidence does not prove a compliance with the requisitions of the Statute, first, because there is no proof of the notice of time and place of the meeting required by the act. I answer, that the sole end of this notice was to procure a meeting, and set the ball in motion. If this end has been attained, it is fair to presume, that the legal means were employed; and it would be very dangerous doctrine to the numerous corporations we are every day creating, to say, that at any distant period, they should be obliged, in any motion against a delinquent member, to produce the advertisement calling the meeting which organized them.

It is objected, secondly, that the entry in the book does not shew that the meeting consisted of "a number of persons, entitled to a majority of all the votes, which could be given on all the shares subscribed," which the law requires. The entry certainly has not followed the words of the law; and if it intended to express the same idea, it has done it a little awkwardly; yet that it did so intend, I am strongly inclined to think. It must have been apparent to every member, that the law required a majority of the stock to be represented in the first meeting; and to that end, directed that those who first met, should adjourn from
582 time to time, until such majority should attend. We can "conceive no motive for departing from the law.

The meeting consisted of partners in the firm, all interested in putting the institution legally into operation. They did organize it, and it has gone on ever since, without objection that we hear of. Under these circumstances, may we not fairly conclude, that the meeting was a legal one? That by the words "majority of the stock-holders," the clerk meant such a majority

as the law required, to wit: holders of a majority of the stock? I think this by no means a strained inference.

It was next objected, that there is not sufficient evidence that the defendants were stock-holders. The original subscription books were produced in Court, with the names of the defendants thereto, the one, J. P. Gray, for ten shares; and he, in Court, acknowledged his hand-writing; the other, B. Gray, for five shares, and as to him, a witness proved, that the hand-writing was like his. It was further proved, that he had stated himself a subscriber for five shares; and in addition, a power of attorney, purporting to be executed by him, was produced, authorising Isaac St. Clair, as his proxy, to represent him in all future elections in the Lynchburg and Salem Turnpike Company. This power of attorney was attested by his brother, J. P. Gray, who testified that he executed it for B. Gray, being empowered by him to do so. This, I think, was abundant evidence to prove the defendants subscribers.

It is next objected, that the notices of the three requisitions, and of the sale of the stock, were not sufficiently proved: that the papers in which they were published, should have been before the Court. It seems to me, that the papers (some of them at least,) were before the Court. The notice is given verbatim, said to be, "in a Lynchburg paper called the Press, dated the 28th of August, 1818; another of the 4th of September; another of the 11th; and another of the 21st, containing the same advertisement." These are the words; and they convey to my
583 mind the idea, that the papers were in Court. Then *follows the evidence of Payne, who states that he saw the notice in these different papers. This evidence is as to the first requisition. As to the second and third, and the notice of the sale of the stock, these notices are first exhibited to the Court, and are spread verbatim on the record, and then Payne swears, that he had examined the file of newspapers, and saw each notice published there for the length of time required. This was, I think, proper evidence, and quite sufficient to satisfy us that the notices were correctly given.

The last objection which I shall examine, arises on the 6th section of the General Turnpike law. That section substantially enacts, that if a stock-holder shall fail to pay the sum required of him, the President and Directors may sell his stock at auction, and retaining the sum due, and all charges of sale, pay the overplus to the owner. And if the sale shall not produce the sum required to be advanced, with the incidental charges, then the President and Directors may recover the balance, of the stock-holder or his assignee, by motion and ten days notice.

The Grays failing to pay the requisitions, their stock was advertised, and cried by the auctioneer, but not sold, for want of bidders; and the question is, are they liable to a recovery by motion for the amount of the requisitions? This has been, to my mind, the most serious objection in the cause; and at one time, I doubted exceed-

ingly whether it was not fatal to the motion; especially when we consider the strictness with which this Court has taken this summary remedy; but my brethren think differently, and further reflection has induced me to believe that they are right. The power to sell the stock of delinquents, was given to the Company, for their benefit. It was thought, no doubt, that this power would coerce the stockholders to punctuality in paying the calls; and if not, would secure to the Company the speedy receipt of the money, by sale of the stock. But, in case this sale should not raise the whole sum, a motion is given for the balance. Now, ought we

584 *to turn this power of sale, given for the safety of the Company, to their ruin? If the stock had sold for a single cent, there can be no doubt that this motion would have been sustained for the whole sum required, even for more than is now required; for the sum given, (a cent,) would not have paid the costs of sale, and the motion would have been for the sum required, with the addition of such costs. In such case, then, the stock-holder would have lost his stock entirely, and been subject, by motion, for the sum demanded; whereas, in the case before us, he is left in possession of his stock, and is only held to pay the sum required, which was certainly the meaning of the law. For it seems clear, that the intention was to give the motion to supply all deficiencies, which could not be answered by a sale of the stock.

The other Judges concurred, and the judgment was affirmed.

585 *Nalle's Representatives, &c. v. Fenwick, Surviving Partner, &c.

December, 1826.

Citizenship—How Decided after Lapse of Time.*

—The question of citizenship may be decided, after a great lapse of time, by facts and circumstances leading to a presumption that a foreigner had actually become a citizen.

Wills—Probate—Lapse of Seven Years—Effect.—The probate of a will cannot be called in question, after the lapse of seven years, and no person appearing within that time to contest it.

Same—How It May Be Proved.—It seems, that a will of lands, where two of the three attesting witnesses reside out of the State, and cannot be procured by any legal means, may be proved by the remaining witness, he proving the attestation of the absent witnesses.

Same—Same—State—Effect.—The mode pointed out in the act, "prescribing the method of proving certain wills," 12 Hen. St. at Large, 502, gives an

*Citizenship—How Proved.—On this subject the principal case is cited in *Dryden v. Swinburne*, 30 W. Va. 121, 123.

*Wills—Probate—Conclusiveness of.—It has been decided very frequently in Virginia that, if a court of competent jurisdiction shall admit a will to probate as a will of lands, which appears upon its face or upon the record of the probate, not to have been duly executed as a will of lands, still the sentence is binding upon all concerned in interest and upon all courts as long as the sentence remains in force. That such is the law is regarded as well settled. *Ballow v. Hudson*, 13 Gratt. 678, citing principal case as authority. A will admitted to probate by the proper court can only be contested by bill, and no party appearing within seven years to contest the will, the probate is forever binding. *Vaughan v. Green*, 1 Leigh 298, citing principal case as so holding. See further, monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

*Same—Proof of.—See principal case cited with approval in *Manns v. Givens*, 7 Leigh 700. See further, monographic note on "Wills," appended to *Hughes v. Hughes* 2 Munf. 209.

additional mode of proceeding, and does not deprive a party of any which he might have pursued before.

Officers—Powers of—How to Be Pursued.—Where a naked power is given by law to an officer or other person, that power must be strictly pursued, especially if such proceeding involve a forfeiture, and it devolves on him who claims a right under the exercise of such power, to shew that it was, in all respects, exactly pursued.

Tax Sales—What Purchasers Must Shew.—Therefore, where land is sold by a sheriff for non-payment of taxes, it is incumbent on the purchaser to shew that all the steps have been regularly taken, which the law requires in such cases. It seems that although the act of 1783 does not require four weeks advertisement in the papers, before land can be sold for non-payment of taxes, yet the act of 1781, is not repealed in this respect, which requires such a proceeding.

Same—Suit in Equity—Parties.—The parties that are necessary in a suit in equity, to remove the obstruction raised by a sheriff's sale for non-payment of taxes.

This was an appeal from the Richmond Chancery Court. The suit was brought by William Fenwick, surviving partner of Heathcote and Fenwick, against the representatives of Edward Rice, Joseph Strother and Francis Nalle. A complete view is given of the case in the opinion which follows, and of the points made in argument.

Standard, for the appellants.

W. Hay, for the appellee.

December 16. JUDGE CARR delivered his opinion.

Doctor Savage, a resident of North Carolina, held a tract of 1500 acres of land in Culpeper county, by deed from

586 *the proprietor of the Northern Neck, bearing date in 1779. In 1784, Savage, by will, devised this land to Edward Rice, then also a resident of North Carolina. In 1787, 900 acres of this land were sold by the deputy sheriff of Culpeper, J. Strother, for non-payment of taxes due thereon, and bought by himself. He afterwards sold to Nalle, a purchaser with notice of the title which Strother held. After the death of Savage, (but at what particular period does not appear,) Edward Rice became an inhabitant of Virginia; and

§Officers—Powers—How to Be Pursued.—The principal case is cited with approval in *Holly River Cool Co. v. Howell*, 86 W. Va. 502, 15 S. E. Rep. 214.

Tax Sale—What Purchaser Thereunder Must Shew.

—In *Flanagan v. Grimmer*, 10 Gratt. 425, ALLEN, J., who delivered the opinion of the court, in discussing the laws in regard to tax sales, said, "when the act of February 9th, 1814, was enacted, the legislature was fully aware of the construction which had uniformly been put on laws of this description. Few principles of law were more firmly settled, and from their influence on the transaction of others, more widely known, than that where the validity of a deed depends upon an act *in pais*, the party claiming under it is bound to prove the performance of the act that in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it; that the claimant under a sale made to enforce a forfeiture, must show that the law has been strictly complied with; that the recitals in a deed of an officer selling for taxes, were not even *prima facie* evidence of the regularity of his proceedings; and that these facts must be proved by evidence *aliunde*. *Yancey v. Hopkins*, 1 Munf. 419; *Christy v. Minor*, 4 Munf. 431; *Nalle v. Fenwick*, 4 Rand. 585; *Steed v. Course*, 4 Cranch R. 408; *Parker v. Rule's Lessee*, 9 Cranch R. 64; *Williams v. Peyton*, 4 Wheat. R. 77; *Allen v. Smith*, 1 Leigh 281; *Ronkendorf v. Taylor*, 4 Peters' R. 349." And in *Hutchings v. Gilmer*, 1 Va. Dec. 501, it is said: "Before the statutes of 1809, 1814 and 1831, all of which have been substantially incorporated in the Code of 1860 and in the present Code, it was firmly established by numerous decisions of this court and of the supreme court of the United States, that a purchaser at a sale for delinquent taxes, in order to maintain his title, must prove affirmatively

(himself and his brother Francis, being indebted by bond to Heathcote and Fenwick, 943l. 6s. 1d.) he entered into a contract to sell them his Culpeper land, according to the valuation of certain persons named. This contract was never executed. Heathcote and Fenwick sued the Rices, and obtained judgment. Edward died, without heirs who could inherit, and no will (if he left one) has ever been proved. Fenwick, surviving partner, filed this bill for a sale of the Culpeper land, under the agreement of E. Rice, or the lien of his judgment. Nalle, who bought of the sheriff, was made a party. He answered, died subsequently, and those who claim under him are before the Court upon answers.

The first point for discussion is, whether Rice had a good title; for if not, Fenwick can have no claim to a sale of the land. This point divides itself into two questions. 1. Had Rice a capacity to take and hold land? 2. Was the will of Savage so proved as to pass land? If these two questions be settled affirmatively, then a third will be, was the sale of the land for non-payment of taxes, a valid one?

1. As to the first, it is asserted, that Rice could not hold land, because he was an alien. That he was an Irishman by birth, is agreed on all hands. This throws on the plaintiff the burthen of proof. He must shew, either an actual qualification of Rice as a citizen; or such fact and circumstances, as, after this length of time, will authorize us to presume, that such qualification did take place. No positive proof on the subject is furnished by 587 the record; but, *of presumptive evidence there is no stint. Seven witnesses (and some of them I should take to be very intelligent men,) express their confident belief, that Rice had taken the oaths required by North Carolina, to make him a citizen of that State; and they relate facts, which strongly corroborate their

tively that all the requirements of the law have been fully complied with. All the authorities declared that statutory directions which are imperative must be strictly complied with, and no principle seemed more firmly fixed by judicial authority, as well as by the common principles of justice and reason, than that where there is a summary proceeding affecting the rights of property in which extraordinary power is exercised concerning such rights of property, the course of proceeding directed by the statute must be strictly followed. Blackwell on Tax Titles, ch. 17, pp. 300-337, 5 Gratt. 120; 14 Howard 78; 18 Howard 60; 13 Wallace 506; Allen v. Smith, 1 Leigh 231; 4 Cranch 403; 4 Rand. 509. In the last-named case, *Nalle v. Fenwick*, 4 Rand. 509, the court said: "As a general proposition it will scarcely be controverted that where a naked power is given by law to an officer or other person, that power must be strictly pursued; especially if by the exercise of that power the estates or rights of others may be forfeited and lost; and it will devolve on him who claims a right, under the exercise of such power, to show that it was in all respects exactly pursued." In consequence of the application of these principles to the sale of land for the nonpayment of taxes, it had become extremely difficult to maintain a title claimed under such a sale, it being incumbent on the claimant to prove, at any distance of time short of that which would give him a title under the act of limitations, that every prerequisite to the exercise of the power of sale was strictly complied with, even though such prerequisite were a mere act in pais.

See principal case cited on this subject in *Dequasie v. Harris*, 16 W. Va. 383; *Hays v. Heatherly*, 36 W. Va. 628, 630, 631, 15 S. E. Rep. 228, 229. See further, foot-note to *Flanagan v. Grimmet*, 10 Gratt. 421.

opinion. They say he was an active partizan at elections, and voted both in North Carolina, and after here moved to this State: that such was the temper of the times, and the watchful jealousy of Americans towards foreigners, (as he was known to be,) that it would have been impossible for an alien to have acted as he did, with impunity; and indeed, that no such would have been permitted to remain in the country. Saterfield says, he knew him as an inhabitant of Edenton (North Carolina,) in 1779, if not earlier, and is well satisfied that he could not have remained, without taking the oath of allegiance to the State. Collins also knew him in 1779, and gives the same opinion as to the temper of the times. Ellison authenticates a deed from Savage to Rice for land, in 1783; says they were men of too much intelligence not to know that an alien could not hold land; and that if they had not known, the father of the deponent (who witnessed the deed) certainly did know it, and would have set them right. After his removal to Virginia, several witnesses speak of his activity and zeal at elections; and two, Cowper and Lugg, say, that he was once a candidate to represent the county of Princess Anne in the Legislature. The correspondence between Rice and Savage, beginning in April 1779, shews him to have been then in the employment of Savage, who, (from his letters,) I consider to have been a shrewd, sensible man of business. It is clear from these letters, that Rice possessed his confidence in a high degree. There are articles of co-partnership between them, which shew that they went into trade on joint stock. If all this mass of evidence, after the lapse of 45 years, be not sufficient to authorize the conclusion that Rice was a citizen, what less than point blank proof 588 will do? I confess I feel as well *satisfied of the fact, as if I had before me the certificate, in due form, of the magistrate who administered the oaths under the act of 1777, spoken of by Ellison. Such a certificate might be forged, but it is impossible to doubt the truth of the facts stated by these witnesses; nor can I conceive how they could have happened, unless Rice had been a citizen. I conclude that he was a citizen.

2. Was the will of Savage so proved as to pass lands? In England, the decision of the Ecclesiastical Court upon the probate of a will of personals, was held conclusive evidence that it was the testament of the party, to the full extent to which that Court had admitted it to probate. Thus in *North v. Wells*, Swinb. 412, citing 1 Lev. 235, the plaintiff gave in evidence probate of a will, to prove an executrix; and the defendant would have proved that the will was forged; but he was not admitted to such proof, because it was against the seal of the ordinary, in a matter proper for his jurisdiction.

In *Chichester v. Philips*, Sir Thomas Raymond, 404, it was held, that probate granted by the Ecclesiastical Court, is not traversable, but conclusive evidence of the will. With us, Courts of probate have equal jurisdiction over a testament of personals and a will of lands. By the Statute

of 1785, it is enacted, "that when any will shall be exhibited to be proved, the Court having jurisdiction, may proceed immediately to receive probate. If any person interested shall, within seven years, appear, and by his bill contest the validity of the will, an issue shall be made up, whether the writing be the will of the testator, &c.; but no such party appearing within that time, the probate shall be forever binding."

On the 19th of June, 1789, the will in the case before us was admitted by the General Court to full probate, "as and for the last will and testament of the said William Savage." This suit was not commenced, until the 2d of December, 1799; upwards of ten years after the probate.

Can we now call in question the probate of this will, or "disturb it in any way? The law says not. It says that no party appearing within seven years to contest the will, "the probate shall be forever binding;" and so say the decisions of this Court. *Bagwell v. Elliott*, 2 Rand. 198. *West v. West's ex'r*, 3 Rand. 373.

But, if the time had not elapsed, and we were free to question this probate, I should strongly incline to the opinion, that the General Court did right in receiving it. The will was executed in North Carolina; the witnesses attested it there; and we must presume that their residence was there. The will was afterwards brought to this State, to be proved in the General Court, as the lands lay here. I understand the entry on the records of the General Court, to be this: "that Cosmo Medici, a witness to the will, proved it according to law; and that he also deposed, that Routhack and John Routhack, the two other witnesses to the same, subscribed their names thereto at the request, and in the presence of the said William Savage; and it appearing to this Court, that every legal means have been taken by the said Edward Rice, to procure the attendance at this Court, of the said Routhack and John Routhack, who are out of this State, to testify concerning the said will, and they not appearing, therefore it is ordered, that the said writing be recorded, as and for the last will and testament of the said William Savage, on the evidence of the said Cosmo Medici." The witnesses residing out of the State, and every legal means having been taken to procure their attendance, without effect, it would seem to present the same case as if they were dead. They were equally beyond the power of the Court; and in case of their death, I presume there could be no doubt that their attestation might be proved by the remaining witness; or that, if all had been dead, their handwriting might be proved.

It was said in the argument, that the mode prescribed in the act, "prescribing the method of proving certain wills," 12 Hen. Stat. at Large, 502, ought to have been pursued; "but I consider the provisions of that Statute, as made in aid of parties claiming under a will, and giving them an additional mode of proceeding; not depriving them of any which they might have pursued before. I therefore incline to think, that if this ques-

tion were open, the decision of the General Court would be approved; but as it is not open, I would not be considered as giving a decided opinion on the point.

3. The third and great point in the cause, relates to the sale of the land made by the sheriff. It is contended for the appellants, that it is a good and valid sale; by the appellees, that it is invalid and void. As a general proposition, it will scarcely be controverted, that where a naked power is given by law, to an officer or other person, that power must be strictly pursued; especially if, by the exercise of that power, the estates or rights of others, may be forfeited and lost; and it will devolve on him who claims a right under the exercise of such power, to shew that it was, in all respects, exactly pursued.

In proof of this, there could not be a case stronger or more exactly in point, than that of *Williams v. Peyton*, 4 Wheat. 77. That was an ejectment brought by the original patentee, against a purchaser at a sale made for non-payment of the direct tax imposed by an act of Congress. The plaintiff exhibited his title. The defendant gave in evidence the books of the supervisor, shewing that the tax on the land was charged to the plaintiff; and that it had been sold for the non-payment thereof. He also gave in evidence the deed of the Marshal, executed in pursuance of the act of Congress; and proved by the plaintiff's agent that he did not pay the taxes, or redeem the land. Upon this evidence, the Court below instructed the jury, that the purchaser, under the sale of lands for the non-payment of the direct tax, to make out title, must shew, that the collector had advertised the land, and performed the other requisites of the law; otherwise, he made out no title; and that the Marshal's deed and the other evidence were not

*prima facie evidence, that the land had been advertised, or the requisites of the law complied with. On appeal, this instruction was decided by the Federal Court to be correct. Chief Justice Marshall delivered the opinion of the Court. In his own clear and strong manner, he says, "It is a general principle, that the party who sets up a title, must furnish the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under that deed, is as much bound to prove the performance of that act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve." The act under which the land was sold, directed that it should be advertised for two months, in six different public places within the district, and in two Gazettes in the State, if there be so many. Upon this part of the case, the Chief Justice observes, "The purchaser ought to preserve these Gazettes, and the proof that these publications were made. It is imposing no greater hardship on him to require it, than it is to require him to prove that a power of attorney, in a case in which his deed had been executed by an attorney, was really given by the prin-

cipal. But, to require from the original proprietor proof that these acts were not performed by the collector, would be to impose on him a task, always difficult, and sometimes impossible to be performed."

The same principle is strongly laid down in *Hopkins v. Yancey*, 1 Munf. 318, and *Christy v. Minor*, 4 Munf. 431.

In 1781, the Legislature passed a law, entitled "an act for ascertaining certain taxes and duties, and for establishing a permanent revenue." 10 Hen. Stat. at Large, 501. By it, (among other things) it is directed, that the several County Courts shall annually, at their February Court, appoint three reputable freeholders of the county, to be commissioners to ascertain the value of all the lands 592 within the *same, (except their own:)

that after taking the oath prescribed, the two first named shall proceed to take an account in writing, of the quantity of the lands, and the names of the proprietors thereof, and shall ascertain their value by the acre: that they shall make out a fair list of the names of the owners of lands and lots, and the quantity and value of the lands belonging to each; and shall return the same to the clerk of the Court of their county, by the 1st of June annually: that each clerk shall file the list in his office, and make out three fair copies; one he shall deliver to the Auditor, by 1st of August annually; another, set up at the Court-house, on the next Court day; and the third, deliver to the sheriff or collector by the 10th of June in each year. The law then fixes the land tax at one pound in the hundred, on the assessed value; and goes on to lay taxes on persons and personal property. After the 1st of June, the sheriff may collect taxes, and after the 1st of July, may distrain the lands, slaves, goods and chattels of delinquents; and if the amount due be not paid, in five days after such distress, he may sell, giving six days notice of the day and place of sale, by advertising the same at the church or other public places in the parish, on the next Sunday after the expiration of the five days; provided, that in all cases where land shall be seized under this act, there shall be given at least four weeks notice in the public papers, before any sale shall be made of the same; and where there are other sufficient effects, no distress of land is to be made. The law then directs, that the sheriff shall account for and pay into the treasury, by the 1st of September, the full amount of taxes, &c. and on failure, subjects him to a judgment on motion before the General Court.

In the October session of 1782, there passed two acts on this subject; the first, entitled "an act to amend and reduce the several acts of Assembly, for ascertaining certain taxes and duties, and for establishing a permanent revenue, into one act." Hen. Stat. at Large, vol. 11, p. 112; the second, entitled "an act,

593 for equalising the land tax." *These

Acts make some small changes in the taxes, (one of which will be more particularly noticed hereafter;) but they do not materially affect the great scheme for

laying and collecting the taxes established by the Act of 1781. This is the Act under which the sheriff proceeded in selling the land; as his deed proves, in which he refers to this Act by its title, as that under which he had sold the land. By this Act then, we will test the correctness of his proceeding.

1. To authorise the sheriff to sell any land for non-payment of taxes, he must shew that it had been actually taxed; that is, that the Commissioners had valued and rated it, and returned it in their list to the clerk. Without this, there could be no tax collected. The sheriff would have no means to ascertain the amount; no authority to levy it. The list of the Commissioners was his guide, and his warrant of distress. We have not only the reason of the thing for this, but we have an express legislative declaration to the same effect. In the Sessions Acts of 1792, (See Old Rev. Code, vol. 1, 454, Appendix,) it is recited, that "whereas no Commissioners had been appointed in several counties, and from the neglect of the Commissioners in returning a list of the taxable property in several other counties, by reason whereof, no collections of the public taxes have been, or could be made," &c. We have also the case of *Kinney v. Beverley*, 2 Hen. & Munf. 318, deciding that lands were not liable to forfeiture under the Act of 1790, for non-payment of taxes, unless they had been assessed and listed by the Commissioners, and returned to the Auditor, &c. We have also the case of *Yancey v. Hopkins*, 1 Munf. 419, deciding, that if land be listed by the Commissioners in a wrong name, and sold in that name for non-payment of taxes, the sale will not affect the title of the true owner. This was a case decided on the very law we are now considering. The land was sold within a few months of the time that the land in the case before us was sold; sold too 594 and bought, as here, by the *deputy sheriff; and by him sold, as here, to a purchaser with notice. Now, how can we know in this case, whether the land was listed at all, or whether listed in the proper name, unless we have the lists of the Commissioners before us? The deed of the officer, as we have seen, is not even prima facie evidence of these facts. Nor is it asking much of the party, to require the production of this evidence. The Commissioners return annually their list to the clerk, and he is bound to file it in his office, and to make out three copies; one of these he delivers to the Auditor, and another to the sheriff himself. If this officer had lost his own copy, he might apply to the clerk's, or the Auditor's office, where these documents are of record, and produce copies. Here then, the very foundation of the proceeding fails.

2. But, secondly, it is incumbent on the appellants to shew, that the amount of taxes, for which the distress and sale were made, was actually due. The advertisement states, that the lands would be sold for taxes due on them, for the years 1782, 1783, 1784, 1785, and 1786; and the sheriff's deed states, that the amount of taxes for which the land was sold, was 371. But,

these statements are no evidence. If we had copies of the Commissioner's lists, or of the examiner's books, directed to be made out by the equalizing law of 1782, these documents would shew us what the lands were valued at; and the law would give us the per centage upon this valuation, which had been imposed as a tax. Here we should have certainty; and surely, it is not imposing too much upon the purchaser with notice, from the sheriff, to require this record evidence. This is a second vital defect in the proof necessary to support the sheriff's sale.

3. There is a third. The Act of 1781, requires, that where land is distrained for taxes, there shall be given at least four weeks notice in the public papers, before any sale shall be made of the same. The only evidence we have have of any advertisement, is a copy certified by the 595 clerk of *Culpeper Court. It bears no date; but the clerk states, that the date of the Virginia Gazette, from which it was taken, was the 10th of March, 1787; and the advertisement says, "To be sold to the highest bidder, at Culpeper Court-house, on Wednesday the 21st day of March next," &c. so that taking this paper as proved, (which it is not,) the only publication was on the 10th of March, of a sale to take place on the 21st, eleven days instead of four weeks. It was contended in the argument, that no advertisement of the sale was required by the law. That the law should direct a public sale of property, without notice to be given, would be a perfect anomaly; and would lead to consequences so mischievous, that we could not, without the strongest necessity, be justified in imputing such a course to the Legislature; especially where there has been no judicial proceeding, and where a man's highest estate, his land, was to be forfeited and lost to him, by the summary process of distress and sale for the non-payment of taxes.

It is true, that the law of 1782, ("To amend and reduce into one, the several Acts for ascertaining certain taxes and duties, and establishing a permanent revenue,") does not contain the proviso of the Act of 1781, that where lands are seized, there shall be four weeks advertisement in the public papers, before sale; but then it does not seem to me, that this omission would amount to a repeal, as both laws might well stand together; and this seems to have been the idea of the Court, in *Yancey v. Hopkins*, where proof of publication was looked to. It seems to have been the cotemporaneous exposition too; for both in *Yancey v. Hopkins*, and in the case before us, the parties thought a publication in the papers necessary; which must have been on the idea, that this provision of the Act of 1781, was not repealed. And indeed, the sheriff, in his deed, expressly states, that the proceeding was under the law of 1781; and it must of necessity have been so, for the tax of 1782, which was due before the Act of 1782, was passed.

596 *But, if it were clear that this Act of 1782, did repeal the provisions of 1781, requiring publication, and that the clause which says, that where a distress

is made, and no payment of the tax in five days, the sheriff may sell, giving six days notice, applies as well to land as to personal chattels; then it follows, that on a distress of land for non-payment of taxes, there must be six days notice of the day and place of sale, given by "advertising the same, at the Church or other public places in the parish wherein such distress shall be, on the next Sunday after the expiration of the five days." These are the very words of the Act of 1782; and the party, claiming under any sale made by virtue of it, would be obliged to produce the proper evidence of this advertisement having been made, at the Church, or other public places in the parish. This is the very point decided in the case of *Williams v. Peyton*, before quoted.

We have no proof of any advertisement here. So that, upon either hypothesis, the proof is defective of the advertisement required by law; and the sale, in my opinion, void on all the grounds I have stated.

With respect to the objection that the proper parties are not before the Court, I do not consider it well founded. The object of the plaintiff, so far as related to the claim of the Nalles, is to remove the obstruction raised by the sale of the sheriff. In order to do that, it is only necessary to have before us, those who claim title under that proceeding, and they are here.

I am of opinion that the decree of the Court below, should be affirmed.

The other Judges concurred, and the decree was affirmed.*

597

*Fulton v. Shaw.

January, 1837.

Slaves—Emancipation—Reservation as to Increase—Effect.—Where a female slave is emancipated, with a reservation that her future increase shall be slaves, such reservation is void, and the woman and her increase are absolutely free.

This was an appeal from the Petersburg Superior Court, where Fanny Shaw, a woman of colour, brought an action to recover her freedom, against Elizabeth B. Fulton. At the trial, the jury found a special verdict, the substance of which is fully stated in the following opinion. The Court gave judgment for the plaintiff, and the defendant appealed.

May, for the appellant.

Spooner, for the appellee.

January 23. JUDGE CARR delivered his opinion.

The first question in this case will be, as to the actual state, the civil condition of Mary Shaw, after the execution of the deed by Fitzgerald. Did that deed emancipate her? If so, then secondly, what was the civil condition of her children born after her emancipation?

In 1723 it was enacted, that no person should emancipate a slave but for meritorious services, and by permission of the Governor and Council. This law continued in force till 1782, when an Act passed entitled, "An Act to authorise the manumission of slaves;" by which it was en-

*JUDGE GREEN did not sit, having acted as Counsel.

†See citing principal case *Forward v. Thamer*, 9 Gratt. 587, 589, and *foot-note*.

acted that "any person, by will or other instrument in writing under his hand and seal, attested and proved in the County Court by two witnesses, or acknowledged, &c. may emancipate and set free his slaves, who shall thereupon be entirely and fully discharged from the performance of any contract, entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this Act."

598 *In 1788, six years after the passage of this Act, John Fitzgerald executed the deed in question. It runs thus: "To all persons whom it may concern. Know ye, that I, John Fitzgerald, do by these presents, by virtue and authority of a certain Act of the General Assembly of Virginia, entitled 'An Act to authorise the manumission of slaves,' liberate, emancipate, and relinquish all claim, right, title and interest, to a certain woman slave named Mary Shaw, and now living in the town of Petersburg, reserving to myself, my heirs, &c., nevertheless, an absolute right and claim to all such child or children, which the said Mary Shaw may hereafter bring, or may have born of her body, &c." This deed was executed, attested by two witnesses, and recorded in Court, in exact conformity with the directions of the Act; and from the reference in the deed to the Act by its title literally recited, it is very probable that the law was before the draftsman, when he drew the deed. The deed says, "by authority of the Act, I do liberate, emancipate and relinquish all claim, right, title and interest to Mary Shaw." Words could not be clearer or stronger to shew, that the grantor meant to liberate the slave as fully and completely as the law would authorise; and that declares that slaves liberated in the manner it directs, shall enjoy "as full freedom as if they had been particularly named and freed by the Act."

Upon the execution and delivery of this deed then, Mary Shaw became, to all intents and purposes, free; unless this effect was prevented by the subsequent reservation of an absolute right to any children she might afterwards have. It is clear that it was not the intention of the grantor, by this subsequent clause, to modify or narrow the freedom before given. The clause relates solely to the future increase. The deed bestows present freedom on Mary Shaw. The reservation had no present effect. It could only operate on a future contingency. Mary might never have children. In that case, the reservation would be a nullity. Would such a clause suspend, or in any way affect the freedom

599 *given immediately, and without qualification by the former part of the deed? Unquestionably not. It was said, that this being a voluntary deed, should be construed like a will. This, I think, would be a new rule of construction. We know not what was the consideration moving the grantor; but at law, the seal stands for a consideration, and all deeds are governed by the same rule of construction. If this were a will however, it would make no difference in the construction. We must give to the instrument

its true meaning; and that is exceedingly plain. The grantor meant to emancipate Mary Shaw fully and immediately, and to hold in slavery any children she might afterwards have; and the only question is a question not of intention, but of power. Could the grantor, after giving the mother perfect freedom, reserve to himself any interest in her future children? When a female slave is given to one, and her future increase to another, such disposition is valid, because it is permitted to a man to exercise control over the increase and issues of his property, within certain limits. But when she is made free, her condition is wholly changed. She becomes a new creature; receives a new existence; all property in her is utterly extinguished; her rights and conditions are just the same as if she had been born free. After thus divesting himself of all property in the mother, the grantor could not reserve to himself a right to hold her future progeny in slavery. A free mother cannot have children who are slaves. Such a birth would be monstrous both in the eye of reason and of law. The reservation, therefore, was repugnant to the grant; and I need not cite authorities to shew, that in such case, the grant is good, and the reservation void.

But, independent of this rule of construction, such reservation was void by the positive law of the land, then in force; which declares that "all children shall be bond or free, according to the condition of their mothers." This law and its effects are noticed in various cases in this Court; by Judge Pendleton, in *Shelton v. 600 Barbour*, *2 Wash. 64; by Judge Fleming, in *Pegram v. Isabel*, 2 Hen. & Munf. 193; and by the Court, in *Maria v. Surbaugh*, 2 Rand. 228. In this last case, a female slave given to A, till she should be 31 years old, and then to be free, had children before she arrived at 31; and these children were held to be slaves. Why? Because, at their birth the mother was a slave. So here, Mary Shaw, by the deed, was emancipated, made free. The plaintiff was born afterwards. She is free, because that was the condition of her mother at her birth.

I think the judgment must be affirmed.

The other Judges concurred, and the judgment was affirmed.*

Kitty v. Fitzhugh.

January, 1827.

Instructions—Party Asking Should Specify.—A party asking instructions of the Court to the jury as to the law, should specify the points, and not ask instructions generally as to the law arising out of a complicated mass of evidence. *JUDGES CARR and COALTER.*

Slaves—Emancipation—Case at Bar.—Quære, how far a slave, who has been emancipated by one, who had no title originally, but who has had a length of possession which bars a recovery by the true owner, can recover his freedom under such emancipation, against the person who had the original right?

Same—Judgment for Freedom—Effect.—A judgment deciding in favor of the freedom of a person held in slavery, has no effect against any party, except

*The PRESIDENT and JUDGE COALTER absent.

†See monographic note on "Instructions" appended to *Womack v. Circle*, 20 Gratt. 192. The principal case is cited in *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 310.

the defendant and those claiming under him, posterior to the judgment.

Same—Owner Dispossessed by Fraud—When Recovery Barred.—If a slave be taken from the possession of his owner by fraud or violence, unaccompanied by any bona fide claim of property, no length of time will bar the action of the true owner.

Appeal from the Superior Court of Fairfax county.

Kitty, a woman of color, brought an action to recover her freedom, against Fitzhugh. The jury found a verdict for the defendant, and the Court gave judgment accordingly.

601 "At the trial, the counsel for the plaintiff gave in evidence a record of proceedings in a suit instituted in Prince George's county, Maryland, by Catharine Norris against Patrick Sim, in July, 1814, (which said Catharine is the appellant in this cause,) in which she claimed her freedom, in consequence of having been imported into the State of Maryland contrary to the laws of that State, by the said Patrick Sim. In that suit, Patrick Sim, (as appears by that record,) disclaimed any right or title to the said Catharine; and judgment was rendered by the Court, that the petitioner should be free.

The counsel for the plaintiff also offered in evidence Patrick Sim's will, made in 1817, in which he declared that the children of Katy Norris were free, in consequence of their mother having been imported into Maryland, in the year 1804, without performing the acts required to be done by the law of that State; on which ground she had recovered her freedom by a judicial proceeding.

Depositions were also offered, which stated the following facts and circumstances: That Patrick Sim had held Kitty in possession for thirty years, as a slave, until the recovery of her freedom in Maryland; after which she continued to reside with Sim, until his death in 1815 or 1816, (one witness states that he died in 1817,) and has been going at large ever since, exercising the rights of freedom, until she was seized upon by Fitzhugh: that Patrick Sim went from Maryland to Loudoun county in Virginia, in 1801, carrying with him the woman Kitty: that he moved back from Loudoun to the City of Washington about the year 1803; and in 1808 or 1809, to Prince George's county, Maryland, and continued to reside there until his death: that Kitty went with Patrick Sim to Loudoun county, returned with him to Washington, and was in his possession in Prince George's county, Maryland: that P. Sim never acquired a settlement in Virginia, and never kept house there: that Mrs. Sim resided, at the time of the death of Patrick Sim, in Georgetown, in

602 the District of Columbia, "and continued to reside there until she removed to Alexandria, where she has resided to the present time: that Kitty and her children removed to the City of Washington soon after the death of Patrick Sim, where she continued to reside until she was removed by Fitzhugh to Virginia: that a separation took place between Patrick Sim and his wife some time in the year 1802, and they were divorced in the year 1805 or 1806, by an Act of the Legislature of

Maryland; and after this event they never did again live together.

A copy of an Act of Assembly of Maryland (but not proved) was also introduced in evidence, by which actions of detinue were required to be brought within three years from the time of such actions accruing.

The next piece of evidence was a mortgage from Patrick Sim to Thomas Contee, by which Kitty was conveyed, with other negroes, to secure a debt due to the said Contee. This deed was dated on the 9th day of April, 1794. The property so conveyed, was advertised to be sold; and Richard Henderson became the purchaser of Kitty, and received a conveyance from Sim and Contee. The conveyance expresses, that the said Richard Henderson desires the said Kitty with her increase to go to the present use or occupation of his daughter Ariana, (Mrs. Sim.) By a codicil to the will of the said Henderson, he gives Kitty and her increase to his daughter (Mrs. Sim) when she shall be capable in law to hold such property in her own right, and failing such capacity, he gives them to his grand-son William Sim, &c.

A certificate of the discharge of Patrick Sim, as an insolvent debtor, dated March 17, 1801, was also given in evidence: that Fitzhugh employed constables and others to take up Katy and her children, who were found in Washington, and carried to Fairfax court-house, and there lodged in jail for safe-keeping. There was other evidence which is not material to this report.

603 "The plaintiff's counsel asked the instruction of the Court to the jury, that if from the evidence the jury should believe that the plaintiff was taken possession of by Patrick Sim, in the year 1802, and held by him in the District of Columbia, until his removal into Prince George's county, Maryland, in 1809: that he took her with him in 1809 into Prince George's county, and held her there until his death in 1819: that in 1815, the plaintiff recovered her freedom by judgment of the Court of Prince George's county against Patrick Sim: that in May, 1819, or previously thereto, he removed to the City of Washington, and from that time until she was seized on by the defendant in October, 1825, resided and acted publicly and openly as a free woman, claiming her freedom under the recovery aforesaid; and that from the year 1802 until 1820, Mrs. Sim resided in Georgetown, and from 1820 until the seizure aforesaid, resided in Alexandria: that in the year 1805, Mrs. Sim was legally divorced from her husband, and from that time, was capable in law of holding property in her own right, under the will of her father, Richard Henderson; then that the plaintiff was entitled to her freedom in this suit; which opinion the Court refused to give, and the plaintiff's counsel excepted.

The plaintiff's counsel also moved the Court to instruct the jury, 'that if from the evidence so as aforesaid given, the jury should believe the matters stated above to be true, and should moreover believe that the said Patrick Sim, had seized and held

the plaintiff as aforesaid, from the year 1802 until her recovery of her freedom by the judgment aforesaid under a claim of title to her as his slave, then, that the plaintiff was entitled to recover in this suit; which opinion the Court refused to give, unless with this qualification, that the jury should be satisfied that the possession of the said Patrick Sim did not originate in fraud or violence, and that the said Sim did really and bona fide claim property in the said slave, when he so forcibly possessed himself of her. To this opinion the plaintiff's counsel excepted.

604 *The plaintiff appealed.

Leigh, for the appellant.

Johnson, for the appellee.

January 31. JUDGE CARR delivered his opinion.

Concurring, as I do entirely, with my brother Coalter, in the general view which he has taken of this case, on the merits, I have thought it not amiss to state a separate ground, which, in my mind, justifies the Court below in refusing the instructions asked for by the counsel for the plaintiff.

It is this: that instead of presenting to the Court, the points of law distinctly and separately, as arising out of the facts, and asking on these points the instruction of the Court to the jury, the counsel has presented the whole mass of evidence, and blending fact with law, has asked the Court to instruct the jury generally, that if they believed the facts to be proved, the plaintiff was entitled to her freedom.

In *Smith v. Carrington*, 4 Cranch, 62, one question before the Court was, whether the Court below erred in refusing to give instructions to the jury, which were asked. The Chief Justice, delivering the opinion of the Court, says, "The difficulty of deciding did not arise from any doubt produced by the facts in the cause, but from the manner in which the question was propounded. After a long and complex statement of the testimony, the counsel for the plaintiffs requested the Court to declare, 'whether if the plaintiffs had actually paid the premium to the underwriters, before any notice of the change of the destination of the ship, they had a right, under the circumstances of the case, to recover the same of the defendant.' Had the plaintiffs' counsel been content with the answer of the Court to the question of law, he would have been entitled to that answer; but when he involved fact

605 *with law, and demanded the opinion of the Court on the force and truth of the testimony, by adding the words, 'under the circumstances of the case,' the question is so qualified as to be essentially changed; and although the Court might, with propriety, have separated the law from the facts, and have stated the legal principle, leaving the fact to the jury, there was no obligation to make this discrimination, and consequently no error in refusing to answer the question propounded."

In *Brooke v. Young*, 3 Rand. 115, this Court examined this subject, and assigned at some length the reasons why a party,

asking the instruction of the Court to the jury, as to the law, should specify the point, and not be permitted to ask instructions generally, as to the law arising out of a complicated mass of evidence; thereby throwing it upon the Court to ascertain all the points of law which might be involved; to separate them from the facts, and decide upon them. To this course there are many strong objections. In the hurry and confusion of a jury trial, points, buried under this mass of evidence, may be overlooked, and this omission may involve a reversal of the judgment; whereas, if the point of law, or the different points arising, had been distinctly put, such a consequence could not follow. The opposite party too, when he heard a specific objection made, might be able to remove it immediately by additional evidence. This course, therefore, is calculated to entrap both the Court and the party. Upon this ground it is, that a party wishing the instruction of the Court on a point of law, is required to give his question a precise shape, and not blend together law and fact.

In the case before us, a mass of evidence filling many pages, is submitted to the Court, and they are asked to instruct the jury, that the plaintiff was entitled to her freedom, if they considered the facts (a long catalogue of which is stated) to be proved. Before the Court could come to the conclusion that the plaintiff was free, observe what they would have to do. This

606 mass of evidence must be carefully weighed and sifted, to ascertain what points of law were involved in it, and then these points must be decided. A few of these points are, 1. What law shall govern the case, that of Maryland or Virginia? 2. Does the Act of Limitations apply? If so, then, 3. From what time shall it run? 4. To what weight is the Maryland judgment entitled? Several other questions might be put as fairly arising on the record. Now is it to be tolerated, that in the hurry and confusion of a jury trial, a Court should be forced in the way of instructions to the jury, to hunt up all these points, and decide on them in the lump? Is this either proper or necessary? If a party wants the opinion of the Court on the law arising on the whole case, let him procure a special verdict, or demur to the evidence; and then the jury are discharged, and the Court deliberates at leisure on all the points which may arise. I have no doubt, that for this reason alone, the Court was justified in refusing the instructions asked.

JUDGE COALTER.

Although the bill of exceptions spreads the evidence in this case on the record, yet we have nothing to do with it, further than to see whether the instructions of the Court were correct in the case, provided the jury should believe that the facts alleged to exist, were proved.

In examining this case, I will consider it as governed by the laws of Maryland, and will endeavor, as far as I am enabled to do so, to pronounce the law of that State upon it. When the law of that State is not in proof before me, I will take the common

law as my guide, the party having furnished me with no other.

I will also premise that the question, whether, if the Statute of Limitations began to run as between Col. Sim and Mrs. Sim, in the county of Washington and District of Columbia, whilst they both resided therein, it continued to run after his removal from the District to the county

607 of "Prince George's in the State of Maryland, is not presented by the statement of facts contended for on the part of the appellant. By those facts, if established, the period of three years had elapsed, before that removal; and there is no instruction asked, as to what the law would be in case that was not the fact. That matter, therefore, both as to fact and law, was left to the jury. They may have found, and probably did find, both against the appellants. On this point, the facts contended for as having been proved, were, 1. That Patrick Sim took possession of the appellant in 1802, and held her in possession in the District of Columbia, until his removal into Prince George's county in 1809. 2. That from 1802, until 1820, Ariana Sim resided in Georgetown in the District of Columbia. 3. That in 1805, she was legally divorced from her husband Patrick Sim, and from that time, was capable in law of holding property in her own right, under the will of her father Richard Henderson.

The evidence set out in the record shews, how Richard Henderson became entitled to the appellant; and his will, which is also in the record, so far it relates to Kitty, made in 1801, gives her to his daughter Ariana, when she shall be capable in law to hold such property in her own right, &c.

The Act of Assembly divorcing these parties, is not in the record; and the only witness who speaks of it, says it passed in 1805 or 1806.

As to the removal of Patrick Sim to Prince George's, two witnesses only speak of it. One says it was in 1808; the other, in 1808 or 1809. The time being thus left doubtful, both as to the passage of the law and his removal, the jury may well be supposed to have found that the three years had not elapsed; and it may have been proved to them, that by the law of Maryland, the Statute did not bar, unless the three years had elapsed before the removal.

There may also be a question, which I would not wish to be considered as having decided, in this case, one way 608 "or the other; and that is, how far a slave, who has been emancipated by one, who, but for a possession which by the Act of Limitations bars a recovery by the true owner, had no title and no right to emancipate, can recover his freedom under such emancipation, against his true owner? As for instance, A. takes possession of a slave, claiming him as his own, but who in reality belongs to B. and holds him for more than 5 years; so that, if he was sued by B. he might plead the Act of Limitations, and bar his recovery; and after this possession, he emancipates him, and B. the real owner, gets possession. Can a title to freedom be maintained against B. the real owner, because A.

might have pleaded the Act of Limitations in a suit against him?

The remaining facts, on which it was contended that the appellant was entitled to her freedom, under the first instruction moved for, are these:

4. That Patrick Sim took her into the county of Prince George's in 1809, and held her there until his death in 1819. 5. That in 1815, she recovered her freedom by judgment of the Court of that county, against him. 6. That in May, 1819, or previous thereto, she removed to the City of Washington, and from that time until she was seized in 1825, resided and acted publicly and openly as a free woman, claiming her freedom under the said judgment. And the Court was asked to instruct the jury, that if, from the evidence, they believed these facts, then the plaintiff was entitled to her freedom. This instruction the Court refused to give.

I think the Court was correct in refusing this instruction. The reason why the Court might have been sustained here in refusing to give either of the instructions asked for, and which have been stated by the Judge who has preceded me, applies emphatically to this instruction; for, in addition to those objections to it, the evidence in the record shews, that the statement of facts so submitted, excluded all those belonging to the defence, and which, if believed, would support that defence and justify a contrary

609 "finding; as for instance, whether a bare possession for the time required by the Act, by one not claiming title or property, but on the contrary disclaiming such property, will, by such mere possession and lapse of time, vest a title in the possessor? Or whether, if such possession is obtained and retained by fraud or false pretence, length of time will give property?

As to the Maryland judgment, it could have no effect in favor of the appellant, except against Sim and those claiming under him, posterior to the judgment.

The object of that judgment, and of the will of Sim, seems to have been, to admit and establish certain fictitious facts, and thereby prove a right to freedom in the appellant, on the return of Sim and wife from Virginia in 1801 or 1802, and prior to the time when he took possession of her; so as to shew in fact, that at that time she was a free person. The intention of this collusive judgment was, doubtless, to defeat the rights of Mrs. Sim, under the will of her father. The Court, therefore, probably erred in not directing the jury to weigh these facts, in the consideration of the question, whether the possession of Sim was unaccompanied by circumstances of fraud, and whether it was accompanied by a real and bona fide claim of property in himself, adverse to that of Mrs. Sim. But, as this error, if it is one, is against the appellee, it is unnecessary to consider it further, inasmuch as I am of opinion, that there is no error in the proceedings, of which the appellant can complain.

The second instruction moved for, was this: that if, from the evidence, the jury believed the matters stated in the preceding

prayer to be true, and should moreover believe that the said Patrick Sim had seized and held the plaintiff as aforesaid, from the year 1802, until her recovery of freedom by judgment as aforesaid, under a claim of title to her as his slave, then that the plaintiff was entitled to recover in this suit; which opinion the Court refused to give, unless under this qualification, 610 that the jury should *be satisfied that the possession of the said Patrick Sim did not originate in fraud or violence, and that the said Sim did really and bona fide claim property in the said slave, when he forcibly possessed himself of her. By this I understand the Court to mean, that if the possession originated in fraud, no title could vest in Sim, by reason of lapse of time; and even if by violence, as the word seize in the instruction asked for, would seem to import, (thereby shewing a possession contrary to the consent of the owner,) that lapse of time would not give property under such possession, unless he did really and bona fide claim property in the said slave, when he so forcibly possessed himself of her.

As the evidence in this case shews no breach of the peace in getting possession, or any thing beyond that force which attends the taking away property which would not go itself, I cannot suppose that the Judge intended to raise the question, how far the Courts would discourage breaches of the peace, in taking property really and bona fide claimed by the taker, by deciding that in such cases, lapse of time would not give property. On the contrary, he instructs under the supposition of a forcible possession, by saying that such possession will not give title, unless accompanied with a real and bona fide claim of property. Was the instruction so understood, correct?

I understand that the first branch of it, as to a fraudulent possession, is considered correct; and as the instruction moved for is predicated on the necessity of a possession, accompanied with a claim of property, and which surely ought to be a real and bona fide claim, or it is no claim, I consider the second branch as mainly objected to on a construction of its meaning variant from that I have put on it; and that if it shall have that construction, it is unobjectionable.

On the whole, I think the judgment must be affirmed.

The other Judges concurred in the opinion that the judgment ought to be affirmed on the merits.

611 *Watson, &c. v. Watson, &c.

February, 1837.

Appeals—Dismissal on Motion.*—An appeal taken in the name of a party without his knowledge or consent, may be dismissed as to him, on motion.

This appeal was docketed in the names of Richard M. Scott and others, against Josiah Watson and others. Richard M. Scott, by his counsel, moved to have the appeal dismissed as to him, upon the allega-

tion that the suit was originally taken without his knowledge or consent. To prove this, he filed sundry affidavits. The Court made a rule on the appellees, to shew cause why the appeal should not be dismissed as to Richard M. Scott; and reasonable notice being given of the rule: It was ordered, that the appeal should be dismissed as to him.

Gregory v. Baugh.

February, 1837.

Pedigree—Hearsay Evidence—When Admissible.†—In what cases, and upon what principles, hear-say evidence as to pedigree, is admitted.

Matters of General History—Must Be Given in Evidence.—Matters of general history must be given in evidence, as well as all other facts; and the jury are not to be left to their own information, as to such things.

Indian Slavery.—A re-view of all our laws concerning Indian slavery in Virginia.

Evidence—Question of Freedom.—In questions of freedom, evidence that there had been a belief in the neighbourhood, some 60 or 60 years before, that the female ancestor of the plaintiff was entitled to her freedom, is not admissible. By two Judges.

Appeal from the Superior Court of Chesterfield county, where James Baugh, a man of color, brought an action against Thomas Gregory, to recover his freedom. The pleadings are in the usual form; and the jury found a verdict for the plaintiff. Judgment was rendered accordingly.

At the trial, the plaintiff filed two bills of exceptions.

612 *1. The first states, that upon the trial, the plaintiff proved by two witnesses that he is the son of Biddy, who was the daughter of Sibyl; that Sibyl was a copper-coloured woman, with long, straight, black hair, with the general appearance of an Indian, except that she was too dark to be of the whole blood: that she was called Indian Sibyl, but her color, and that only, shewed she had negro blood; that he also introduced the deposition of Benjamin Smith, aged 70, who proved that when he was a boy, between 7 and 10 years old, he knew a yellow woman in the family of Peter Ashbrooke, who was called Ashbrooke's old Sibyl, and Indian Sibyl; that she had every appearance of an Indian, and had several children; one by the name of Biddy, and one by the name of Jenny; that Sibyl had long, straight, black hair; and he was always under the impression that she was of Indian descent. The plaintiff also offered to prove, that in the life-time of Sibyl, about the year 1770, it was currently said and believed in the neighborhood, that she was entitled to her freedom. To the introduction of this evidence the defendant's counsel objected. But, the Court was of opinion, that though such evidence was not legal evidence to prove the affirmative position that Sibyl was free, it was legal and proper evidence, as a circumstance with others, to aid the jury in deciding whether the African mixture in Sibyl came from the father or mother, and for that purpose only, and to have such weight as the jury deemed it entitled to. The defendant excepted to this opinion.

2. The second bill of exceptions states,

*See monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 268. The principal case is cited with approval in Franklin v. Peers, 96 Va. 604, 29 S. E. Rep. 321.

†See monographic note on "Evidence" appended to Lee v. Tapscott, 3 Wash. 276.

that after the cause had been argued before the jury, on all the circumstances of the case, the defendant by counsel stated, that the evidence proved the plaintiff to be the son of Biddy, who was the daughter of Sibyl, who was half Indian and half negro, and moved the Court to instruct the jury, that if they so found the facts, that in this action it was needful for the plaintiff to prove, that Sibyl was descended, in the maternal line, from an Indian

613 woman. But the Court *said, that it is true that the jury must find that fact, but that the Court would not instruct the jury, that further evidence to prove it, was of legal necessity, to be given by the plaintiff: that it was a question to be decided on probabilities and circumstances; among which, it was lawful for the jury to consider facts connected with the history of the country, as if formally proved to them; and if, at the time spoken of, it was much more common for female Indians to be captured and domesticated among us, than males, that circumstance might be regarded by them as of some weight, and in the case before them, they should attentively consider all the circumstances, and find for the plaintiff, if they believed that Sibyl's mother was an Indian woman; otherwise, they should find for the defendant. To this opinion, the defendant excepted.

The defendant appealed.

Leigh, for the appellant.

Bacchus, for the appellee.

February 14. JUDGE CARR delivered his opinion.

The appellee sued the appellant for freedom. The pleadings are in the usual form, putting the question of freedom in issue. The case comes up on two exceptions taken by the defendant to the opinion of the Court.

1. The plaintiff proved by two witnesses, that he is the son of Biddy, who was the daughter of Sibyl: that Sibyl was a copper-coloured woman, with long, straight, black hair, with the general appearance of an Indian, except that she was too dark to be of the whole blood: that she was called Indian Sibyl; but her color, and that only, shewed she had negro blood. He also introduced the deposition of Smith, who said, that when a boy, (between 7 and 10,) he

614 knew a yellow woman in the family of Ashbrooke. She *was called Ashbrooke's old Sibyl and Indian Sibyl. She had every appearance of an Indian; long, straight, black hair; and he was always under the impression that she was of Indian descent. After the introduction of this evidence, the plaintiff offered to prove, that in the life-time of Sibyl, about the year 1770, it was currently said, and believed in the neighbourhood, that she was entitled to her freedom; to the introduction of which evidence, the defendant objected. But, the Court was of opinion, that though such evidence was not legal evidence to prove the affirmative position that Sibyl was free, it was legal and proper evidence, as a circumstance with others, to aid the jury in deciding whether the African mixture in Sibyl came from the father or mother, and for that purpose only, and to have such weight as the jury deemed it en-

titled to. The plaintiff was allowed to give the said evidence.

2. The second exception is substantially this: After argument of the cause, the defendant's counsel, stating the amount of the evidence to be, that the plaintiff was son of Biddy, who was daughter of Sibyl, who was half Indian, half negro, moved the Court to instruct the jury, that it was necessary for the plaintiff to prove, that Sibyl was descended in the maternal line from an Indian woman. But, the Court said, that it is true the jury must find that fact, but that the Court would not instruct the jury, that further evidence to prove it, was of legal necessity, to be given by the plaintiff: that it was a question to be decided on probabilities and circumstances, among which it was lawful for the jury to consider facts connected with the history of the country, as if formally proved to them; and if, at the time spoken of, it was much more common for female Indians to be captured, and domesticated among us than males, that circumstance might be regarded by them of some weight, and in the case before them, they should attentively consider all the circumstances, and find for the plaintiff, if they believed Sibyl's mother was an Indian woman; otherwise, they should find for the defendant.

615 *The question presented by the first bill of exceptions is, in my mind, a very important one. In *Shelton v. Barbours*, 2 Wash. 64, the President remarks, "that although liberty is to be favoured, the Court cannot, on that, or any other favored subject, infringe the settled rules of law." In *Pegram v. Isabel*, 2 Hen. & Munf. 193, Judge Roane repeats these remarks verbatim, and adds, "This decision, therefore, shuts out the pretence, that we can, in this case, take a greater latitude in relation to the rules of evidence, than in any other." In *Mima Queen and Child v. Hepburn*, 7 Cranch's Rep. 290, the Chief Justice, delivering the opinion of the Court, says, "However the feelings of the individual may be interested on the part of a person claiming freedom, the Court cannot perceive any legal distinction between the assertion of this, and any other right, which will justify the application of a rule of evidence to cases of this description, which would be inapplicable to general cases, in which a right of property may be asserted." I have thought it proper to state these authorities, in order to fortify the mind against that bias we so naturally fell, in favor of liberty.

This, then, is a general question on the law of evidence. It is well remarked by Lord Kenyon in *Rex v. Eriawell*, 3 Term. Rep. 707, that "all questions upon the rules of evidence are of vast importance to all orders and degrees of men. Our lives, our liberties and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now reversed from their antiquity, and the good sense in which they are founded. They are not rules depending on technical refinements, but upon good sense; and the preservation of them is the first duty of Judges." Among these rules, none is more firmly fixed, or rests on a more solid

foundation, than this; "that hear-say evidence is in its every nature inadmissible. It violates the fundamental principles which ordain, that any fact which is to affect a person should be proved by a witness sworn to speak the truth, and testifying
616 "in the presence of the party, that he may cross-examine him.. It generally supposes better evidence behind; and even where this is not the case, its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule, that hear-say evidence is totally inadmissible." To this rule, however, there are some few exceptions, which, the books tell us, are as old as the rule itself. These are cases of pedigree, prescription, custom, and in some cases of boundary. These exceptions were no doubt admitted, under the idea that they resulted from the necessity of the case; but Courts have been fearful, (and with good reason,) lest they should let in many mischiefs, and have guarded strongly against enlarging them. This subject is very ably discussed in the case of *The King v. The Inhabitants of Eriswell*; and though, in that case, the Judges were equally divided, it will be seen by the cases of *Rex v. The Inhabitants of Nuneham Courtney*, 1 East. 373, and *Rex v. Ferryfrystone*, 3 East. 54, that the question has been entirely settled in favor of the opinion of Grose and Lord Kenyon, who were opposed to the introduction of hear-say evidence. Grose remarks, "I dread that rules of evidence should ever depend on the discretion of Judges. I wish to find the rule laid down, and to abide by it; and nothing but a clear incontrovertible decision upon the point, and not the concession of counsel, or the obiter dictum of a Judge, ought to form an exception to a general rule of law, framed in wisdom by our ancestors, and adopted in every case, except where the exception is as ancient as the rule."

Lord Kenyon also, speaking of the necessity of defining the exceptions to the rule strictly adds; "For, unless that is done, I am much afraid we may endanger a rule of infinite importance to every individual, and by suffering exceptions to creep on, one after another, leave nothing like a rule." In the case before cited from 7th Cranch, Judge Marshall, after laying down the rule and the exceptions,
617 "adds; "But if other cases, standing on similar principles, should arise, it may well be doubted whether justice, and the general policy of the law, would warrant the creation of new exceptions. The danger of admitting hear-say evidence, is sufficient to admonish Courts of Justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all. If (he adds) the circumstance that the eye-witnesses of any fact be dead, should justify the introduction of testimony to establish that fact from hear-say, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained."

If I have dwelt longer on this point, than

might seem necessary, it is because of my anxiety (by the aid of these great names) to impress deeply a sense of the mischiefs, which may result from enlarging the exceptions to this ancient and venerable rule.

The question before us, is a case of pedigree. The object was, to trace back the descent of the plaintiff, through the maternal line, to an Indian woman. The evidence offered was, that about the year 1770, it was currently reported and believed in the neighbourhood, that Sibyl, the maternal grand-mother of the plaintiff, was entitled to her freedom; and the Court said, that this was legal and proper evidence, as a circumstance with others, to aid the jury in deciding, whether the African mixture in Sibyl came from the father or mother. To ascertain the correctness of this opinion, let us examine a little the extent to which the exception has gone, in cases of pedigree.

In *Rex v. Eriswell*, (before cited,) Lord Kenyon says, "I admit that declarations of the members of a family, and perhaps, of others living in intimacy with them, or received as evidence as to pedigrees; but evidence of what a mere stranger has said, has always been rejected in such cases."

In *Vowles v. Young*, 13 Ves. 140, an issue had been directed out of Chancery,
618 in the trial of which, upon a "question of pedigree, what a husband had said as to the legitimacy of his wife, was offered in evidence. The law Judge rejected it, on the ground that the husband did not come within the rule, which limited the evidence to members of the family of the person, whose descent was to be traced. A motion was made to Lord Chancellor Erskine for a new trial, on the ground of mis-direction; and he granted it, thinking the husband clearly within the rule. He says, "The law resorts to hear-say of relations upon the principle of interest in the person, from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relation or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree, which, perhaps, he could not tell, if asked. But, it is evidence from the interest of that person in knowing the connections of the family: Therefore, the opinion of the neighbourhood, or what passed among acquaintance, will not do.

This point is again stated in the case of *Whitlocke v. Baker*, 13 Ves. 511, where Lord Eldon says, "I accede to the doctrine of Lord Mansfield, as it has been stated from Cowper, 591; but it must be understood as it has been practised and acted upon; and one word in that passage wants explanation. It was not the opinion of Lord Mansfield, or of any Judge, that tradition generally is evidence of pedigree; the tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The whole goes

upon that. Declarations in the family, descriptions in wills, descriptions on monuments, descriptions in bibles and registry books; all, are admitted upon the principle that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But, there may be many circumstances forming part of the tradition, which you would reject, taking the body of the tradition." From these authorities it would seem, that the exception which tolerates hear-say in cases of pedigree extends only to the hear-say of those who, by connection and consanguinity, have both the means of knowing, and an interest in making themselves acquainted with, the facts of which they speak, and does not take in every neighbourhood rumor or report. If some of the cases heretofore decided in this Court, on the subject of freedom, should seem to have overstepped these limits, it is by no means my purpose to disturb or unsettle what they may have decided. I have merely attempted to shew what is the rule. The Court has always professed in these cases, as in others, not to intend a departure from settled rules. The doctrine was not particularly laid down in those cases. The opinion in the case before us, seems to me to have gone a step beyond any former decision, and it is to shew its error that I have stated the exception to the general rule.

Suppose we allow the greatest extent to this exception, that any of the cases give, and admit that in the case of persons claiming freedom by descent, through the female line, from Indian ancestors, general report of the neighbourhood should be admitted; still, it must be general report as to pedigree. In the case before us, it should be a general report that old Sibyl was the child of an Indian woman. But, there was no such evidence here. The evidence offered and objected to was, that it was the current belief of the neighbourhood, that Sibyl was entitled to her freedom. What was the ground of that belief, no where appears. Was it a knowledge in the neighbours, that Sibyl was the daughter of an Indian woman? If so, that would naturally have been stated as the reason. Or, was it her appearance, copper color, and long hair? These, we know, she might as well have derived from an Indian

*father as mother. Or, was it an idle rumor, which, like a thousand others, had no foundation at all? Suppose a man were to bring suit for a tract of land, claiming it by a descent from a remote ancestor. He proved that he was the son of A., who was the son of B.; but here the proof of descent stopped, being still short of the ancestor. To supply the defective links in the chain, however, proof was offered that it was the current belief of the neighbourhood, some fifty or sixty years past, that B. was entitled to the land. Would this be received as evidence, that B. was descended from the ancestor, so as to complete the chain of descent? I do not think this would be contended for;

and yet the two cases seem to me exactly parallel.

The case of *Mima Queen v. Hepburn*, before cited, was, like this, a question of freedom; and evidence, very much of the character of that offered here, was rejected by the Court below, and a writ of error brought before the Supreme Court, where the judgment was affirmed; the Chief Justice delivering a clear and strong opinion, from which I have already quoted several passages.

Again. In *Negro John Davis, &c. v. Wood*, 1 Wheat. 6. Error on judgment of the Court below, rendered against the plaintiffs, who in that Court were petitioners for freedom. They excepted to the opinion of the Court, stating that they had offered to prove by competent witnesses, that they (the witnesses) had heard old persons now dead, declare that a certain Mary Davis, now dead, was a white woman born in England, and such was the general report of the neighbourhood where she lived; and also offered the same kind of evidence to prove that Susan Davis, mother of the petitioners, was lineally descended in the female line, from the said Mary; which evidence by hear-say and general reputation, the Court refused to admit, except so far as it was applicable to the fact of the petitioner's pedigree. The counsel for the plaintiffs in error, referred to the case of *Mima Queen and Child v. Hepburn*, remarking, that unless the Court was

disposed to re-view its decision, it must be taken for law; and he could not deny its authority. The Chief Justice delivered the opinion of the Court, and stated, that as to the first exception (the one I have stated,) the Court had revised its opinion in *Mima Queen v. Hepburn*, and confirmed it. These two cases clearly decide, that though evidence by hear-say and general reputation be inadmissible as to pedigree, it is not admissible to prove the freedom of the plaintiff's ancestor, and thence to deduce his own. I conclude on this point, that the admission of the evidence in the case before us, was erroneous, whether we consider the exception as it seems to be confined by the English cases, to the hear-say of relations and connections; or, extended by our own and the cases in the Federal Court, to general report and reputation.

It remains to consider the second bill of exceptions. The Court was asked to instruct the jury, that it was necessary for the plaintiff to prove the descent of Sibyl in the maternal line, from an Indian woman. Such proof was certainly necessary, and it seems to me that the Court ought to have said so, without further comment. But the Court said it was true the jury must find that fact, but that the Court would not instruct them that further evidence to prove it was necessary, but simply that the fact must be proved. The Court went on to remark, that it was a question to be decided upon probabilities and circumstances, among which it was lawful for the jury to consider facts connected with the history of the country, as if formally proved to them.

I have two objections to this part of the

instruction. 1. That it was not called for by the motion, and seemed calculated, (though I am sure the worthy Judge had no such intention,) to influence the jury on the evidence. 2. That it was not, (if I understand it aright,) correct in point of law. "The jury may consider facts connected with the history of the country, as if formally proved to them." This, I presume, cannot mean that the jury are
622 to consider *such facts as if formally proved, when proved; but, that without proof, they are to consider them as if formally proved; that is, that each juror might take any facts as formally proved, which he might have heard of in a way to satisfy his mind, and might consider as connected with the history of the country. If this be the meaning, (and I can see no other,) it is contrary to law; for, it is laid down in all the books, that there must be some proof adduced of historical facts. In the case of *Mima Queen v. Hepburn*, Judge Marshall says, "There are also matters of general and public history, which may be received without that full proof, which is necessary for the establishment of a private fact."

In *Stainer v. The Burgesses of Droitwich*, Salk. 281, an issue was directed out of Chancery, wherein the question was, whether by the custom of Droitwich, salt pits could be sunk in any part of the town, or in a certain place only; and upon the trial at bar, Camden's *Britannia* was offered in evidence, but refused. For, the Court held, that "a general history might be given in evidence to prove a matter relating to the Kingdom in general, because the nature of the thing requires it, but not to prove a particular right or custom." Surely, there ought to have been some evidence adduced of any facts contended for as historical. The jury should all have had the same proof to act upon, and not to be left, each to his own stock of information, whether scanty or abundant, correct or erroneous.

The Court go on to say, that "if, at the time spoken of, it was much more common for female Indians to be captured and domesticated among us than males, that circumstance might be regarded by the jury as of some weight." This is very vaguely expressed; and there is always danger in such cases, of mis-leading the jury. "The time spoken of." What time? There is nothing to specify. If the Court meant the time when Sibyl's mother, (taking her to have been an Indian,) was brought into the country, when was that? From the record it would seem, that Sibyl, about
623 *the year 1760, must have been at least fifty years old, as she was then called old Sibyl. This would carry back the time of her birth to 1710. But, how old her mother then was, or when brought into the country, (if brought in at all,) there is not a single fact in the cause, to give us the slightest information.—Again. What was the evidence, on which the jury was to decide, that it was more common to capture females than males at this period; so vaguely alluded to? None is stated, none in the record. The jury might conclude, that being one of the historical facts

before mentioned, they might take it as formally proved, without any evidence being adduced to them; or, they might suppose that they were at liberty to weigh probabilities; and if to their understanding, it seemed more likely that women should be captured than warriors, to conclude that the fact was so in the case before them. It was wrong, I think, to commit the jury to this vague course of surmise and conjecture.

The last part of this instruction is, that the jury should find for the plaintiff, if they believed Sibyl's mother was an Indian woman. I think this was laying down the law too broadly. Taking Sibyl to have been born about the year 1710, and her mother to have been thirty at her birth, she would have been born in 1680, and might have been brought into the country under the law of 1682, permitting Indians to be held in slavery. This act, we know, was in force till repealed (as the Courts have decided) by the act of 1691, permitting free trade with the Indians. It would have been going far enough, I think, if not too far, to have told the jury, that if they believed that Sibyl was the daughter of an Indian woman, it was *prima facie* evidence of freedom, and threw on the other party the burthen of proving, that she was properly held in slavery or service; for, there were laws allowing this latter. It will be observed that the motion, under which this instruction was given, was made by the defendant, who did not ask the Court to say, that proof of Sibyl's
624 being the daughter *of an Indian woman was sufficient; but, that such proof was necessary for the plaintiff to support his action. The two things are very different.

Upon the whole, my opinion is that the Court erred in both the instructions excepted to; and that the judgment should be reversed, and the case sent back for a new trial, on which such instructions are not to be given.

JUDGE GREEN.

It appears by the bills of exceptions, that the plaintiff was the son of Biddy, who was the daughter of Sibyl: that the latter, about the year 1760, was called old Sibyl and Indian Sibyl, was a copper-coloured woman, with long, straight, black hair, with the general appearance of an Indian, except that she was too dark to be of the whole blood; and her color shewed that she was half Indian and half negro; and that about 1770, it was currently said and believed in the neighbourhood, that Sibyl was entitled to her freedom; which latter evidence the Court admitted, not as legal evidence to prove that Sibyl was free, but as legal and proper evidence of a circumstance, with others, to aid the jury in deciding whether the African mixture in Sibyl came from the father or mother, and for that purpose only, to have such weight as the jury deemed it entitled to. The Court also instructed the jury, that although it was necessary to justify the jury in finding for the plaintiff, that Sibyl descended, in the maternal line, from an Indian woman, the Court would not instruct them (although asked to do so by the defendant,)

that further evidence to prove it, was of legal necessity, to be given by the plaintiff: that it was a question to be decided on probabilities and circumstances; amongst which, it was lawful for the jury to consider facts, connected with the history of the country, as if formally proved; and if, at the time spoken of, it was much more common for female Indians to be captured and domesticated among us, than
625 males, *that circumstance might be regarded by them of some weight; and in the case before them, they should attentively consider all the circumstances, and find for the plaintiff, if they believed that Sibyl's mother was an Indian woman; otherwise, they should find for the defendant.

To determine upon the propriety of these decisions, it will be proper to enquire in what cases Indians, under our laws, could be held as servants, and in what, as slaves.

An act of 1655, 1 Hen. Stat. at Large, 410, provided, that all Indian children might be taken as servants with the consent of their parents, for such term as might be agreed upon, provided the covenants for service were confirmed before two justices of the peace, and that they be brought up in the christian religion.

In 1657-8, Ibid. 455, it was enacted, that the service of such children should not be transferred to any other, and that they should be at their own disposal at the age of twenty-five. These are the only acts relating to voluntary contracts of service.

An act of 1661-2, 2 Hen. Stat. at Large, 143, provided, that what Englishman, trader or other, shall bring in any Indians as servants, and shall assign them over to any other, shall not sell them for slaves, nor for any longer time than English of the like ages should serve by Act of Assembly, (if above sixteen, five years; if under, until they attain the age of 24;) and no one was to entertain any of the neighbouring Indians as servants, without license of the Governor.

In 1670, 2 Hen. Stat. at Large, 283, an act recites, that whereas some disputes have arisen, whether Indians taken in war by any other nation, and by that nation that take them, sold to the English, are servants for life or term of years; and enacts that all servants, not being christians, imported into this colony by shipping, shall be slaves for their lives; but what shall come by land, shall serve, if boys or girls, until thirty years of age; if men or women, twelve years and no longer. This act

(26 was *the first that alludes to the question of the slavery of Indians under any circumstances, and was made to remove a doubt whether those taken in war by other nations, and sold to the English, were slaves or not.

There are several indications that Indians, before this time, were held in slavery. 2 Hen. Stat. at Large, 155, (1661-2,) there is an order of the Assembly discharging Metappin, a Powhatan Indian sold for life to Elizabeth Short, by the King of the Wainoake Indians, because he had no power to sell him, being of another nation; and in 1670 an act passed, reciting that it hath been questioned whether In-

dians or negroes manumitted, or otherwise free, could be capable of purchasing christian servants; and enacting that no negro or Indian, although baptised, and enjoying their own freedom, shall be capable of any such purchase of christians.

In 1675, war was declared against most of the Indian nations. In 1676, Nathaniel Bacon rebelled, and took possession of the Government; and in June of that year, the Assembly passed a law renewing the declaration of war, and declaring that "all Indians taken in war be held and accounted slaves during life." Bacon's insurrection being quelled, all his laws were repealed in February, 1676-7; and most of them re-enacted at the same session; and amongst others, it was ordered, that all such soldiers who either already have or shall hereafter take prisoners any of our Indian enemies, at the time of such taking being under a lawful command, under due and full authority, shall retain and keep such Indian slaves to their own proper use. 2 Hen. Stat. at Large, 404. And in 1679, Ibid. 440 it was enacted that the Indian prisoners taken in war, shall be free purchase to the soldier taking the same.

In 1682, 2 Hen. Stat. at Large, 490, an act was passed, reciting, amongst other things, that "those Indians that are taken in war or otherwise, by our neighbouring Indians, confederates or tributaries to his Majesty, and this, his plantation, are slaves to the said
627 neighbouring Indians that *so take them, and by them are sold to his Majesty's subjects here as slaves; repeals the act of 1670 in express terms, to all intents and purposes, and enacts, that all servants, except Moors and Turks, in amity, &c. which, from and after the publication of this act, shall be brought or imported into this country, either by sea or land, whether negroes, Moors, mulattoes or Indians, who and whose parentage and native country are not christian, &c. and all Indians which shall be hereafter sold by our neighbouring Indians, or any other trafficking with us, as for slaves, are hereby adjudged, deemed and taken to be slaves, to all intents and purposes. The next act declares, that Indian women servants, sold to the English, above the age of 16, are tithable.

In 1691, 2 Hen. Stat. at Large, 69, an act passed declaring a free trade for all persons, at all times, at all places, and with all Indians whatsoever. Until this time, there had been continually restrictions in various degrees, upon the trade with the Indians. This statute was re-enacted in 1705, and the General Court in 1777 decided, that after this act no American Indian could be enslaved; and the Court of Appeals have repeatedly affirmed the same proposition; which, however, does not affect the condition of those Indians and their descendants in the female line, who were slaves before the passing of the act.

In 1691, 3 Hen. Stat. at Large, 87, it was enacted, that any English woman, whether free or a servant, having a bastard child by a negro or mulatto, the child should be bound out by the church-wardens as a servant, until the age of 30 years.

This does not apply to the case of an Indian woman servant; but, is mentioned only for the understanding of the subsequent laws.

By the act of 1705, 3 Hen. Stat. at Large, 453, it was provided, that if any woman servant, or free christian white woman, had a bastard child by a negro or mulatto, the child should be bound out by the church-wardens, until 31 years old. This extended to the case of such a bastard

628 *child of an Indian woman servant. An act of 1723, 4 Hen. Stat. at Large, 133, provided, that "when any female mulatto or Indian, by law obliged to serve to the age of 30 or 31 years, shall, during the time of her servitude, have any child, every such child shall serve the master or mistress of such mulatto or Indian, until it shall attain the age the mother of such child was obliged by law to serve unto." This statute was re-enacted verbatim, in 1753, 6 Hen. Stat. at Large, 357; except that it mentions only those mulatto or Indian servants, by law bound to serve 31 years, not noticing those bound to serve to 30 years.

An act of 1765, 8 Hen. Statutes at Large, 134, 135, after reciting, that by the act of 1753, "if any woman servant shall have a bastard child by a negro or mulatto, or if any free christian white woman shall have such bastard child by a negro or mulatto, the church-wardens were directed to bind the child to be a servant until it shall be 31 years of age, which is an unreasonable severity upon such children," provides, "that the church-wardens shall bind out such bastard children already born, and not yet bound out, or which shall hereafter be born, either of white women servants, or of free christian white women, the males to 21, and the females to 18, and no longer;" and, that "the children hereafter to be born of mulatto women, during the term of their service, who are obliged by law to serve to the age of 31 years, shall serve the master or mistress of such mulatto woman, the males to the age of 21, and the females to the age of 18 only, and no longer." An act of 1778, prohibits the enlistment, as soldiers, of "such servants as are bound to serve to 31 years of age."

That the act of 1705, included in the general description of "any woman servant," female Indian servants, I think is perfectly apparent from various considerations. First — the expression literally embraces them; and although the Legislature might not have felt the same anxiety to prevent the connection of negro or 629 mulatto men *with Indian, as with white women, yet they would feel no greater reluctance to bind the child of an Indian woman servant by a negro or mulatto, to a protracted service, than the child of a white woman by a negro or mulatto. Again: The terms of the act of 1691, "English woman being a servant," are dropped, and in their place, the act of 1705 uses the words "any woman servant;" which could only be for the purpose of including the case of Indian women servants; for, there could be no other than those two descriptions of servants. But, on this question, the words of the act of 1723, are

decisive. They subject any child of any female mulatto or Indian, by law bound to service till the age of 30 or 31, to a service to the same age. What class of persons fell within the description of female mulattoes by law bound to service, till the age of 30 or 31? The definition given by law, of the term mulatto, by the act of 1705, 3 Hen. Stat. at Large, 252, answers this question. That act is in these words: "and for clearing all manner of doubts which may hereafter happen to arise upon the construction of this act, or any other act, who shall be accounted a mulatto, be it enacted, that the child of an Indian, and the child, grand-child, or great grand-child of a negro, shall be deemed, accounted, held and taken to be a mulatto." This act does not, in terms, state, that to constitute a mulatto, some portion of white blood was necessary; but, that is the necessary construction. For, otherwise a child of a negro by a negro, and of an Indian by an Indian, would have been a mulatto; and after one generation there could have been no Indian or negro, but all would have been mulattoes. Yet, the subsequent statutes speak of Indians and negroes. If, therefore, there was no white blood, the child of an Indian woman, no matter who was the father, was an Indian, and of a negro woman, no matter by whom begotten, a negro; the child belonging to the class of the mother. That this was the effect of the law, will clearly appear hereafter, when we enquire what class of

630 persons was designated *by the word Indian in the act of 1723. By "mulattoes by law bound to serve till 30 or 31," in this act, was meant, the bastard children of white women, whether free or servants, by a negro or mulatto; those born between the passing of the acts of 1691 and 1705, being bound to serve to the age of 30; and those born after the passing of the act of 1705, being bound to serve until 31. No other laws than those of 1691 and 1705, bound any mulattoes to serve until 30 or 31. If the mother was a slave, the child was a slave; if free, the child, in all other cases than those provided for by those acts, was absolutely free. If it were admitted, that the child of a negro and an Indian could be called a mulatto, then no such mulatto was bound, by any law, to serve until 30 or 31, unless the law of 1705 extended to the case of a female Indian servant, having a bastard child by a negro or mulatto. But, the act of 1723, by the term "Indian bound by law to serve till 31," recognized that Indians might, by law, be bound to such service, and provided in relation to the condition of their children born during such service. There was no law, by which an Indian could be bound to such service, unless he or she was a bastard of a female Indian servant by a negro or mulatto, and bound to such service by the act of 1705. The act of 1723, recognizing Indian female servants by law bound to serve till 31, and it being impossible that any other Indians but of that description, should be bound to such service, it follows, that the act of 1723, by Indian servants bound by law to serve till 31, meant the bastard children of Indian women

servants, by negroes and mulattoes. No Indian could, in 1723, be bound to such service, except such bastards. The act of 1670, which allowed Indians to be bound to the age of 30, being repealed by the act of 1682, all those so bound must have been free in the year 1712. The act of 1723, called persons descending from an Indian woman by a negro or mulatto, Indians, and not mulattoes; as did the act of 1753, 6

Hen. Stat. at Large, 357, repeating 631 verbatim the *act of 1723. Surely, in 1753, there could be no Indians bound to serve till 31, by law, unless those descended in the female line from an Indian, and in the male line originally from a negro, were so under the act of 1705.

This legal description, designating a descendant of an Indian mother and a negro father, as an Indian, and a descendant of a negro woman and Indian father, as a negro, and neither as a mulatto, was probably, in 1753, and even so late as 1778, (when the law before cited was passed,) familiarly known, and in common parlance, the descendant of an Indian by the female line, and of a negro on the father's side, was called an Indian; and the descendant of a negro woman in the female line, and of an Indian on the father's side, was known as, and called, a negro.

In 1785, an act passed, 12 Hen. Stat. at Large, 184, which is still in force, changing the definition of the word mulatto. It enacts that every person, of whose grandfathers or grand-mothers, any one is or shall have been a negro, although all his other progenitors except that descending from the negro, shall have been white persons, shall be deemed a mulatto; and so, every person who shall have one-fourth part or more, of negro blood, shall in like manner be deemed a mulatto. Since this act, a mixture of Indian and negro blood, if there be one-fourth part or more of negro blood, constitutes a mulatto; but did not, before this act.

The effect of these laws, in respect to the various classes of Indians which might be lawfully held as slaves, or as involuntary servants, or as servants by contract, seems to be, first, as to slaves, that up to 1670, no Indian could be legally a slave. After 1670, and up to the passing of the act of 1778, prohibiting the importation of slaves, all Indians imported by shipping, were slaves; but no Indian brought in by land, could be a slave before the act of 1682, except those taken as prisoners in war by our own troops, under the acts of June, 1676, February, 1676-7, and 1679; after the act of 1682, all brought into this country 632 by sea *or land, whose parentage and native country were not christian, or sold by the neighboring Indians, or any other trafficking with us as for slaves, were slaves. The provisions of the act of 1682, were virtually re-enacted in 1705, and in 1753; the last of which enacts that "all persons who have been or shall be imported into this colony by sea or land, and were not christians in their native country, except Turks and Moors in amity with his Majesty, and such as can prove their being free in England, or any other christian country, before they were shipped for trans-

portation hither, shall be accounted and be slaves, and as such be here brought and sold, notwithstanding their conversion to christianity after their importation."

These acts, so repeated in terms, embrace the case of all Indians imported by sea or land, not coming within the exceptions of the acts, and prove that the Legislature had no idea up to 1753, that the permission to trade with all Indians, allowed by the acts of 1691, and 1705, prohibited the enslaving of all American Indians, as was decided by the General Court in 1777, and repeatedly by this Court since; and so I should have thought, but for those decisions. Even if such a construction of the acts of 1691, and 1705, was otherwise proper, I should have thought that the acts of 1705, and 1753, directly contradicting it, would have prohibited that construction. We have no intimation that the idea that the acts of 1691, and 1705, allowing a free trade with Indians, could have the effect of prohibiting the enslaving of American Indians ever existed until the case decided in 1777, occurred.

Allowing the acts of 1691, and 1705, to have the effect which has been attributed to them, then American Indians coming within the act of 1682, might have been made slaves up to 1691. The Indians, therefore, which could have legally been slaves in Virginia, at the time of Sibyl's birth, were all foreign Indians brought in by sea since 1670; all taken prisoners in war from 1676, to 1691; and all brought in by land and sold as slaves by Indians or 633 *others, from 1682 to 1691, or perhaps, until long after Sibyl's birth.

I am persuaded that few, if any Indians, were brought in as slaves, after the act of 1682; especially of those captured in war. The statutes, as might be expected, notify us of all the Indian wars, in which Virginia was engaged, of the wars of 1623, 1629, 1631, 1632, 1644, 1654, 1675, 1676, and 1677. After the war terminating in 1677, we find no traces of an Indian war, until 1754, when the war with the French and Western Indians began. The war of 1675 was a general one, with all the Indians in our neighbourhood, and ended in 1677, in the total subjection of all the Indian tribes, within the limits of Virginia, on this side of the Alleghany, who submitted to be tributaries, and by our laws, (1705, 3 Hen. Stat. at Large, 467,) were protected in their persons, goods and properties. Those tributary Indians, therefore, could not be made slaves legally, and there was not the least probability, that, in the teeth of this legal guarantee, any attempt would be made to reduce one of them to slavery. As to the more remote Indians, not tributaries, the Five Nations seem to have been the only Indians, with whom we had any intercourse or misunderstanding. They having wars with divers nations of the Southern Indians for many years, took their marches along the frontiers of the colony, and committed many robberies and hostilities. A treaty was made with them in 1722, 4 Hen. Stat. at Large, 103, by which they stipulated not to cross the Potomac, or to pass to the eastward of the great mountains; and our tributary Indians agreed not to pass

over the Potomac or to the west of the great mountains, without licenses respectively from the Governors of Virginia and New York; and it was enacted, *Ibid.* 104, that any tributary Indians violating this treaty should be transported to the West Indies, and sold for slaves. In 1711, 4 Hen. Stat. at Large, 1, to restrain disorderly and barbarous Indians frequenting our frontiers,

Rangers were appointed; and it was enacted, that if any *Indian, of any nation at war with us, was taken by the Rangers, he should be transported, and sold for the benefit of the Rangers.

From all this, and particularly from the provision for transporting to the West Indies those who were to be made slaves, instead of keeping them here, I think but few, if any American Indians, were enslaved here, after the great Indian war of 1675.

As to those who might be held to involuntary service at the time Sibyl was probably born, they consisted of those who were bound to service until thirty years of age, under the act of 1670, which was repealed by the act of 1682; (and all those must have been free in 1712;) and the children of the females of these by a negro or mulatto, born during the mother's time of service, and after the passing of the act of 1705, who were to be bound out until the age of thirty-one; and by the act of 1723, the children of those children, born whilst the mother was bound to service, and so their children in all generations, were bound to service until their ages of thirty-one. There were also other Indian servants, bound by their parents with the assent of two justices, until their age of twenty-five, or for a shorter time, under the acts of 1655 and 1657. The children of the females of these by a negro or mulatto, were bound to service until 31, by the act of 1705, if born during the time of their mother's service; and the children of such children were bound to service till thirty-one, under the act of 1723, in like manner as the others. There could no longer be a class of Indians bound to involuntary service, (as English servants were bound) under the act of 1661. That act being repealed by the act of 1670, would have been, as the law then was, revived by the repeal of the act of 1670 by that of 1682, if the latter act had not contained a provision directly against that of the act of 1661, providing that the very Indians directed by the act of 1661, to be bound as English servants, should be held as slaves.

635 *The question whether Sibyl was free or a slave, depends upon the facts, 1. Whether she was descended, in the maternal line, from a negro or an Indian. If from a negro, she was a slave; since her being, and always continuing in service, would have been utterly inconsistent with the supposition that her mother was free; for, a negro woman could at no time be bound to service, unless as a slave. 2. If from an Indian, Sibyl may either have been a slave, because her female ancestor might have been a slave; or free, but subjected to service until she attained her age of thirty-one years, because her mother might have been an Indian servant, bound to service until she attained the age of

thirty years, or otherwise, as aforesaid; in which case, Sibyl's being retained in involuntary service until her age of thirty-one, would not have been inconsistent with her right to freedom, after she attained that age.

There is no direct evidence in relation to the quality or condition of the mother of Sibyl; and in the nature of things, there could be no such evidence. No written evidence ever existed, as to what Indians were slaves, and what servants; nor as to the descent of any child from an Indian or negro mother; except that the church-wardens bound, by indentures, the children of Indian servants by a negro or mulatto, till the age of thirty-one, and the Indian parents, with the approbation of two justices, bound their own children at pleasure, not longer than the age of twenty-five. But these indentures were not recorded, and remained either in the hands of the masters, or church-wardens, or justices, and not of the servants; and wherever left, were not likely to be preserved with any care. Such fugitive papers might naturally be expected to be lost within thirty years.

As to these facts, therefore, no direct evidence could be expected to exist, but only parol; and no such evidence could possibly exist, of facts of considerably more than one hundred years standing. 636 Hear-say and presumptive *evidence, therefore, (if any evidence at all was admissible in such a case) was necessarily to be admitted.

The questions, therefore, to be considered, are, 1. Whether any such hear-say and presumptive evidence was admissible in such a case as this; and 2. Whether the evidence offered in this case, was admissible or not.

The fundamental rule of evidence is, that the best evidence which the nature of the case will admit of, must be produced; and this rule is without exception. Another rule is, that no evidence can be received but upon oath; and this excludes hear-say evidence in general. But to this there are exceptions; in cases in which hear-say is not only the best, but the only evidence, which can, in the nature of things, exist. Thus, under the first rule, if the question be, whether an instrument of writing was executed or not; if there be a subscribing witness who is alive, and can be produced, no other evidence of the execution can be received but his testimony upon oath, not even the proof of the admission of the party. If the subscribing witness be dead, or cannot be produced, then the next best evidence is the proof of his hand-writing, which is therefore required and received. If the witness could not write, and his attestation was by a mark only, as no proof could be given of his hand-writing or his mark, the next best evidence is proof of the hand-writing of the party, which is therefore required and received; and if the party was himself a marksman, so that neither his hand-writing nor mark could be proved, then proof of his admission would be admissible. In *Keeling v. Ball*, 1 Peake's Evid. Appendix, 184, it was held, that a bond to which there were subscribing witnesses, being lost, and the names of the subscribing wit-

nesses being for gotten, proof of the acknowledgment of the debt by the party, and his promise to pay it, was held admissible and sufficient evidence of the execution of the bond; and proof that the bond was printed, and in the usual form, was held to be sufficient evidence that it bound the heirs.

637 But, in such a case, *evidence that a deceased person had said, that he heard the party acknowledge the debt, and promise to pay it, would not have been admissible, because the transaction being recent, the reasonable presumption would be, that if the bond ever had an existence, some direct proof must exist as to the fact; and nothing short of that direct proof would be admitted. But this objection does not exist as to matters, in relation to which, from their nature and antiquity, none but hear-say evidence can possibly exist.

Accordingly, hear-say evidence has always been admitted in questions of pedigree and legitimacy, and that not only as to the actual descent of the party in question, but as to the time of the marriage of the parents, and the birth of the child, and death of the parent or other relation: in questions of boundary and prescription, as of a right of way and other easements or services, and of modus; and not only as to the possession according to the right claimed, but also of the reputation of the existence of the right itself. In such cases, hear-say is admitted, when from the antiquity of the fact and other circumstances, it is not reasonable to suppose, that if the fact in truth existed, it could be otherwise proved. Peake, after laying down the rule that all evidence must be given upon oath, says, "The few instances in which this general rule has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as were in their very nature incapable of positive and direct proof. Of this kind are all those which can only depend on reputation. The excluding of hear-say in questions of pedigree, prescription, or custom, would prevent all testimony whatever; for, the evidence of any living witness of what passed within the short time of his own memory, would often be insufficient in the former instance, always in the latter; and there is no other way of knowing the evidence of deceased persons, than by the relation of others of what they have been heard to say. In these cases, therefore, the law departs from its general rule, and receives evidence of

638 the *declarations of deceased persons, who, from their situation, were like to know the facts." 1 Peake's Evid. 8, 9; and Buller, in his Nisi Prius, p. 294, says, "So where the issue is on the legitimacy of the plaintiff or defendant, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married; and with good reason," &c. "So hear-say is good evidence to prove who is my grand-father, when he married, what children he had, &c. of which it is not reasonable to presume I had better evidence. So, to prove my father, mother, cousin, or other relation beyond the sea, dead; and the common reputation and belief of it, in the family, gives credit

to such evidence; and for a stranger, it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. So, in questions of prescription, it is allowable to give hear-say evidence, in order to prove general reputation; as when the issue was on the right of way, evidence was admitted of a conversation between persons not interested, then dead, wherein the right to the way was agreed."

In two cases in Noy's Rep. anon. 28, and Webb v. Pitts, 44, cited in 11 Vin. Abr. 118, pl. 2, 3, it was held, that common fame, proved by two witnesses, was sufficient to establish a modus; or proof by witnesses, "that for a long time, as they heard say, the occupiers of that farm had used to pay annually to the parson, 3s. 6d. for all tithes."

In allowing hear-say evidence, the principle, as to the best evidence which the nature of the case will admit of, is applied; so that, in giving evidence of hear-say, as to pedigree, the reputation must come originally from a member or members of the family, who are more likely to know the truth, than a stranger. Vowles v. Young, 13 Ves. 140. The same rule, as to hear-say evidence, is found in the civil law. Domat, citing the texts of the civil law, 1 Dom. 456, sec. 14, lays it down thus:

"When the question is to prove an ancient fact, of which there are no written 639 *proofs nor living witnesses, if the fact be such as that it ought to be admitted to proof, as for instance, if the matter be to know how long an estate has been in a family, at what time a work was made, or other fact of the like nature, we receive the declarations which witnesses are able to make, of what they have heard concerning the said facts from other persons, who were then alive," &c.

The evidence of hear-say and reputation are in effect the same, and stand upon the same principles, whenever admissible. Are hear-say and reputation, as to the descent and right to freedom of one claiming to be free, admissible in any case? That they are admissible, as to descent, has been frequently decided in this Court; and upon the best reason. From the nature of the case, if the question arises after a great lapse of time, no better evidence can be presumed, or can possibly exist; and, upon this broad ground, the rule admitting such evidence is founded. In the questions of legitimacy, pedigree and prescription, it is admitted, not upon any ground of peculiarity in such questions, other than that such evidence is the only evidence which can exist in such cases; and when, owing to a state of things existing here, unknown in England, a new case arises in all respects like those to which this rule has been applied there, and turning upon the same reasoning, the principle of the law should be applied to such new case. For the same reasons, reputation of the right to freedom may, in proper cases, be received, as the reputation of the right of way, and of a modus.

In all cases in which hear-say and reputation are offered in evidence, it is the province of the Court to determine, upon all

the circumstances of the case, whether such evidence is admissible. If it be offered under circumstances, in which it may fairly be presumed, that if the fact existed, better proofs of its existence might be produced, it should be rejected; or, if the evidence is so inconsistent with other circumstances, as to produce only a light presumption, it should be rejected as unfit to be left
640 to the *jury, from which to presume the fact in issue. But, if no better evidence can be presumed to exist, if the fact existed, and if the evidence of hear-say or reputation be so consistent with the other circumstances in proof, as to afford probable grounds to presume that the fact alleged existed; then it should go to the jury, to be weighed by them, even if the Court should think that it was not sufficient to justify the jury in finding the fact affirmatively. Thus, in a question as to a right of way, if the right was alleged to have commenced recently, hear-say and reputation of right would be inadmissible, because it ought to be presumed, that if the right existed, there would be better proof of it; or, if the right was alleged to be ancient, and the possession had been long adverse to the right, such evidence ought not to be admitted against the possession. But, if the possession had been, as far as it could be traced, equivocal, the use of the way being interrupted, or if it were doubtful whether the use of it was permissive, or in the assertion of a right; such evidence might then be properly admitted, to remove the doubt.

So, in a question of slavery. If the claimant and his ancestors had been immemorially held in slavery, and from their race could only be absolutely slaves or free, hear-say evidence, or reputation that they were entitled to their freedom, would afford so light a presumption of the fact, against the immemorial possession of them as slaves, as to be inadmissible. But, if the claimant was of a race, of which some might be absolute slaves, and some bound to service from their birth, until they attained an age considerably advanced, and the possession of them in service was equivocal, and might be the holding of them as slaves, or only as bound to service until a given age; then the hear-say and reputation that they were entitled to their freedom after they attained the age to which they were bound to service, might be admissible. As in the case under consideration. The proofs not objected to, shewed that Sibyl was the child
641 of a negro and an Indian, and was *kept in service all her life, and to an old age. Whether her mother was an Indian or a negro, was the first enquiry. The probabilities were precisely equal, upon the mere fact that she was half negro and half Indian. The circumstance that she was held in service, would have been calculated to induce a belief that her mother was a negro, if no descendant of an Indian woman could be a slave or servant by birth. The circumstance that Indians might be slaves, and bastards by a negro or mulatto man and an Indian woman might be bound to service until they were 31 years old, is calculated to weigh on the other side, in the scale of probability; and, in deciding

this question, I think the fact that Sibyl was called Indian Sibyl, and the reputation that she was entitled to be free, were admissible, and proper to be weighed by the jury, with the fact of her being held all her life in service, to determine whether her mother was an Indian or a negro; and if, as I suppose, the child of an Indian woman by a negro was considered and called an Indian, and the child of a negro woman by an Indian was considered and called a negro, both by our laws and in common parlance, at the time when Sibyl was called Indian Sibyl, the fact of her being so called, is proof of a reputation that her mother was an Indian. The legal distinction between the epithets Indian, negro, and mulatto, was probably then perfectly familiar, as many rights under the then existing laws, as that of 1723, depended upon the distinction; rights, which have long since ceased to exist, and the distinction consequently forgotten.

If, upon this evidence, the jury thought that Sibyl's mother was a pure Indian, the next question would be, whether she was a slave or bound to service, until she attained the age of 30, under the act of 1670, or was bound to service by her parents, as aforesaid. On this question also, the continual possession of Sibyl and her children in service, would afford a presumption that her mother was a slave. On the other hand, the evidence as to the age of Sibyl gives reason to believe that she was
642 born between *1705 and 1712; and if of an Indian woman, her father was a negro; in which case, if her mother was free, and bound to service till the age of thirty, and was not thirty years old at Sibyl's birth, or was otherwise bound to service as aforesaid, the latter and all her children, and their children born before she and they were 31 years old, were born free, and bound to service until they attained thirty-one years of age. The presumption that Sibyl was born a slave, founded upon her being kept in service after she attained her age, is met by the proof that she was in 1770 reputed to be entitled to her freedom, which might be founded upon the knowledge that she was born of an Indian woman servant, and therefore entitled to be free at her age of thirty-one. This reputation in 1770, probably could not be founded upon any idea that she was free, merely because she was descended from an Indian woman. For the construction of the act of 1705, authorising a free trade with all Indians, and its consequences that all brought in after 1705, or rather after 1691, could not be held as slaves, was not probably known or thought of till 1777, or at least until after 1770. The presumption too of Sibyl being born a slave, from her being continued in service twenty or thirty years after she was thirty-one, is weakened by the consideration of her servile condition and ignorance from her birth, and the decisive power of her master over her. Upon the whole, I think that this evidence of the reputation that Sibyl was entitled to her freedom, should be left to the jury to be weighed by them, with all the other circumstances of the case, in order to determine whether Sibyl's mother was an Indian, and if an

Indian, whether she was a slave, or free woman bound to service, until her age of thirty years, or otherwise.

The Court erred in directing the jury to find for the plaintiff, if they believed that Sibyl's mother was an Indian. It did not follow, if the mother was an Indian, that she was free. She might have been a slave; and in the absence of any other evidence, such as the reputation
643 *that Sibyl was entitled to be free, I should think that the circumstance of Sibyl and her descendants being always held in service, would be conclusive to prove, by a violent presumption, that she was born a slave. But, upon the proofs in the cause, the fact (if the jury should think her mother was an Indian) whether she was a slave or free, though bound to service till her age of thirty or otherwise, should have been left to the jury, without any instruction as to the weight of the evidence.

The other branch of the instruction, mentioned in the second bill of exceptions, is also erroneous. Facts connected with the history of the country, must be proved as all other facts, by the evidence proper to prove them; as by books written on the subject, laws, records, letters or other documents or even by well-supported tradition; the confidence in the facts alleged being regulated in degree, according to the nature of the proofs. This is only another instance of the application of the rules of law already discussed. Such proofs are admitted, because they are the best which, from the nature of the question, can be presumed to exist, and indeed the only proofs which can exist. It does not appear, that the fact that female Indians were more commonly captured and domesticated with us, than males, was proved in any way; but was only conjectured from the greater probability, which was supposed to exist, that the fact was so; and as to the time spoken of, it does not appear what time that was. If it was a time subsequent to 1691, which was the only material time, upon a reference to the Statutes at Large, it does not appear that we had any war with any Indians after 1677, until 1754; whilst the same books give us distinct indications of many Indian wars before 1677. There was, therefore, no probability of any Indians being captured and domesticated by us after 1691. If the captures alluded to, were supposed to be made by our tributary Indians in war against Indians more remote, and the captive brought to us, then, from the same source, we
644 have no information *of any wars carried on by them, except with the Five Nations, who marched southward to attack their enemies, and probably did not bring with them their wives and female children, to be captured. This instruction was calculated to influence the jury upon the preliminary question, whether Sibyl's mother was an Indian or a negro. The conjecture that, from the nature of the subject, it was probable that more females than males were captured and domesticated, was too slight (if indeed the fair presumption was not the contrary) to be admitted as evidence, if it can be so called; or to have

any effect whatever, on the decision of any of the questions in the cause.

I have treated the second exception, as properly taken, as I think it was. The Judge, if he had thought after the trial that he had mis-directed the jury, might ex-officio have set aside the verdict, and awarded a new trial. So, if he had doubted whether he had mis-directed or not, and if he thought it proper, upon all the circumstances of the case, to save that question to the party by signing a bill of exceptions, he might rightfully do so, although the party might have lost the strict right to claim it as legally due to him.

The judgment should be reversed, and the cause remanded, with instructions that upon the second trial, no such instruction shall be given to the jury as that contained in the second bill of exceptions; and that, if it shall appear that Sibyl was the child of a negro and an Indian, and was born after the passing of the act of 1705, the proof (if offered) of the reputation of the neighbourhood in which she lived, that she was entitled to her freedom, shall be admitted, not to prove that she was free, but to weigh as much as the jury shall think it ought to weigh in deciding the questions, whether Sibyl's mother was an Indian or a negro, and if an Indian, whether she was a slave or free.

645 *JUDGE COALTER.

In order to the better understanding of the questions involved in the case before us, it becomes, in some measure, necessary to enquire into the early state of Indian slavery and servitude in this State. Fortunately, we have a better opportunity of doing this, than our predecessors, who had not the advantages of that valuable collection of our Statutes, which, under the title of "Hening's Statutes at Large," has been furnished to us.

It was not until the year 1733, that an edition of our laws was published in Virginia. An abridgment by Beverley, was published in 1722, and a second edition thereof, in 1728. The collection by Purvis, is supposed to have been published between 1684 and 1687. All these were published in London, and the last is said to have been very inaccurate. So that, at all events, up to 1684, the laws were promulgated here by manuscript copies, read to the people at the Courts, and a copy deposited in the Clerks' offices. See preface to the 1st volume of Hening's Statutes at Large, p. 5.

I mention these things now, because, in the progress of this enquiry, when I shall come to speak of the decision of the General Court, and of this Court, on the subject of Indian slavery, after the year 1691. I shall have occasion to remark, that probably those decisions would have been different, had the present compilation then existed. The result of my examination of the various acts, from 1655 up to 1676, to be found in the 1st vol. of Hen. Stat. at Large, p. 396, 410, 455, 481; and vol. 2d, 143, 113 and 240, is this: That attempts had, in various ways been made to reduce Indians to slavery, as by encouraging Indians to steal Indian children and sell them, by importing them, and by purchasing them from the Kings of their country; all which

were prohibited by law, except the last, which seems impliedly to have been sanctioned, by an act of 1661, declaring that a Powhatan Indian, who had been sold for
646 *life, by the King of Wainoake, who had no power to sell him, being of another nation, and that, therefore, he should be free, he speaking perfectly the English tongue, and desiring baptism.

As to imported Indians, another act of 1661 declares, that they shall not be sold for any longer time than English of the like ages should serve by act of Assembly; which acts, as to English servants not indentured, provided that they should serve for five years, if above 16 years of age, and all under, until 24; and by a subsequent act, that they should serve five years, if of 19 years old or above, and if under, until the age of 24.

Thus stood the laws until the year 1670; when, by an act entitled, an act "what time Indians to serve," 2 Hen. Stat. at Large, 283, it was enacted, that whereas some disputes have arisen, whether Indians, taken in war by any other nation, and by that nation sold to the English, are servants for life, or term of years, it is resolved and enacted, that all servants, not being christians, imported into this colony by shipping, shall be slaves for their lives; but, what shall come by land, shall serve, if boys or girls, until 30 years of age; if men or women, 12 years and no longer. The enacting clause seems to drop the distinction between Indians and other pagans, and also, the circumstance of an Indian being captured in war by another nation; and, was doubtless intended to make a general provision, extending as well to Indians as other pagans imported by shipping. Although negroes had been brought into the country as slaves, by some Dutch ships, as early it is said as 1620, I see no law before this to justify their importation as slaves.

After this, until 1682, all Indians imported by shipping were slaves for life, those brought in by land were to serve until the age of 30; with this exception, that in order to encourage and reward our soldiers in time of war, it was provided by the acts of 1676, 1677, and 1679, that Indians taken in war should be slaves for life, and
647 free purchase *to our soldiers. 2 Hen. Stat. at Large, 346, 404, 440.

The next law in order of time is that of 1680, entitled, "an act allowing a free trade with the Indians;" by which it was enacted, that all former acts of Assembly restraining, limiting and forbidding trading with the Indians, be, and stand hereby repealed, and that henceforth there be a free and open trade for all persons, at all times and places, with our friendly Indians. Ibid. 480.

It becomes necessary here, to collate this act with that of 1696, entitled, "an act for a free trade with the Indians," and that of 1705, on the same subject. 3 Hen. Stat. at Large, 69, 468. That of 1691, declares that all former clauses of former acts of Assembly, limiting, restraining and prohibiting trade with Indians, be, and stand repealed, and that from henceforth there be a free and open trade for all persons, at all times, and

at all places, with all Indians whatever. This act of 1705, is verbatim with that of 1691, from the words, "there be a free and open trade," to the end.

These acts, then, seem to be essentially and verbatim the same, except the words "friendly Indians," in the first; and "all Indians whatever," in the last two, if that can be called a difference. Neither the act of 1691, nor that of 1705, could have been intended to permit a free and open trade, by people belonging to the colony, with Indians at war with the colony. All others, I presume, would come under the denomination of friendly Indians.

The edition of the laws of 1733, which was the first edition printed in this country, as above stated, and was published by order of the General Assembly, and is said to contain the titles of such acts as are expired or repealed, contains the titles of the acts of 1680, and 1691, above cited, and puts the word expired opposite the first, and repealed opposite the last, Ibid. 82, 44; referring to the act of 1705, ch. 52. Under the act of 1705, it is understood that the General Court in 1777, in the case
648 of Hancock *and others v. Davis, decided that after 1705, no native American Indian could be made a slave. 1 Tuck. Black. part 2, Append. 47. This Court, in Jenkins v. Tom, 1 Wash. 123, and in Coleman v. Dick, Ibid. 233, decided the same thing.

In Pallas v. Hill, in this Court, 2 Hen. & Munf. 149, in consequence of a discovery of a manuscript copy of the act of 1691, above cited, the Court carried back the time when an Indian could not have been made a slave to 1691.

The act of 1680, which I have above cited, I presume was not known at the time of those decisions; for it is not hinted at either by Court or bar. If it had been before the Court, it would seem to me that the same principle would have carried the Court back to the year 1680.

But, whatever might be the legal effect of this law declaring a free trade, did the Legislature intend that it should alter the law in relation to Indian slavery? It seems to me clearly, that it did not; and that this law was not intended to operate on the act of 1670, above mentioned. For I find that two years after, to wit: in 1682, by an act entitled, "an act to repeal a former law making Indians and others free," it is recited, that "whereas, by the 12th act of Assembly of 1670, entitled "an act declaring who shall be slaves," it is enacted that all servants, not being christians, being imported into this country by shipping, shall be slaves; but what shall come by land shall serve, boys and girls until 30, and men and women for 12 years. It then goes on to recite, that "many Moors, mulattoes, negroes, and others, born in heathenish and pagan countries, have heretofore and may hereafter be purchased or obtained as slaves from their native country, by well disposed christians, who may have converted them to christianity, which by law does not manumit or make them free here, and as it often happens that such owner may be enforced to bring or send such slaves here, to sell or dispose of them;

and will be obliged to carry them back, or send them to some other place, if they should be obliged to sell them
649 *here for no longer time than the English or other christian is to serve; and whereas also, those Indians that are taken in war or otherwise, by our neighbouring Indians confederates or tributaries, are slaves to those Indians which take them, and by them are likewise sold here as slaves;" it is enacted that the act of 1670, be and is repealed, &c. and further, "that all servants, except Turks and Moors, whilst in amity, &c. which from and after publication of this act, shall be brought or imported into this country, either by sea or land, whether negroes, mulattoes, Moors, or Indians, who, and whose parentage or native country are not christian at the time of the first purchase, though after and before their importation they be converted to christianity, and all Indians which shall hereafter be sold by our neighbouring Indians, or any other trafficking with us, as for slaves, are hereby declared slaves." 2 Hen. Stat. at Large, 490.

The act of 1670, above, bore several titles. The title given in Hening's Statutes, as cited above, is, "What time Indians shall serve." In the act of 1682, and in the edition of 1733, and elsewhere, it is entitled, "an act declaring who shall be slaves." It was certainly, however, considered a statute restrictive of the power of making Indian slaves; as for instance, in case of importations by land, whether by traders or neighbouring Indians, who had taken them in war, and who, by the act of 1670, were to serve only for a term of years, but who, by the act of 1682, are to be slaves. Now, the act of 1680, allowing a free trade, cannot be supposed as intended to repeal the act of 1670, as to Indians imported, as seems evident by the act of 1862 above, which extends the right of making slaves of Indians, far beyond the act of 1670. If, then, the acts of 1680 and 1682, had been before this Court in the decision of the case last mentioned, it seems to me it would have afforded strong ground for a contrary decision. Nor can I perceive any thing in that part of the act of 1705 which declares a free trade, which would have warranted the

650 *judgment of the General Court above cited, if they had had the laws above mentioned before them. For it is to be remarked, that even that act, in declaring who shall be slaves, though it takes perhaps a middle ground between the act of 1670 and that of 1682 above noticed, still extends the right to make Indian slaves beyond the act of 1670. It declares that all servants imported and brought into this country by sea or land, who were not christians in their native country, except Turks and Moors in amity &c. and others who can make due proof of their being free in England or any other christian country, before they were shipped in order to transportation hither, shall be accounted slaves, notwithstanding a conversion to christianity afterwards. This law, then, which is enacted at the same session with the act of 1705, ch. 52, allowing a free trade as aforesaid, is broader in its operation than the act of 1670, under which, undoubtedly, Indians imported in

ships could be made slaves; inasmuch as by this, whether imported by sea or land, they could be made slaves. Now Turks, Moors or negroes could not be brought in by land, so that this part of the law could only relate to Indians. At all events, I am so well satisfied, that, viewing all the laws together, (as we are now enabled to do) that there is some ground to question the propriety of those decisions, I think the Court ought to do nothing which would enlarge the claims to freedom under them.

When Indians captured in war, either by our soldiers or by other nations, ceased to be brought in as slaves, or when traders and others ceased to bring them in, it is not easy, at this day, to conjecture. It doubtless, gradually ceased in practice, as our friendly relations with them extended; to which, perhaps, the clause in the act of 1705, ch. 52, 3 Hen. Stat. at Large, 467, contributed; by which it is enacted, that Indians, tributary to this government, shall be secured and defended in their persons, goods and properties; and that whosoever shall defraud or take from them their goods, or do hurt or injury to their persons, shall
651 *make satisfaction, and be punished for the same, according to law, as if the Indian sufferer had been an Englishman. As this, however, did not extend to all Indians, those not tributary would seem to be left as theretofore. I think, however, without any direct repeal of the laws, the practice had probably ceased before 1711; for, by a statute then made, providing for Rangers, &c. they are authorised to apprehend any Indian, have him examined, &c. and if it turns out that he belongs to any of the nations at war with this government, he shall be transported for the benefit of the party of Rangers. 4 Hen. Stat. at Large, 10. So too, by the act of 1722, 4 Hen. Stat. at Large, 104, any tributary Indians, or Indians belonging to the Five Nations, are not to pass certain bounds, &c. and if they do, they shall suffer death or be transported to the West Indies, and there sold as slaves. If it had then been the habit to make slaves of Indians here, I see no particular reason why these should be transported.

Before proceeding to examine the remaining acts on the subject of Indians bound to service for a term of years, it may be proper to make some remarks on the grounds, on which the plaintiff claims his freedom, and which have been fully stated by the Judges who have preceded me. These must be proved, in order to support the plaintiff's action.

Smith, the witness, whose deposition was taken in 1820, and who was then about 70 years of age, testifies that when he was between seven and ten years old, (say between 1757 and 1760) he knew a yellow woman in the family of Peter Ashbrooke, called Ashbrooke's old Sibyl or Indian Sibyl, who had every appearance of an Indian: that she had several children, one named Biddy, and one by the name of Jenny, which he recollects. She had long, straight, black hair, and he was under the impression that she was of Indian descent.

In the year 1758, or 1760, then, Sibyl had acquired the appellation of old Sibyl,

652 had a number of children, and *had been and continued, during her life, to be held in slavery, as her progeny has been ever since. To what number they now amount, is unknown; but one of them has sued for his freedom. It is not probable that she acquired the appellation of old, much under fifty years of age, and consequently was probably born as early as the year 1710. This, however, must be altogether conjecture. Whether she was the first only, or any other child of her mother, does not appear by any direct evidence, any more than whether that mother was a negro or Indian.

But, if the jury were satisfied that her mother was an Indian, did that of itself and without any proof whatever of the condition of that mother, throw the burthen of proof on the defendant, to show that she was a slave? It seems to me that it would not. She might have been brought into the country, even before 1680, and then have been about thirty years of age when Sibyl was born.

In all the cases above referred to, in the General Court and this Court, I understand the plaintiff not only proved Indian blood, but also, by hear-say or otherwise, that the importation of the mother stock was, in all the cases but one, since 1705, and in that one, since 1691. Accordingly, in this case, the plaintiff offered to prove that in the lifetime of Sibyl, viz: about the year 1770, it was currently said and believed in the neighbourhood, that she was entitled to her freedom. This evidence was objected to; "but the Court was of opinion, that though it was not legal evidence to prove the affirmative position that Sibyl was free, it was legal and proper evidence, as a circumstance with others, to aid the jury in deciding, whether the African mixture in Sibyl came from the father or mother, and for that purpose only, and to have such weight as the jury deemed it entitled to."

If it was to have no other bearing; if it was to be no proof whatever of the condition of that mother, further than that she was an Indian, and it was intended to be so restricted; was it a circumstance

653 to prove that her mother *was an Indian? In what way would it simply conduce to prove this, and this only, more than that her father was an Indian? In no way that I can perceive, except in this: that a report that Sibyl was entitled to freedom, if it can be connected with, or considered as having its origin in, the fact that she was born free, then, as it would be more likely that such a report and belief should exist, in case her mother was an Indian, then it would, in case she was a negro, the jury might weigh it, and determine that her mother was an Indian; but unconnected with her title to freedom by birth, I cannot perceive that it was entitled to any weight. If we say that though it may be admitted, that the report and belief did not arise from any knowledge of the party raising it, that her mother was free, but that it arose from a mere conjecture that, as she had Indian blood she may have been free, and of course Sibyl free also; and that, in this way, without having any weight or being entitled to any, as to the

freedom of the mother, it might be a circumstance to shew that Sibyl's mother was an Indian, and that only; I think it would behove us well to consider whether hear-say of a title to freedom, resting on mere conjecture, and not on a knowledge of the facts necessary to give such title, would be at all admissible for any purpose? I think it would not.

All hear-say or reputation, to be evidence, must proceed from those who knew the fact itself, and could prove it, if in Court; for, if they were examined in Court, and only proved a conjecture or a vague opinion, arising from facts not sufficient to support the belief, the facts only, and not the conclusion or belief, would be evidence. The evidence, then, in order to prove any thing at all as to Sibyl's mother being an Indian, must, it seems to me, be permitted to go further, and to prove that she got her freedom from her mother; that is, that her mother was a free Indian. For, if the jury ought not to have been permitted, and were not permitted, to consider that it was more likely that the mother of Sibyl would be free, if an

654 *Indian, than if she was a negro, then the evidence would prove nothing as to the condition of the mother, and was only calculated to confuse and embarrass the jury. If, in either case, the mother was equally to be considered a slave, until proved to be otherwise, by other evidence than this report, then it was as easy to believe that Sibyl might be entitled to her freedom as the daughter of a free negro woman, as of a free Indian woman. But, as it could not be legal evidence, (restricted as the literal construction would seem to restrict it,) and as it could not, so restricted, tend to prove that Sibyl's mother was an Indian, and could only do so by its collateral operation on the question of freedom in her mother, was it proper to be admitted for this double purpose, not only to weigh as a probable circumstance to prove that the mother was an Indian, but that she was a free Indian? If it would, then we would not reverse, for the apparent restriction of the evidence to one point when it might have been explicitly admitted for both objects.

Was it properly admitted, or might it have been properly admitted for both objects? Why would it be evidence of both propositions? Because it is said, that unless her mother was not only an Indian, but a free Indian, such report and belief could not have had existence. The evidence, then, must prove first and mainly, that the mother was a free Indian; and if she was, it was not a matter of proof but of law that Sibyl, following her condition, would be free also. What would this be more than to prove directly by this report, that Sibyl was entitled to her freedom? And if so, why could not the jury as well say that this report arose because her mother was a free negro; for, if this was the fact, it would equally justify the report? But, no. It is not as probable that a report would arise from that fact, as from the other, that she was an Indian. Why so? All reports ought to originate in a known fact, sufficient to prove the title resting on

it, if the fact itself was given in evidence; and when a report may have arisen
655 from the existence *either of one fact or another, either of which would be sufficient to support the title claimed under that report, and we have no evidence on which of the facts it was founded, by what authority do we set a jury to conjecturing on which of those facts the author or authors of the report founded their opinion? There is no hear-say or reputation, or other evidence, that Sibyl's mother was free, except inasmuch that if Sibyl was entitled to freedom, it may be that she was entitled by birth; but, it also may be that she was entitled to it otherwise. The authors of the report have not stated on what foundation they placed her title to freedom; and as it was not necessary to have birth for its foundation, there is no proof, by hear-say or otherwise, of any fact from which title to freedom in the mother can be deduced. Indian blood, no more than white blood, can give that title. Beyond this, we have no evidence, except a report that, in some way or other, she was entitled to freedom. If a witness had sworn that he believed her entitled to her freedom, (and this is the amount of the report,) it would not be enough. He must say on what ground he believed it; for, that might not have justified such belief. How can hear-say, then, be evidence, when, if what was said, and is so detailed, had been given in evidence by those who had said so, it would not be received? There is no hear-say of neighbours, that they knew Sibyl's mother, or her condition; the hear-say is as to Sibyl herself. They probably knew more about her than her mother; and as they say nothing of the latter, they may have known something by which Sibyl was entitled to freedom, though her mother might have been a slave. All this is conjecture; and I fear, that to admit such evidence, would be going very wide of the legitimate limits, within which hear-say evidence is proper.

But, if admitted to all, it would seem to me more reasonable that a report and belief that Sibyl was entitled to freedom, should be received directly to prove that she herself was free, than to prove that her
656 mother was free, *who might have been a slave, and yet Sibyl be free. For, it does not follow, as the jury were permitted to suppose, that because Sibyl was half Indian, and entitled to freedom, her mother must have been a free Indian woman.

It seems to me, then, that we are brought back to the enquiry; was the Judge right in saying, that this was not legal evidence to prove that Sibyl herself was free? Surely he must have been right on that point. It would be going too far to say, that after the lapse of more than a century, during all which time a woman and her descendants have been held in slavery, that those descendants should be considered as entitled to freedom in consequence of a report and belief in the neighbourhood, that their mother was entitled to her freedom, though she was held all her life as a slave; without any evidence, hear-say or other, from what fact such belief origi-

nated. It is impossible to contradict so vague a report. No fact is stated as being reported, nor is any one named as the author of the report; nor is there any thing, concerning which a Court can judge. They must be left to their own conjectures as to the grounds on which such a report has obtained circulation.

But, suppose the jury have arrived at the belief that Sibyl's mother was an Indian; still, the plaintiff must produce some proof that she was a free Indian, or such a strong probability of it, as to throw the burthen on the defendant to prove that she was a slave. Could the plaintiff then say, "I have produced evidence to satisfy the jury that her mother was an Indian: that she must have been in the country prior to 1710, as Sibyl may have been born about that time; and although it does not appear how or when she came into the country, yet, as Sibyl, about 60 years thereafter, was reported to be entitled to her freedom, I have a right to insist that it was so reported, on this ground, to wit: that her mother was an Indian woman servant, not a slave: that she had a bastard child, Sibyl, by a negro man, and which child, though it ought to have been bound an apprentice, and to have her freedom recorded,
657 *&c. was nevertheless held in slavery all her life, and her children after her, for more than a century; and that, through this long detention is entitled to some weight against me, and although I know nothing, and can prove nothing of the ground on which such a report was founded; yet, as it might have originated from the facts aforesaid, if the defendant cannot prove otherwise, the jury must find for me." If such pretension would be right, then the position for which I have above contended, to wit, that a belief that Sibyl was free, cannot prove that her mother was, which, in turn, is to prove that she was, is not correct. In short, I can view the subject in no way, in which I am not brought back to that point.

As to the acts of Assembly in relation to Indian servants, bound to service for a term of years, and that if Sibyl's mother was such, and during the term of her service had a bastard child by a negro man, &c. I had intended to take a view of the acts of Assembly, and to express some doubts which have arisen in my mind, whether the act of 1705 which fines a woman servant 15l. or to be sold for five years, and the child bound until 31 years of age, was intended as anything more than re-enacting the law on that subject, which theretofore existed, and which was confined to whites, and was intended, not to punish the crime of fornication, but to superadd thereto a heavy penalty, in order to prevent the contamination of the white blood. It is not necessary to pursue that enquiry; because, from the view I have taken above, it would not alter my opinion. It is not unworthy, however, of remark, that by the ancient laws, the church-wardens, at their meetings, were to make presentment of certain offences, and amongst others, that of fornication; and to return their presentments to Court, 1 Hen. Stat. at Large, 240; 2 Ditto, 49; 3 Ditto, 140; and that this was

the law about the time when Sibyl was probably born. If, too, she was to be bound out until 31, then the records of the Court or church-wardens might shew a presentment or a binding out. 3 Hen. Stat. 658 at *Large, 454. The act of 1705, (and I believe previous acts,) provides also for the recording of the freedom of servants. Now it may be, that none of these things were done, or that the records are lost, &c. But, there is no proof that they are lost; but, as the 15l. penalty, if it would be incurred in this case, went to the parish, it is not very likely that such offences would be overlooked by the wardens.

Be all this, however, as it may, the Judge, as it appears by another exception hereafter mentioned, was of opinion, that if the jury were satisfied that Sibyl's mother was an Indian, the plaintiff was entitled to recover; but, if he was not right as to this broad ground, as I have before stated, then the jury were to be satisfied from this hear-say report. 1. That Sibyl's mother was an Indian; 2. That she was a free Indian held to service for a term of years; 3. That during that time of service, she had a bastard child, Sibyl, by a negro man; 4. That that child was bound to service, under the act of 1705, until she was 31 years of age, and was continued to be held as a slave forever after, contrary to law; or. 5. That he was not bound, but held by the master of her mother, who, by the way, must, according to the above dates, have been free from that service very soon after the birth of Sibyl, and would probably have not permitted such injustice, but had her bound out. It does seem to me, that to permit all these suppositions to be found as facts by a jury, on so vague a rumor, when that same rumor would as well justify the finding of certain other suppositions as facts equally sustaining the report, would be going too far. On the whole, I think this evidence ought not to have been received.

The second bill of exceptions sets out the application of the defendant to the Court, to instruct the jury, that though the evidence should have proved the plaintiff to be the son of Sibyl, who was half Indian and half negro, yet it was necessary that the plaintiff should prove that Sibyl was descended, in the maternal line, from an Indian woman. *The Court gave that instruction, but went on to give further instructions, as has been stated by the other Judges.

I concur in the opinions which have been given, that both branches of the instruction so given and excepted to, were wrong. The judgment must be reversed.*

George v. Parker.†

February, 1826.

Slaves—Removal into State—Oath—Presumption.†—A man removing into this State with his slave, takes the oath required by the law of 1792; but it is

*The PRESIDENT and JUDGE CABELL, absent.

†The two following cases were accidentally omitted in their proper place.

‡See principal case cited with approval on this point in *Betty v. Horton*, 5 Leigh 621, 626; *Huston v. Cantril*, 11 Leigh 162; *Unis v. Charlton*, 12 Gratt. 402.

doubtful, upon the evidence, whether the oath was taken within sixty days after his removal. After a great lapse of time, it will be presumed that what had been done, was done rightly.

Same—Same—Oath—Failure to Take—Effect.—But, if it does not appear, by evidence or otherwise, that the oath was taken within sixty days after the removal of the master, the slave will be entitled to his freedom, when he has remained in the State twelve months.

This was an appeal from the Superior Court of Law for Hampshire county, where George, a man of colour, brought an action to recover his freedom, against Jacob Parker, who held him in slavery. At the trial, the defendant produced a certified copy of a record from the County Court of Berkeley, in these words: "Berkeley Scil. Appeared before me Gerrard Keith, and made oath that a negro man named George, aged about two or three and thirty years of age, was not imported into this State with a view of traffic or trade, but for his own use. Given under my hand this 19th day of January, 1796.

JAMES MAXWELL."

660 *This certificate was duly recorded in the County Court of Berkeley.

There was another oath taken by Keith on the same day, to the same effect, but more strictly following the terms of the law. This oath was also recorded, in the same manner as the former.

The defendant also produced a witness, who said that he could not say when Keith, the former owner, moved to Virginia, but that he knew that it was after the first day of January, 1795; but whether in 1795 or 1796, he did not know.

Upon this evidence, the defendant moved the Court to instruct the jury, that they ought to presume, after so long a time, that that which appeared to be done was rightly done, until the contrary appeared by rebutting such presumption. The Court gave this instruction, and added, that with respect to the sixty days elapsing before the oath was made, it ought not to be presumed unless proved; and if the oath had been made before the plaintiff had remained altogether a whole year in the State, it was a sufficient compliance with the law, it being, in this respect, directory. To this opinion, the plaintiff excepted.

Verdict and judgment for the defendant; and the plaintiff appealed.

Leigh, for the appellant.

No Counsel, for the appellee.

February 14. JUDGE CARR delivered his opinion.

This is a suit brought for freedom, by the plaintiff, as having been imported contrary to the provisions of the act of 1792. By that act, slaves imported into the State, and remaining twelve months, are declared free. But it is provided, that the act shall not extend to a person removing

661 *into the State and becoming a citizen, "if, within sixty days after such removal, he take the oath prescribed, before some justice of the peace." The question here was, whether that oath had been taken, and in due time. To prove this, the defendant produced a certified copy from the record of Berkeley, of an oath taken by Keith, the former owner of the slave, bearing date

‡The suit was brought in 1822.

the 19th of January, 1796, and in the precise words of the law. He proved also by a witness, that Keith removed into the State after the 1st of January, 1795; but whether in the year 1795 or 1796, the witness did not know. Upon this evidence, the Court was moved to instruct the jury, that after such a lapse of time (the suit being brought in 1823,) they ought to presume that, that which appeared to have been done, had been rightly done, until the contrary appeared by rebutting such presumption; which the Court did do; and if they had stopped here, there could be no doubt of the correctness of the instruction. The defendant would have had the benefit of the presumption, in the first place; and the plaintiff would have been left free to rebut it by any evidence he could produce.

But the Court went further, and instructed the jury, that "if the oath had been made before the plaintiff had remained altogether a whole year in the State, it was a sufficient compliance with the law, it being, in this respect, directory." Here, I think the Judge was palpably wrong. The law is not directory at all. It leaves the importer perfectly at liberty to take the oath or not. It says that the slave shall be free; but that the law shall not extend to the importer becoming a citizen, "if within sixty days, he take the oath;" making this the condition by which he may save the forfeiture. If the importer suffer the sixty days to elapse, without taking the oath, he cannot take it with effect afterwards. To say that he can, would make the law restricting him to sixty days, a dead letter. If the importer fail to take the oath within sixty days, I see no possible chance of his escaping the forfeiture, except by removing the slave out of the State before the end of the year. If he remain twelve months, and there has been no oath taken within the sixty days, he is free, or the law is a senseless jargon.

I am clear, therefore, that the Judge misdirected the jury, and that the judgment should be reversed, and the cause sent back for a new trial, upon which no such instructions as those last above mentioned, are to be given.

The other Judges concurred.*

Almond v. Almond.

July, 1826

Alimony—Power of Equity Court to Grant.—A Court of Chancery has power to grant alimony to a wife, in Virginia, even without a contract for separation, where the misconduct of the husband is such

*The PRESIDENT absent.

†**Alimony—Power of Equity Courts to Grant.**—In *Stewart v. Stewart*, 27 W. Va. 172, it is said: "In *Galland v. Galland*, 38 Cal. 265, it was decided by a majority of the court, that the provision for alimony made in the statute concerning divorces was not intended to be a prohibition to the granting of alimony in other cases; that the power to decree alimony falls within the general powers of a court of equity and exists independent of statutory authority, and in the exercise of its original and inherent powers a court of equity will in a proper case decree alimony to the wife in an action, which has no reference to a divorce or separation. For instances, where this power has been exercised either as claimed under the inherent power of chancery courts or by authority of statutes I refer to the following cases: *Jelineau*, by next friend v. *Jelineau*, 2 Des. 46; *Prather v. Prather*, 4 Des. 33; *Helms*

as to render it unsafe for the wife to live with him, or he turns her out of doors without a support."

Husband and Wife—Rights of Wife.—But such a claim does not give the wife a right to any specific property of the husband.

Appeal from the Chancery Court of Fredericksburg.

Elizabeth Almond, by Cox, her next friend, filed a bill against David Almond, her husband. The whole nature of the subject is fully unfolded in the following opinion.

Briggs, for the appellant.

Harrison and Stanard, for the appellee.

The case was submitted without argument.

July 21. JUDGE CARR delivered his opinion.

This is a bill filed by Mrs. Almond, by E. Cox, her next friend, against her husband, for alimony. It states, "that she brought him seven or eight negroes, which have all been wasted by him in riot and drink: that her brother gave her a girl after her marriage, who has had three children: that her husband treated her with great cruelty, beating her in his drunken fits, which became so frequent and intolerable, that she was at length obliged to leave him, and throw herself upon the charity of her son: that when she went, her husband told her to take her present along, meaning the woman: that the woman and her children soon after joined her at her son's: that her husband, though he had disclaimed any right in the property, came to her son's, took the children, and sold them out of the State; saying, at the time, that he left the mother at her free disposal; but, he has since brought suit against the said Cox for her, and recovered a judgment for her at law, which he will enforce, unless prevented. The bill prays, that the Court would decree her a separate maintenance, that she may be quieted in the possession of the slave, and the judgment enjoined."

The answer denies, that the defendant ever treated his wife amiss: that she became morose and ill-tempered, and at length, without cause, left him: that he was anxious for her return, and solicited her often to come back to him: that she did so, and remained with him from 1815 to 1818, when she again, without cause, left him: that ever since her last separation, he has been entirely willing, and still is so, to receive her back; and while she behaves as a wife, will treat her with the kindness due to one: that as she has voluntarily separated from him, she has no right to a separate maintenance; and he submits, whether, by the law of the land, and the

v. Francisus, 2 Bland 544; *Galwith v. Galwith*, 4 Har. & McH. 477; *Turrell v. Turrell*, 2 Johns Ch'y 391; *Lockridge v. Lockridge*, 3 Dana 28; *Bogges v. Bogges*, 4 Dana 38; *Butler v. Butler*, 44 Litt. 302; *Mayhugh v. Mayhugh*, 7 B. Mon. 424; *Wray v. Wray*, 3 Ala. 187; *Anshutz v. Anshutz*, 1 C. E. Green 132; *Bascom v. Bascom*, Wright, 632; *Purcell v. Purcell*, 4 Hen. & M. 507; *Almond v. Almond*, 4 Rand. 662. See also, the following English cases: *Oxenden*, by next friend v. *Oxenden*, 2 Vern. 498; *Head v. Head*, 3 Atk. 295; *Duncan v. Duncan*, 19 Ves. 394." See further, monographic note on "Alimony" appended to Carr v. Carr, 22 Gratt. 108.

†**Husband and Wife—Rights of Wife.**—See monographic note on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

constitution of Courts of Equity, that Court has jurisdiction of the case, where there are no articles of separation between the parties, no divorce, nor any trust fund for the use of the wife, the disposition of which the Court might control; and where, by their interposition, the Court would take from him the only means of discharging the claims of his creditors; the funds
664 tied up *by his wife being by far the greater part of what he is worth.

There is evidence in the record of the defendant's bad habits: that he is addicted to drinking, beyond the hope of reform; that he has treated his wife badly, beating and abusing her in his drunken frolics; and that she cannot, in the opinion of the witnesses, live in peace and safety with him; also, that he has wasted his whole property, that now in contest in this suit excepted; and that the negro woman is dead. There certainly is nothing like an agreement between the parties for living separately; nor any arrangement as to their property in case of separation. It is proved by four witnesses, that when the defendant went to take, and did take, the children forcibly from Cox, he said he left their mother for his wife's use. Some say he said he had no claim to her; others, that she was free to dispose of her as she pleased. But, there is nothing like a contract; nothing in such a form, that equity could act upon it under the idea of executing an agreement. The Chancellor dissolved the injunction, and dismissed the bill.

Can we say that he erred? In England, matters of this kind belonged principally to the Ecclesiastical jurisdiction. It was only incidentally, that Courts of Equity acted upon it. Where there have been articles of separation between man and wife, by which she is allowed so much for her separate maintenance, there Equity will, at her suit, carry these articles into execution, while the separation continues; or where a woman applies to the Court upon a supplicavit, for security of the peace against her husband, and it is necessary that she should live apart; as incidental to that, the Chancellor will allow her a separate maintenance.

In *Head v. Head*, 3 Atk. 295, Lord Hardwicke says, "The principal grounds for bills of this kind, are an agreement for maintenance, or a trust for this purpose, and in either of these cases, the Court will entertain a suit for alimony and maintenance; and even after sentence in
665 *the Ecclesiastical Court for it, when the husband, in order to evade it, is going out of the kingdom, will, upon a bill filed by the wife, grant a *ne exact regno*."

The same case afterwards came before the Court again. 3 Atk. 547. Sir Francis Head had written to his wife's father, saying, "I am willing to send her 100l. and no more, between this and Christmas, and to continue her such quarterly payments, when it shall best suit my convenience, so long as we shall continue separate." Lady Head brought her bill for execution of this, as an agreement for separate maintenance, and prayed liberty to live separately, and that the Court would decree payment of the money. Lord Hardwicke said, "as to the liberty prayed, it is not in the power of the

Court to decree it, and I do not find that this Court ever has made a decree for establishing a perpetual separation between man and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this, unwillingly." He went on to decide that the letter of the defendant was not an agreement to continue during their lives, but merely for her maintenance during an occasional absence, and Sir Francis having, by his answer, offered to receive her again. The Chancellor decreed only the arrearages of the maintenance, and that he should receive and treat her as a wife; and if she did not return within a month, the allowance should cease: But if she returned, and the defendant refused to receive her, and maintain and treat her as a wife, the maintenance should continue.

In *Ball v. Montgomery*, 2 Ves. jr. 195, Lord Roslyn says, "It is contrary to the established doctrine, that a married woman should be a plaintiff in this Court, for a separate maintenance."

"I take it to be now the established law, that no Court, not even the Ecclesiastical Court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter,
666 that she becomes entitled *to a separate provision. If she applies to this Court upon a supplicavit for security of the peace against her husband, and it is necessary that she should live apart; as incidental to that, the Chancellor will allow her separate maintenance. So, in the Ecclesiastical Court, if it is necessary for a divorce a mensa et thoro propter coevitiam." There are other cases which say, that subsistence has been provided for the wife by this Court, either where the husband has turned her out of doors, or by ill treatment obliged her to leave his house, or has quitted the kingdom, leaving her destitute. See *Duncan v. Duncan*, 19 Ves. 394, and the cases there cited. See also 1 Fonb. Eq. 104, a learned note, where all the cases are brought together. This seems to be a brief view of the law in England.

I find no case with us, in which the subject has been before this Court. Having no Ecclesiastical Tribunal, the powers of that Court seem to have been considered as vesting originally in the old General Court. From thence, some of them have been distributed to other Courts, as they were branched out. The power over the probat of wills, executors and administrators, and distributions, &c. were given to the District, Superior, County and Corporation Courts. I know of no law which has given to any Court the trial of matrimonial causes, except so far as relates to incestuous marriages; as to which, a power is given to the Court of Chancery to annul them. Judge Tucker, in his *Blackstone*, 3d vol. 94, says, "With respect to suits for alimony after a divorce a mensa et thoro, as there is no Court in Virginia which possesses jurisdiction in such cases, so until there is such Court, there can be no room for suits of this nature; unless, perhaps, the High Court of Chancery should sustain them as incidental to its equitable jurisdiction."

The suit before us is not after a divorce.

but a voluntary separation; if that may be called voluntary, which seems to have been forced upon the wife by ill treatment. I

believe that in practice, the County
667 Courts, sitting as Courts *of Equity,

have assumed the power of giving separate maintenance in cases of separation; but, by what rule they have been regulated, I know not. The jurisdiction was sustained by the Chancellor of the Richmond Chancery Court, in *Purcell v. Purcell*, 4 Hen. & Munf. 507; and the reasoning of the Chancellor on the point of jurisdiction seems to me sound. If there be a contract for separation, it is conceded on all hands, that equity might, in proper cases, enforce that contract. But, suppose a husband to turn his wife out of doors, or to treat her so cruelly that she cannot possibly live with him; suppose him to persevere in refusing to take her back, or to provide a cent to feed and clothe her. Surely, in a civilized country, there must be some tribunal to which she may resort. She cannot be out of the protection of the law; an outcast, dependent on the charity of the world, while her husband may have thousands, and she may have brought him all. I would, in such cases, unquestionably, stretch out the arm of Chancery, to save and protect her.

But, assuming jurisdiction, I should be cautious to regulate it by the rules which have been established elsewhere. If the parties have made an agreement, that should be the standard; if not, I would take the practice of the Court in analogous cases. There has certainly been no contract here. I find it laid down, that where a separation has taken place, and the wife sues for a support, if the husband, in his answer, states that she left him of her own accord, that he has offered to receive her, and is

willing to receive and treat her well, the Court refuse the maintenance. In the answer before us, there is an entire willingness expressed, to receive her back and treat her as a wife. But, though this be a general rule, there must be exceptions to it. Suppose it fully proved to the Court, that the husband was in the constant habit of intoxication; that when drunk, he was a madman, and his anger particularly pointed at his wife. Surely, the Court would not, because of the offer to take her back, refuse

a support, and thus force her either
668 to hazard *her life, or to depend on charity. I do not mean to say that this is such a case; but, I put it to test the principle.

I have considered the case thus much at large, because it is entirely new in this Court. There is a specific objection to the proceeding here, on which I think the judgment of the Court below must be sustained. The demand is not for alimony, or maintenance generally; but, that a judgment which the husband has recovered for a specific piece of property, (a negro woman,) shall be enjoined, and the wife quieted in the possession of that woman. Now, the claim of the wife for alimony is a personal claim on the husband: she has no lien on any specific property, without an agreement. She can no more, therefore, ask the Court to assign her this negro, or that tract of land, than a creditor of the husband could come into Court and ask such assignment; which we know, without a particular lien, could not be done.

Under this view of the case, I think the injunction was properly dissolved, and the bill dismissed.

The other Judges concurred, and the decree was affirmed.*

*The PRESIDENT and JUDGE COALTER absent.

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3. Therefore, if the record omits to state that a plea was entered and issue joined, the Court cannot, after the term at which judgment was rendered, direct a plea to be entered nunc pro tunc, upon the evidence of the Clerk, that such a plea was filed and issue joined. Ibid.

ANSWER IN CHANCERY.

1. Where the answer of the defendant in Chancery omits to notice some of the allegations of the bill, and replies to others, the allegations not noticed are not considered as admitted, but the plaintiff must except to the answer as insufficient.

Coleman v. Lyne's ex'or, 454

2. An answer cannot be excepted to as insufficient after replication. Ibid.

APPEAL.

1. See Injunction, No. 5.

2. Where a judgment of a County Court is appealed from and reversed, and sent back for a new trial by the Superior Court, from which judgment of reversal there is an appeal to the Court of Appeals, and before bond and security are given on this appeal, the cause goes back to the County Court, is again reversed by the Superior Court, and a second appeal taken to the Court of Appeals; on this last appeal, it is competent for this Court to enquire into the propriety of the first judgment.

Jones v. Raine, 386

3. An appeal from a Court of Common Law cannot be allowed, with condition to give bond and security after the term at which the judgment was obtained.

Morris v. Deshazo, 460

4. But, a Court of Chancery has power to grant an appeal, if bond and security be given within a reasonable and limited time, in the next vacation after the term at which the decree was rendered. Ibid.

5. An appeal will lie from the order of an inferior Court, refusing to grant leave to a person held in slavery, to sue in forma pauperis.

Sam v. Blakemore, 466

6. A party appealing from an order dissolving an injunction, can only be required to give security to perform the decree of the inferior Court, and to pay the costs and damages awarded in the Appellate Court, if the decree shall be affirmed.

M'Kay v. Hite's ex'ors, 564

7. Quære, whether, where bond and security have been given to perform the decree of the Court below, and further security is required in the Appellate Court, which the party cannot give, the surety in the first bond is discharged? Ibid.

8. An appeal taken in the name of a party without his knowledge or consent, may be dismissed as to him, on motion.

Watson, &c. v. Watson, &c., 611

APPEALS, COURT OF.

See Jurisdiction, No. 1.

APPOINTMENT.

1. Where an appointment is made, in pursuance of a general power not prescribing the mode of appointment, it must be made in such a way as would pass the title, if the property belonged to the person making the appointment.

Knight v. Yarborough, 566

2. Therefore, where an appointment is made of slaves, under such a general power, by an oral declaration that the trustee gives them to the appointee, without a delivery of possession, the appointment is void.

Ibid.

3. Where an appointment is made to several persons at different times, or in unequal portions, and a residue of property is left unappointed, the appointees shall be allowed to participate in the unappointed surplus, upon bringing the value of their several appointments at the time they were made, into account, without accounting for interest, profits or increase, since they received their several appointments. Ibid.

4. But the appointees must account for interest, profits, &c. after the death of the trustee having the power of appointment, before they can participate in the unappointed surplus.

Ibid.

APPRENTICE.

The master of an apprentice is bound to pay for medical attendance on the apprentice, from the very nature of the relation between master and apprentice; and the father of the apprentice is only bound, when the services have been rendered at his instance.

Easley v. Craddock, &c., 423

ASSIGNEE.

1. The assignee of a bond, under our statute, does not acquire the legal title to the debt, but an equitable right, which, by virtue of the statute, he may assert at law in his own name; and he has his election to sue at law in his own name, or in that of the original obligee, for his benefit.

Garland v. Richeson, 266

2. The assignee of a chose in action has not a right, in all cases, to come into a Court of Equity, upon the mere ground that he cannot sue in his own name, 671 at law; but *it must appear that he is prevented from suing at law in the name of the assignor, or that the assignor himself would have had a right, if he had not assigned, to go into a Court of Equity. Per Green, Judge.

Moseley v. Boush, &c., 392

ATTACHMENT.

See Action, No. 1.

See Averment, No. 2.

AUDITOR.

1. See Malitia, No. 1.

2. A contract is made with the Executive, under an authority given them by law; which directs that the Auditor shall issue warrants upon the orders of the Executive. The Executive refuse to give such order. The party aggrieved may resort to the

Courts, by original petition, and have his rights enforced by their judgment.

Shields v. The Commonwealth, 541

3. It seems, that in such cases, the party may obtain redress either in law or equity as the circumstances of the case may give jurisdiction to either tribunal. Per Green, Judge. Ibid.

AVERMENT.

Quære, what averments of the transfer of a note, and of demand and notice, are sufficient?

Hatcher v. Lewis, 152

2. In an action on an attachment-bond, it is not sufficient to allege in the declaration, that the defendant "did not pay all such costs and damages as have accrued, &c." but it must be expressly averred, that costs and damages had been actually sustained.

Dickinson, Adm'r &c. v. M'Craw, 158

3. An averment of a breach of the condition of a bond, although it may not entitle the plaintiff to all the demands, will entitle him to recover what he is legally entitled to, in consequence of the breach.

M'Dowell v. Burwell's Adm'r, 317

4. No defect in a record can be supplied by averment.

Wood v. The Commonwealth, 329

AWARD.

1. See Equity, No. 7, 8.

2. Where some only of several distributees submit their interest to arbitration, the award will be binding on the parties to the submission, as far as their interests are concerned.

Smith and others v. Smith, &c., 95

3. When parties submit a question of law alone to arbitration, the award is binding, though contrary to law.

Ibid.

4. Awards are to be construed liberally; and therefore, the terms "heirs at law," in an award respecting personal estate, may be construed to mean "all a testator's children living, and the child or children of any of them who died in his life-time."

Ibid.

5. Where a submission is made of all matters in difference between two parties, in a particular suit then depending, to two persons and such umpire as they shall choose, and their award to be made the judgment of the Court; and the arbitrators and umpire act together and make a joint award; such award will be good.

Rison v. Berry, 275

6. Although the award does not state that the third person who signed the award, had been chosen by the arbitrators, as umpire, yet that fact may be proved by other evidence.

Ibid.

7. If the third person who signed the award was a mere stranger, this would not vitiate the award.

Ibid.

BAIL.

1. Appearance bail enters into a recognition of special bail before a Judge in the country. He commits it to his son, to be delivered to the clerk where the suit was depending. The son delivers it to a lawyer who practised in that Court, and who promised to deliver it in time. The lawyer forgets his commission, and the office

judgment is confirmed against the principal and his appearance bail. A Court of Equity will not grant relief in such a case. By two Judges, one dissenting.

Dickinson v. Sizer, &c., 113

2. The principles on which relief will be granted to bail. Ibid.

3. Where a joint action is brought against drawer and endorser of a negotiable note, bail cannot be demanded as of right, but can only be obtained from a Judge or Justice of the Peace, on proper affidavit.

Hatcher v. Lewis, 152

4. It is error to require bail in an action on a bond with a collateral condition.

Nadenbush, &c. v. Lane, 413

5. It is a general rule, liable to very few exceptions, that no tribunal can take from a plaintiff a legal advantage which he has gained against bail, if such advantage happens without any participation or agency of the plaintiff.

Gilliam v. Allen, 498

6. Special bail cannot be entered at the Clerk's table, unless it is directed by the Court, or assented to by the plaintiff's counsel; even where the appearance bail is offered as special bail. Ibid.

672 *BAIL BOND.

A bond which is returned to the clerk's office, but which specifies no sum to be paid by the obligor to the obligee, is a mere nullity.

Harrison v. Tiernans, 177

BANK.

See Jurisdiction, No. 1.

BANK NOTE.

1. Where a bank note is cut in two, and one half sent by mail and lost, the holder of the remaining half has a right to demand payment at the Bank, upon presentation of the half in his possession, proving ownership, and giving bond with adequate security for the indemnification of the Bank.

Farmers' Bank, &c. v. Reynolds, 186

2. But, if these prerequisites are not complied with, and the Bank is sued in consequence of refusing payment, the holder will not recover interest or costs, although he may perform the conditions after the suit is brought. Ibid.

BILL OF EXCEPTIONS.

Where parol evidence is excluded, which might be proper when connected with a record, the bill of exceptions should state that such record was offered. Otherwise, it will be presumed that the parol evidence alone was offered.

M'Dowell v. Burwell's Adm'r, 317

BILL OF EXCHANGE.

1. When a bill of exchange returns protested, and the drawer, on payment being demanded, promises to pay, he cannot afterwards resist the payment, on the ground that due notice was not given of the protest.

Pate v. M'Clure, &c., 164

2. See Fraud, No. 7.

3. Where a bill of exchange is presented to the drawee, who refuses to accept or to pay, notice need not be given to the en-

dorser, if the bill was drawn and endorsed for the accommodation of the drawer, with the knowledge of the endorser, and there was no expectation that the bill would be paid by the drawee.

Farmers' Bank, &c. v. Vanmeter, 553

BOND.

1. See Assignee, No. 1.

2. See Bail Bond.

BRITISH SUBJECT.

The representative of a British subject, whose estate was sequestered under the law of 1777, and who does not apply to the Auditor until 1822 for a certificate, is not entitled to interest on his claim, after the 1st of January, 1811.

Martin v. The Auditor, 264

CHOSE IN ACTION.

See Assignee, No. 2.

CITIZENSHIP.

The question of citizenship may be decided, after a great lapse of time, by facts and circumstances leading to a presumption that a foreigner had actually become a citizen.

Nalle's Representatives v. Fenwick, &c., 585

COMMONWEALTH.

When the Commonwealth sells the lands of a public debtor, and the purchaser is afterwards evicted by title paramount, the purchaser has no redress against the Commonwealth, as the law only authorises a sale of all the estate and interest of the debtor.

Commonwealth v. M'Clenachan's Ex'ors, 482

CONDITION.

1. Where it is stipulated in a mortgage, that money shall be paid on or before a given day, and it is paid after that day, the mortgagee is not deprived of his right of action at law, on the mortgage.

Faulkner's Administratrix v. Brockenbrough, 245

2. See Declaration, No. 2, 3, 4.

3. In a contract for the purchase of land, where no time is limited for the conveyance of the property, and a time is limited for the payment of the purchase money, the conveyance is not a condition precedent to the right to demand the money.

Bailey v. Clay, &c., 346

4. A general undertaking to pay money, without appointing a day of payment, obliges the party to pay immediately; but an undertaking to do a collateral act, as to convey lands, entitles the party to perform it at any time during his life, unless hastened by the request of the other party. Ibid.

5. When a day is appointed for the payment of money, and the day is to happen after the thing, which is the consideration of the money, is to be performed, no action can be maintained for the money before performance.

Brockenbrough v. Ward's Adm'r, 352

6. Covenants are dependent or independent, according to the intention and meaning of the parties, and the good sense of the case. Ibid.

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***CONSTABLE.**

An execution issued upon a judgment by a Justice of the Peace, from the Court of a county or corporation, cannot be served by a constable, except in the City of Richmond.

Stokes v. Perkins, 356

CONTRIBUTION.

The endorser of a bill of exchange has no right to contribution against the other endorsers, where the several endorsements were made for the accommodation of the drawer, unless there is a stipulation to that effect.

Farmers' Bank v. Vanmeter, 553

CORPORATION.

1. A corporation can only sue in the name and style given to it by law.

Porter v. Nekervis, 359

2. When a corporation sues, it need not set forth in the declaration, by way of averment, how it is a corporation, but may prove it on the trial.

Grays v. Turnpike Company, 578

3. This doctrine is equally applicable to motions by corporations, as to suits brought by them. Ibid.

4. If the law authorizes a sale of the stock of delinquent subscribers, and if the sale shall not produce the sum due, then a motion against such subscribers for the deficiency; and under this power the corporation exposes the stock to sale, which is not sold for want of bidders; they may then maintain a motion against the delinquent subscriber, under the spirit of the law. Ibid.

CREDITORS.

1. An unrecorded deed is void as to creditors, whether they have notice or not; but it will be good against purchasers with notice, or who have not purchased for valuable consideration.

Guerrant v. Anderson, 208

2. A purchaser under a sale in behalf of a creditor, holds the rights and occupies the place of the creditor; and therefore he will not be affected by notice of an unrecorded deed. Ibid.

DAMAGES.

The stipulated price of property sold, is the proper measure of damages for the non-performance of the contract, if no evidence is offered to shew that some other standard is more proper.

Bailey v. Clay, 346

DECLARATION.

1. See Averment, No. 1, 2, 3.

2. The failure to allege the performance of a precedent condition in a declaration, will be cured by a verdict.

Bailey v. Clay, &c., 346

3. The general rule is, that no party can be required to prove, upon the trial, any matter not alleged by him in his pleadings, unless the fact not alleged is necessarily implied from the facts stated in the pleadings. In cases coming within the general rule, all matters necessarily implied from what is alleged, are presumed to have been proved on the trial, after verdict. Ibid.

4. But, matters collateral to the fact in

issue, and necessary to the right of the party, if they are omitted in the pleadings, cannot be presumed to have been proved, and therefore their omission could not be cured by the verdict at common law. Ibid.

DEEDS.

1. The difference between deeds and bills of exchange and promissory notes, as to the mode of their execution.

Harrison v. Tiernans, 177

2. Where a grantor has conveyed all his estate, real and personal, to trustees, the conveyance includes equitable as well as legal rights, and the trustees are the proper persons to assert them in a Court of Equity.

Carter v. Harris, 199

3. See Creditors, No. 1, 2.

4. See Voluntary Conveyance, No. 1, 2.

DEMURRER TO EVIDENCE.

1. A demurrer to evidence should contain the evidence on both sides.

Childers v. Deane & Page, 406

2. The Court ought not to compel a plaintiff to join in a demurrer to evidence, if the evidence set forth in the demurrer shews that the plaintiff ought to recover.

Brockenbrough v. Ward's Adm'r. 352

DEPOSITION.

A deposition taken while the replication was standing, cannot be read after it is withdrawn.

Clarke v. Tinsley's Adm'r. 250

DISTRESS.

1. The property of a third person never was liable to distress, unless it were found upon the premises; and even where it is found there, the distress is taken away by the act of 1818, 1 Rev. Code, ch. 113, sec. 15.

Davis v. Payne's Adm'r, 332

2. See Equity, No. 23.

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***EJECTMENT.**

An ejectment may be brought against several persons in possession of any part of the tract of land claimed by the lessor of the plaintiff.

Stuart's heirs, &c. v. Coalter, 74

EQUITY.

1. See Injunction, No. 1.

2. See New Trial, No. 1.

3. It is a correct course of proceeding, for a Chancellor to dissolve an injunction upon the defendant's tendering a deed to the plaintiff, or filing it with the papers, without requiring it to be approved by the Court before the injunction shall be dissolved.

M'Mahon v. Spangler, 51

4. Equity has not jurisdiction to grant redress for the unlawful diversion of a water-course, but to prevent it by injunction before it is done.

Coalter v. Hunter, &c., 58

5. See Partition, No. 1, 2.

6. A Court of Equity has no jurisdiction to settle the title or bounds of land between adverse claimants, unless the plaintiff has an equity against the defendant claiming adversely to him. An equity against other persons will not give such jurisdiction.

Stuart's heirs, &c. v. Coalter, 74

7. A bill in Chancery, which makes out a case for a specific execution of an award, but does not pray for general or special relief, is sufficient, if no objection be taken by the defendant, and he answers on the merits of the complaint, and submits himself to the decree of the Court. Quære, would this objection be sustained on a demurrer to the bill?

Smith, &c. v. Smith, &c., 95

8. Equity has jurisdiction to decree specific execution of an award, where the remedy at law is inadequate. Ibid.

9. Tenants in common, of personal estate, cannot have partition at common law; and, therefore, a Court of Equity is the proper tribunal to decree a partition of it. Ibid.

10. See Amendment, No. 1.

11. A surety will not be discharged by an indulgence granted by the creditor to the principal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law. Nor will the surety be discharged even then, where the indulgence was granted with his knowledge and assent.

Hunter's Adm'r v. Jett, 104

12. A surety will not be discharged from his responsibility, unless he demands such discharge in his bill, and states such a case as would entitle him to it. Ibid.

13. See Bill, No. 1, 2.

14. Where a debtor who has given a deed of trust, enjoins a sale of the property, and pending the suit the trustee dies, the Chancellor, upon dismissing the bill, may direct the property to be sold by his Marshal.

Pate v. M'Clure, &c., 164

15. See Bank Note, No. 1, 2.

16. See Deeds, No. 2.

17. See Account.

18. When exceptions are filed to an answer, they must be disposed of before any further proceedings can take place in the cause.

Clarke v. Tinsley's Adm'r, 250

19. Where two persons purchase a tract of land jointly, and one of them pays more than his proportion of the purchase money, while the other takes a conveyance of the whole to himself, the person who has advanced more than his share, has a lien on the land for the money so advanced.

Hayes v. Wood, 272

20. In such case, if the plaintiff does not pray to subject the land, but only for a personal decree for the balance due, equity will have jurisdiction. Ibid.

21. The maxim of equity, that he who seeks equity must do it, only applies to an equity between the parties, but not to an equity which any third person may have against the plaintiff.

Garland v. Rives, 282

22. Where a creditor, who claims under a judgment at law, comes into equity to enforce his judgment, that judgment is prima facie evidence against the debtor or mere strangers, unless they can impeach it on the ground of fraud, or by shewing that a full defence was not made, and can produce new proof shewing that the debt is not due. Ibid.

23. If the landlord should distrain prop-

erty as being fraudulently removed from the premises, and should not shew that it was so fraudulently removed, nor that the distress was levied within the time allowed by law, nor that the property was ever on the demised premises, the tenant ought not to seek his redress in a Court of Equity, but by damages at law.

Davis v. Payne's Adm'r, 332

24. Equity will not grant relief on the ground of a defence which might have been made at law, unless the plaintiff alleges and proves a good excuse for not having used it at law. Carr, Judge.

Chapman, &c. v. Harrison, 336

25. See Injunction, No. 4.

26. See Assignee, No. 2.

27. A bill by husband and wife is the husband's suit only, and the wife is joined for conformity, to be bound only so far as in justice she ought to be bound.

Dandridge, &c. v. Minge, 397

28. See Usury, No. 4.

29. If the proceedings under an execution are wholly void, no title passes by the sale to the purchaser, and the defendant may have redress in an action of detinue, and a Court of Equity has no jurisdiction.

Hamilton v. Shrewsbury, 427

30. See Execution, No. 2.

31. See Substitution, No. 1, 2, 3.

32. All persons materially interested in the subject in controversy, ought to be made parties in equity; and if they are not, the defect may be taken advantage of, either by demurrer, or by the Court at the hearing.

Clarke v. Long, 451

33. Therefore, the purchaser of an equity of redemption cannot file a bill to redeem against the mortgagee, without making the mortgagor a party. Ibid.

34. See Answer in Chancery, No. 1, 2.

35. Equity will not, without strong reasons, rip up old transactions, or settle stale accounts.

Coleman v. Lyne's Ex'or, 454

36. Quære, whether on a bill taken pro confesso, the plaintiff can have a decree for his claim, without documents or other evidence to support his bill? Ibid.

37. In general, a contract will not be enforced by a Court of Equity, if the party asking the execution of it has been in default, and the other party will thereby suffer a serious loss, if compelled to carry the contract into execution.

Vail v. Nelson, &c., 478

38. But if the purchaser knew, when he made his contract, that there was a defect in the title, and that it would take a considerable time to remove it; or acquires this knowledge after his purchase, and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract; he had no ground of complaint. Ibid.

39. A bill in equity for partition is a matter of right, if the title of the plaintiff is admitted or clear; but if that be denied, and it depends on doubtful facts or questions of law, a Court of Equity will either dismiss the bill, or retain it until the right is decided at law.

Straughan, &c. v. Wright, &c., 493

40. In questions purely equitable, twenty years adverse possession will bar the remedy of the plaintiff; but where the Court is only called upon to grant partition under a legal title, which is disputed, the proper course is to retain the cause until the title is decided at law. Ibid.

41. Quære, whether a Court of Equity would refuse to assist a party to assert a legal title, when the right of entry is barred by twenty years adverse possession, by removing impediments to a fair trial at law? Ibid.

42. See Bail, No. 5, 6.

43. It is a general rule, that a Court of Equity will not allow a man to make a defence which he might have made in a Court of Law, unless she shews some good reason why he did not make that defence in a Court of Law.

Vanlew v. Bohannon, &c., 537

44. But if the defendant in equity does not insist upon that objection, but voluntarily goes in to the merits of the case, and in his answer admits facts, which, if they had appeared to the Court of Law, would have produced there a different result, a Court of Equity ought to grant relief. Ibid.

45. Courts of Law or Equity may entertain petitions by claimants against the Commonwealth, as the circumstances of the case may give jurisdiction to either tribunal. Per Green, Judge.

Shields v. The Commonwealth, 541

46. Equity has jurisdiction wherever a lost instrument is to be set up, notwithstanding that Courts of Law now exercise jurisdiction in the same cases. Ibid.

47. A Court of Equity will never injoin a judgment on the ground that it would have been reversible if the proper steps had been taken in the Court of Law, but by mistake a confession of judgment had been entered.

Farmers' Bank v. Vanmeter, 553

48. See Alimony, 1, 2.

EVIDENCE.

1. The general rule is, that parol evidence cannot be admitted to contradict, explain or alter a written agreement, but may be received to prove fraud, mistake or surprise in the execution of it. But in the latter case, the evidence must be strong and clear.

M'Mahon v. Spangler, 51

2. An affidavit taken by a party may be read in the cause, although the party taking it may wish to suppress it, because it operates against him. Ibid.

3. See Sheriff, No. 1, 4.

4. See Bill of Exceptions.

5. It is a general rule, that the evidence of a subscribing witness to an instrument, is the best, and must be adduced, if it can be had; and if it cannot, proof of his handwriting will be required.

Gilliam's Adm'r v. Perkinson's Adm'r, 325

6. But if the subscribing witness merely makes his mark if he is dead, proof of the hand-writing of the party executing the instrument, will be proper. Ibid.

7. Parol evidence is admissible to impeach evidence under seal, on the ground of fraud.

Starke's Ex'rs v. Littlepage, 368

8. The principal obligor in a bond cannot be a witness for his surety jointly bound with him, because the latter would have recourse against the former for the whole recovery against him, including all subsequent costs expended by him.

Jones v. Raine, 386

676 *9. An interested witness, who has been examined on a former trial without being released, may be rendered competent on a subsequent trial, by a release. The objection will only go to his credit. Ibid.

10. In what cases, and upon what principles, hear-say evidence as to pedigree is admitted.

Gregory v. Baugh, 611

11. Matters of general history must be given in evidence, as well as other facts; and the jury are not to be left to their own information as to such things. Ibid.

12. In questions of freedom, evidence that there had been a belief in the neighbourhood, some 50 or 60 years before, that the female ancestor of the plaintiff was entitled to her freedom, is not admissible. By two Judges. Ibid.

EXCEPTIONS.

See Equity, No. 18.

EXECUTION.

1. An action of debt will not lie against the surety of a sheriff, on his official bond, to recover the penalty imposed by law for failing to return an execution. Such penalty can only be recovered by motion; and an action of debt will only lie for the damage actually sustained by the sheriff's failure to return the execution.

M'Dowell v. Burwell's Adm'r, 317

2. If the execution is valid so far as to bind the property, but the sale under it is void on account of the interest or improper conduct of the Sheriff, the Court, from which the execution issued, may correct the abuse of its own process, by quashing the execution, &c. and there is no ground for equity to interfere.

Hamilton v. Shrewsbury, 427

3. See Equity, No. 29.

EXECUTIVE.

1. If the payment of certain expenses of militia, which properly belong to the United States, is left by law to the discretion of the Executive of the State, a party cannot claim, as a matter of legal right, more than the Executive, in their discretion, may choose to allow.

Commonwealth v. Pierce's Adm'r, 432

2. See Auditor, No. 2, 3.

EXECUTOR.

1. It is the duty of an executor or administrator to apply the assets of the estate, not necessary for the payment of debts, to the exoneration of the real estate of his testator or intestate, which may be under mortgage.

Dandridge, &c. v. Minge, 397

2. An executor may make a valid sale of his testator's effects, whether they be necessary for the payment of debts or not, if there is no fraud or collusion in the purchaser.

Knight v. Yarborough, 566

EXECUTORY DEVISE.

1. A limitation over after an indefinite failure of issue in the first taker, is too remote and void.

Riddick v. Cohoon, 547

2. Where an estate is given by will to A. and if he should die without issue living at his death, then so much of the estate as may remain undisposed of by A. to B. the limitation over is void for uncertainty, and because the power to dispose of the property, gives A. an absolute estate. Ibid.

FORTHCOMING BOND.

A. B. and C. execute a forthcoming bond to release the goods of A. taken in execution. C. pays the debt, and moves against B. as a principal in the bond. There is nothing in the bond to shew whether B. was principal or surety. B. contends that he was only a surety jointly with C. The Court below give judgment for C. on the motion. No evidence is in the record to shew whether B. was surety or principal. The judgment was affirmed in the Court of Appeals, as it will be presumed that the Court below had evidence before them, that B. was a principal and not a surety.

Cunningham v. Mitchell, 189

FRAUD.

1. A creditor who takes a conveyance from his debtor to secure his debt, but at the same time inserts provisions in the deed, to delay, hinder or defraud other creditors, comes within the Statute of Frauds, and the conveyance is void.

Garland v. Rives, 282

2. So likewise, if the grantee be privy to a fraudulent intent on the part of the grantor, and takes a deed to secure his own debt, with provisions to delay, hinder or defraud other creditors, the deed will be void, although his only motive was to secure his own debt, and the other provisions were forced upon him by the grantor, as the only means of having his own debt secured. Such a grantee will not be considered a bona fide purchaser. Ibid.

3. Under our Statute of Frauds, as well as the English Statute of 13th Eliz. a bona fide purchaser for value, having no notice of covin, fraud, collusion, &c. will be protected. *To vitiate a conveyance, there must be a fraudulent design in the grantor, and notice of that design in the grantee. Ibid.

4. In cases of actual fraud, a Court of Equity has concurrent jurisdiction with a Court of Law, in remedying the fraud. In these cases, equity follows the law, and gives relief to the same extent as a Court of Law. And, therefore, where a creditor comes into equity to set aside a conveyance tainted with actual fraud, and the grantee had notice of the fraud, the conveyance shall be set aside in toto. Ibid.

5. Where a debtor makes a fraudulent conveyance of his property, for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance in a Court of Law, and the debtor will not be allowed to defeat the claim, by proving the fraud. By two Judges.

Starke's ex'ors v. Littlepage, 268

6. See In Pari Delicto.

7. It is no fraud in the holder of the bill of exchange to make an arrangement with one of the endorsers, by which it is agreed that the whole burden shall be thrown upon the other endorsers, and that the endorser first mentioned is to be liable only in case they should be unable to pay.

Farmers' Bank v. Vanmeter, 553

FREIGHT.

1. It is a general principle that freight is not due until it is earned by a delivery of the cargo, unless the delivery is prevented by the default of the shipper or his agents.

Brown & Rives v. Ralston & Pleasants, 504

2. If it is impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying freight. By two Judges. Ibid.

HEAR-SAY.

See Evidence, No. 10.

HUSBAND AND WIFE.

1. A husband cannot rightfully elect that his wife's property should be real or personal, at his pleasure.

Dandridge, &c. v. Minge, 397

2. When the rights of a wife appear clearly in the record, it is the duty of the Court, ex officio, to protect her against any injurious effects arising from the acts or admissions of her husband, whether the point was made in the pleadings or not. Ibid.

3. See Equity, No. 27.

INDEBITATUS ASSUMPSIT.

Under the 86th section of the act concerning proceedings in civil suits, &c. (1 Rev. Code, 510,) an account filed in an action of indebitatus assumpsit, which gives notice of the character of a claim, is sufficient, although it may be made up of various items, of which no notice is given.

Moore v. Mauro, 488

INDULGENCE.

See Equity, No. 11, 12.

INJUNCTION.

1. On a motion to dissolve an injunction, it ought not to be required of the defendant to invalidate, by full proof, the allegations of the bill; but the burthen of proof lies on the plaintiff to support them. All that is required of the defendant, is, to shew that the evidence of the plaintiff is entitled to no credit.

North's Ex'or v. Perrow, &c., 1

2. See Equity, No. 3.

3. The principal and surety to a bond obtain an injunction to a judgment against them. The surety dies pending the suit in Chancery. After referring the cause to a Commissioner, exceptions to the report on account of set-offs disallowed (some of which were claimed by the surety himself,) and the Court rejecting them because not filed in time, the injunction is in part dissolved, and in part perpetuated, without making the representative of the deceased plaintiff, a party. This proceeding is erroneous. A rule should have been given him, at the instance of the defendant, that

unless he revived the suit by an appointed time, the injunction should stand dissolved.

Jackson v. Arnold, 195

4. It is error to perpetuate an injunction against a party, without having him before the Court.

Chapman, &c. v. Harrison, 336

5. When a party has obtained an injunction from the Chancery Court to a judgment at law, which is afterwards dissolved, and he appeals to the Court of Appeals, he cannot be required to give security for the amount of the judgment enjoined, but only for such costs as may be awarded against him by the Court of Appeals.

Eppes v. Thurman, 384

6. See Appeal, No. 6, 7.

IN PARI DELICTO, &c.

1. The rule in *in pari delicto potior est conditio defendentis*, does not apply, 678 where "the policy of the law requires that a fraudulent or vicious conveyance should be enforced.

Starke's Ex'ors v. Littlepage, 368

2. See Fraud, No. 5.

INSTRUCTION.

1. An instruction by the Court, that the facts proved are not conclusive evidence, does not amount to an instruction as to the weight of evidence, because it leaves the whole matter open to the jury.

Dabney v. Taliaferro, 256

2. The instruction of a Court will not be reversed, when it is right in principle, but the reason assigned is erroneous.

Easley v. Craddock, &c., 423

3. The instruction of a Court to the jury ought not to involve matters of fact as well as of law.

M'Rae v. Scott & Saunders, 463

4. A party asking instructions of the Court to the jury as to the law, should specify the points, and not ask instructions generally as to the law arising out of a complicated mass of evidence.

Kitty v. Fitzhugh, 600

INTEREST.

1. A demand of interest in the declaration, which is not claimed in the writ, is not erroneous.

Hatcher v. Lewis, 152

2. Interest upon interest on a legacy will not be allowed, unless the testator plainly requires it.

Calloway, &c. v. Langhorne and wife, 181

3. Compound interest will not be allowed, except under special circumstances. As to what those circumstances are, see

Childers v. Deane & Page, 406

ISSUE.

The misjoinder of an issue is not fatal after a verdict, and it being stated in the record that issue was joined.

Moore v. Mauro, 488

JAILOR.

1. A sheriff, as jailor, is bound to furnish a runaway committed to the jail, with such supplies as are necessary for the season of the year.

Dabney v. Taliaferro, 256

2. A sheriff is *ex-officio* jailor, and is

liable for the misconduct of his turn-key or servant. Ibid.

3. Quare, if a jailor is regularly appointed by the sheriff, is he thereby discharged from responsibility for the acts of his jailor? Ibid.

JEOfAILS.

1. See Interest, No. 1.

2. Quare, how far the statute of Jeofails will cure a declaration which sets out no cause of action?

Sydnor v. Burke and wife, 161

JOINT ACTION.

1. Where a joint action is brought against drawer and endorsers of a negotiable note, an office judgment cannot be confirmed against all or either of the defendants, without a writ of enquiry.

Hatcher v. Lewis, 152

2. A single bill under seal, is not a note, but a specialty; and therefore, the drawer and endorsers of such a note, made negotiable and payable at the Farmers' Bank, cannot be sued jointly.

Mann v. Sutton, 253

JUDGMENT.

1. When the judgment of a Court of competent jurisdiction is pronounced on any question, it is conclusive on all other tribunals, until it is reversed by a regular course of proceedings.

Cottom v. Cottom, 192

2. Therefore, where two successive applications are made to a County Court for administration, and rejected; appeals taken to the Circuit Court from both decisions, and the judgments of the County Court affirmed; upon an appeal to this Court on the second case, the Court cannot reverse the first judgment and grant administration. Ibid.

3. A joint judgment cannot be reversed as to one defendant, and affirmed as to the other.

Jones v. Raine, 386

4. In cases of judgments by default for want of appearance, the writ, with the endorsement, is a necessary part of the record.

Nadenbush, &c. v. Lane, 413

5. A judgment deciding in favor of the freedom of a person held in slavery, has no effect against any party, except the defendant and those claiming under him posterior to the judgment.

Kitty v. Fitzhugh, 600

JURISDICTION.

1. The Court of Appeals has no jurisdiction in the case of an information against the members of an unchartered Bank, for a violation of the law of 1816, 2 Rev. Code, 111, because that act is a penal law.

Commonwealth v. Scott & Thompson, 143

2. See Equity, No. 6, 29.

3. See Auditor, No. 3.

LAND.

1. See Equity, No. 6.

679 *2. Where a patent is issued in pursuance of the act of 1788, 2 Rev. Code, 434, which includes in its general course a prior claim, it does not pass to the patentee the title of the Commonwealth in

and to the lands covered by such prior claim, subject only to the title, whatever it may be, in the prior claimant; but, if that title is only a prior entry, and becomes vacated by neglect to survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated land.

Nichols, &c. v. Covey, &c., 365

3. The purchase of a warrant from the Commonwealth, and an entry in consequence thereof, is not a purchase of the land itself until the entry is carried into grant. Ibid.

LEGACY.

See Interest, No. 2.

LIEN.

See Equity, No. 19.

LIMITATIONS.

The saving in the 4th section of the act of limitations, 1 Rev. Code, 488, applies to the 7th section of the same act; by which an action between merchant and merchant is neither barred by one year, nor five years.

Moore v. Mauro, 488

LOST INSTRUMENT.

See Equity, No. 46.

MILITIA.

1. By the general law prescribing the duties of the Auditor, he is not authorised to issue a warrant for any claim not arising under some law or resolution of the General Assembly; and, therefore, a claim under the act of January 8th, 1814, for the passage of troops over a toll-bridge, who were in the service of the Commonwealth, but not taken into the service of the State by any law or resolution, cannot be sanctioned by the Auditor, but the redress of the claimant is by application to the Legislature.

Commonwealth v. Pierce's adm'r, 432

2. Expenses of the militia in time of war, under requisition of the United States, are properly payable by them; and if the State of Virginia consents to advance any portion of those expenses, she is under no legal or moral obligation to pay more. Ibid.

3. The act of January 8th, 1814, only provides for expenses necessary to place the militia under requisition for the service of the United States, at the appointed place of rendezvous. Ibid.

MILLS.

1. The law does not give power to condemn land for a tail race.

Coalter v. Hunter, &c., 58

2. What decree of certainty is necessary in an order for establishing a mill. Ibid.

MONEY HAD AND RECEIVED.

In what cases an action for money had and received is the proper action.

Brockenbrough v. Ward's Adm'r, 352

MORTGAGE.

1. See Sale, No. 4.

2. See Condition, No. 1.

3. The acceptance of the money by the mortgagee, after the day appointed for

payment, does not change the rights of the parties, at law.

Faulkner's Adm'r v. Brockenbrough, 245

4. See Unlawful Detainer, No. 2.

NEW TRIAL.

1. Where a plaintiff suffers a verdict and judgment to go against him at law, he cannot apply to a Court of Equity to grant him a new trial, on the ground of his having been surprised at the trial at law by unexpected evidence, unless he was prevented by fraud or accident from suffering a non-suit.

Oswald, &c. v. Tyler, &c., 19

2. Difference between a new trial and a venire de novo. By Carr, Judge.

Brown, &c. v. Ralston, &c., 504

NON EST FACTUM.

The plea of non est factum is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for.

Franklin v. Cox, 448

NORFOLK.

The act authorising an assessment for paving the streets of Norfolk, does not impose a lien upon the lots in the borough, for the payment of the assessment, but gives a personal remedy only, against the freeholders in possession, and not against remaindermen and reversionsers.

Moseley v. Boush, &c., 392

NOTICE.

See Equity, No. 38.

NUL TIEL RECORD.

In what cases the plea of nul tiel record is proper.

Wood v. The Commonwealth, 329

PARTIES.

1. See Injunction, No. 3, 4.

2. See Equity, No. 32, 33.

3. The parties that are necessary in a suit in equity, to remove the obstruction raised by a sheriff's sale for non-payment of taxes.

Nalle's Representatives v. Fenwick, &c., 585

PARTITION.

1. The power of a Court of Equity to decree partition, is governed by the same principles which govern cases of partition at law. It may decide on the rights of the parties to participate in the division, but not on the simple question of title to the land.

Stuart's heirs, &c. v. Coalter, 74

2. Tenants in common of personal estate cannot have partition at common law, and therefore, a Court of Equity is the proper tribunal to decree a partition of it.

Smith, &c. v. Smith, &c., 95

3. See Equity, No. 39, 40, 41.

PAYMENT.

1. See Sheriff, No. 5.

2. Where one man pays money for another at his request, the latter cannot resist the re-payment of it on the ground

that the original debt was not legally due. 681
Moseley v. Bonsh, &c., 392

PEDIGREE.

See Evidence, No. 10.

PLEADING.

1. The same strictness as to form, is not required in actions for freedom, as in other cases.

M'Michen v. Amos & al., 134

2. Where the defendant, in such an action, by his plea, protests that the plaintiff is his slave, and that he is not guilty of the assault, &c. the plaintiff replies, that "by reason of any thing by the defendant in protesting alleged, he ought not to be barred, &c." because he is a free person; and issue is joined on this replication; this issue, although irregular, will be sustained after verdict. *Ibid.*

3. See Non Est Factum.

POSSESSION.

No person has a right to divert a water-course on his own land, so as to turn it from the land of his neighbour lower down the stream; and if he claims that right from long enjoyment of it, he must prove that he has had adverse possession for upwards of twenty years.

Coalter v. Hunter, &c., 58

POWER.

Where a naked power is given by law to an officer or other person, that power must be strictly pursued, especially if such proceeding involve a forfeiture; and it devolves on him who claims a right under the exercise of such power, to shew that it was, in all respects, exactly pursued.

Nalle's Representatives v. Fenwick, &c., 585

PROBATE.

1. See Administration, No. 2.

2. The probate of a will cannot be called in question, after the lapse of seven years, no person appearing within that time to contest it.

Nalle's Representatives v. Fenwick, &c., 585

PROTEST.

1. Costs of protest of a note cannot be claimed in the declaration, if they are not demanded in the writ.

Hatcher v. Lewis, 152

2. See Bill of Exchange, No. 1.

3. In what cases a protest is necessary to maintain an action for freight.

Brown, & Rives v. Ralston & Pleasants, 504

PURCHASER.

See Creditors, No. 1, 2, and Sale, No. 4, 5.

RECORD.

1. See Amendment, No. 2, 3.

2. Papers inserted in the record by the clerk, cannot be considered as part of the record, unless they are made so by the party wishing to avail himself of them.

Cunningham v. Mitchell, 189

3. See Sale, No. 4.

4. No defect in a record can be supplied by averment.

Wood v. The Commonwealth, 329

*5. See Judgment, No. 5.

6. See Voluntary Conveyance, No. 2.

RENT.

See Distress, No. 1, and Equity, No. 23.

RUNAWAY.

See Jailor, No. 1.

SALE.

1. See Warranty.

2. A sale by a sheriff will be vacated, if he raises doubts or makes impressions, unfavourable to a fair sale, and then buys in the property at an under rate.

Carter v. Harris, 199

3. Such a sale will be void if the sheriff is the only bidder, or there is another who only gives a colour of fairness to the sale.

Ibid.

4. If a sheriff sell under execution a slave mortgaged by a deed not recorded, and void against the creditor, and he sells and the purchaser buys the property, subject to the claim asserted in the deed; the purchaser takes the slave subject to the payment of the mortgage debt. But if, in such case, the sheriff sells all the title that he has a right to sell in the property, under the execution, whether the deed be valid or void, the absolute title passes to the purchaser, discharged of any claim on the part of the mortgagee.

Guerrant v. Anderson, 208

5. A fair purchaser under a sheriff's sale, without knowledge of any improper conduct on the part of the officer, acquires a valid title to the property purchased, and the remedy of the party injured, is by action at law for damages against the sheriff. The same remedy applies, where a sheriff has improperly refused a forthcoming bond, when he ought to have received it.

Hamilton v. Shrewsbury, 427

6. See Power and Taxes.

SCIRE FACIAS.

When a recognizance is entered into before two justices, and it omits to state that it was taken in the county to which the justices belong, while the scire facias, in reciting the recognizance, sets forth the county in which it was taken, the variance will be fatal.

Wood v. The Commonwealth, 329

SET-OFF.

Joint and separate demands cannot be set off against each other; nor can partnership and separate demands be set off against each other.

Porter v. Nekervis, 359

SHERIFF.

1. A sheriff's return may be contradicted by evidence allunde; in which case the sheriff himself would be a competent witness to prove its truth. But after judgment by default, a party cannot object in an Appellate Court, to the truth of the return.

Cunningham v. Mitchell, 189

2. A sheriff who is interested in an execution cannot levy it himself.

Carter v. Harris, 199

3. See Sale, No. 2, 3, 4, 5.

4. In an action against the sureties of a sheriff for breach of duty, judgments obtained against the latter are not evidence against the former.

M'Dowell v. Burwell's administrator, 317

5. A payment to a sheriff in discharge of an execution, after the return day of the execution is passed, is not binding on the creditor.

Chapman, &c. v. Harrison, 336

SLAVES.

1. The act of 1778, prohibiting the importation of slaves into Virginia, applies only to those slaves who are brought in with the consent of the owner, and not to those imported by wrong-doers.

Sallust v. Ruth, &c., 67

2. See Pleading, No. 1, 2, and Verdict, No. 1.

3. See Appeal, No. 5.

4. Where a female slave is emancipated, with a reservation that her future increase shall be slaves, such reservation is void, and the woman and her increase are absolutely free.

Fulton v. Shaw, 597

5. Quære, how far a slave, who has been emancipated by one who had no title originally, but who has had a length of possession which bars a recovery by the true owner, can recover his freedom under such emancipation, against the person who had the original right?

Kitty v. Fitzhugh, 600

6. See Evidence, No. 13.

7. A man removing into this State with his slave, takes the oath required by the law of 1792; but it is doubtful upon the evidence, whether the oath was taken within 60 days after his removal. After a great lapse of time, it will be presumed that what had been done, was done rightly.

George v. Parker, 659

8. But if it does not appear by evidence or otherwise, that the oath was taken within 60 days after the removal of the master, the slave will be entitled to his freedom, when he has remained in the State twelve months. Ibid.

682

*SPECIALTY.

See Joint Action, No. 2.

SPECIAL VERDICT.

See Verdict, No. 1, 2.

SUBSCRIBING WITNESS.

See Evidence, No. 5, 6.

SUBSTITUTION.

1. Where A. gives his bond for duties imported into the U. States for B. the importer, and B. is not bound in the bond, if A. discharges the bond, it seems that he cannot be placed in the condition of the U. States, as to priority, in a claim against A. under the law of Congress.

Enders, &c. v. Bruue, 438

2. But upon general principles of equity, A. in such a case, will be substituted in place of the creditor (the U. S.) and have every preference that the United States were entitled to. Ibid.

3. Equity does not regard form but sub-

stance; and therefore it does not require that a surety shall be bound in the same bond with his principal, in order to make the doctrine of substitution operate, but merely that having bound himself for the debt of the principal debtor, he should have paid it. Ibid.

SURETY.

1. See Equity, No. 11, 12.

2. See Sheriff, No. 4.

3. See Substitution, No. 1, 2, 3.

TAXES.

Where land is sold by a sheriff for non-payment of taxes, it is incumbent on the purchaser to shew that all the steps have been taken, which the law requires in such cases. It seems that although the act of 1782 does not require four weeks advertisement in the papers, before land can be sold for non-payment of taxes, yet the act of 1781 is not repealed in this respect, which requires such a proceeding.

Nalle's Representatives v. Fenwick, &c., 585

UNLAWFUL DETAINER.

1. In a writ of unlawful detainer, under the act of 1814, the omission to state in the complaint the estimated quantity of the land in dispute, is not fatal, if the complaint contains a reasonably certain description.

Allen v. Gibson, 468

2. Under this act, a mortgagee may obtain possession of the mortgaged premises after forfeiture, by the mode of proceeding therein pointed out. Ibid.

3. This act gives a civil remedy for the immediate recovery of the possession, in certain cases, even where no force occurred. Ibid.

4. One tenant in common may have this remedy for the whole land, against any party having no right whatever, without joining his co-tenant. Ibid.

USURY.

1. To constitute usury, there must be an intention to take more than legal interest.

Childers v. Deane & Page, 406

2. The mistake of a scrivener in putting one sum for another, will not charge a party with usury. Ibid.

3. If a mode of calculating interest, which gives to the creditor more than legal interest, is adopted, and the creditor knows it will have that effect, he is guilty of usury, although he may not suspect that he is violating the law. Ibid.

4. In all cases, where a party applies to a Court of Equity for relief against an usurious contract, whether he alleges in his bill that he is able to prove the usury without the defendant's confession, or not, he can only be relieved upon payment of principal without interest, under the third section of our act of Assembly.

Young v. Scott, &c., 415

VENDOR AND VENDEE.

1. The vendor of real estate is not responsible for any defects of title, unless he has bound himself by some covenant or warranty to protect the vendee, or unless

he has been guilty of some fraud or concealment.

Commonwealth v. M'Clenachan's heirs, 482
2. See Commonwealth.

VERDICT.

1. A verdict may find generally for either party, dependent upon a single point of law presented to the Court, although such a verdict is not strictly a special verdict.

M'Michen v. Amos & others, 134

2. A special verdict must contain facts, and not evidence of facts.

Brown, &c. v. Ralston, &c., 504

VOLUNTARY CONVEYANCE.

1. A voluntary conveyance of personal property, by a party not indebted at the time, *is good against subsequent creditors, if the deed be duly recorded, or the possession remain solely and bona fide with the donee. Otherwise, it will be void by the Statute of Frauds.

Davis v. Payne's adm'r, 332

2. Such a deed cannot be recorded in a Corporation Court. Ibid.

WARRANT.

See Land, No. 2. Equity, No. 6.

WARRANTY.

By the common law, the vendor of personal property is not answerable for the quality of the thing sold, unless he either warrants its quality, or makes some false representation in respect to it, or knowing of the defect, omits to disclose it; and this is the law of Virginia.

Wilson v. Shackelford, 5

WATER COURSE.

See Possession and Equity, No. 4.

WILLS.

1. The intention is to govern in the construction of a will. Therefore, where a testator, who devises his real estate to his children, and also a sum of money to one of them, so that his estate, both real and personal, not specifically given, shall be brought into estimate, and divided in such manner as to make their portions equal; the sum of money bequeathed as aforesaid, shall be taken into the general estimate, although the terms specifically given, and estimate, do not strictly apply to money; it being the plain intention, inferred from the whole will, to make all his children equal.

Calloway, &c. v. Langhorn & Wife, 181

2. In the construction of wills, the first object is, to gather the intention of the testator from the whole will; and this intention must prevail, unless it violate some rule of law.

Land, &c. v. Otley, 213

3. Where a testator leaves one half of his estate to his wife for life, and the use of the other half to her until his child or children come of age or marry, with directions that his children shall be supported and educated out of his latter half; the wife had no interest under this will, which, upon her death before the children attained their age or married, was transmissible to her representatives. Ibid.

WRIT OF ENQUIRY.

See Joint Action, No. 1.



THE OPINION OF CHIEF JUSTICE MARSHALL IN THE CASE OF
GARNETT, EX'R OF BROOKE v. MACON, ET AL.

ADVERTISEMENT.

The subjects involved in the following Opinion, being of great and general concernment, wherever the principles of the Common and Chancery Law of England prevail; and the ability with which they are examined, induced me to believe that its publication would be acceptable to the profession.

The Opinion contains a full Statement of the Case, and of the positions and arguments of the Counsel.

Probably the following Abstract, will not be wholly unacceptable to the Reader.

What circumstances are indicative of an abandonment of a contract of sale, by a vendor. p. 12-3.

When the lands are charged with the payment of debts in the hands of the devisee; the creditor is bound to proceed against the Executor, and to exhaust the personal estate, before the lands become liable to his claim. p. 17, 18.

Since the proceeding against the personal representative, is, in substance, the foundation of the proceeding against the heir, or devisee; the argument for considering it as *prima facie* evidence against the heir, or devisee, may be irresistible; but it is not conclusive as an estoppel. pp. 17, 18.

A covenant never to put a bond in suit, is a release; and a release to one of several obligors, is a release to his co-obligors, whether they be bound jointly, or jointly and severally. But

A covenant not to sue one of several obligors, whether they be bound jointly and severally, or merely jointly, does not operate as a release to the others. pp. 21, 24, 27.

An Agreement by parol, cannot release an instrument of writing under seal. p. 29.

Where all the parties are before the Court, at the time of the Decree, and their several liabilities are clearly ascertained; it is the course of the Court, to Decree, in the first instance, against the party who is ultimately responsible. p. 30.

The creditor by receiving one moiety of his debt from one co-surety, does not thereby, injure the other;—nor can his liability be increased, nor his burthen augmented, by the agreement of the creditor, not to levy the remaining moiety, in any possible state of things, on the paying surety. p. 31.

Where a charge on lands is general, the purchaser is not bound to see to the application of the purchase money;—and there is no distinction, as to the operation of this rule, between a charge on lands which descend to the heir, or pass to a devisee, subject to the charge; and a devise to Exec-

utors, or other trustees, for the payment of debts. p. 34.

What degree of connivance on the part of the purchaser, in acts which may defeat the trust, will leave him responsible to the creditor. This question considered, and applied to the case—

Of a contract for the purchase of lands, equitably charged with the payment of debts, and notice of a debt given to the purchaser between the date of the contract, and the time when it is to be executed. p. 36, 37.

All persons acquiring property bound by a trust, with notice, are considered as trustees. p. 39.

A purchaser is subject to all the consequences of notice, if he receive it before payment of the purchase money. p. 39-40.

A purchaser with notice, must take the subject clothed with the trust, unless he can bring himself with the principle, that he is not bound to see to the application of the purchase money,—this principle examined. p. 39-42.

The purchaser of a chattel from an Executor, is not liable for the application of the purchase money, although such chattel be given in trust for a special purpose, or be itself a specific legacy. But if the Executor sells to a person who knows that there are no debts, or that all the debts are paid, or at such undervalue, as to indicate fraud, or for payment of his own debt, the purchaser will take the property subject to the trust. p. 44.

The principle of the cases which support this position, seems to be applicable to freehold estates charged with the payment of debts. p. 45, 49.

The principle by which a Court of Equity is governed, in enforcing the specific performance of contracts. p. 15.

A specific performance will not be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make, be unquestionable. This rule is not confined to cases of doubtful title. It applies to incumbrances of every description, which may, in any manner, embarrass the purchaser in the full and quiet enjoyment of his purchase. p. 51, 52.

The present doctrine of the Court of Chancery of England, and of the Courts of the United States, is, that where time is really material to the parties, the right to a specific performance, may depend upon it. p. 54.

A very great change in the value of the article, constitutes a serious objection to a decree for a specific performance, when claimed by the party whose fault it is, that the contract has not been executed. p. 57.

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CIRCUIT COURT OF THE UNITED STATES,

FIFTH CIRCUIT, EASTERN DISTRICT OF VIRGINIA, (EQUITY SIDE.)

OPINION OF THE COURT DELIVERED BY

THE HON. JOHN MARSHALL, CHIEF JUSTICE OF THE UNITED STATES.

Garnett, Ex'r of Brooke, v. Macon
and Others.

Stanard and Leigh, for Plaintiff.

Call, Wickham and Wm. Hay, for Defendants.

This case was elaborately argued, May Term, 1825. On the 25th November, 1825, the following opinion was delivered by MARSHALL, Chief Justice.

Richard Brooke, by his last will, empowered his ex'rs, to sell his whole estate, and William Garnett, the plaintiff, alone proved the will, and took the executorship upon himself.

10 *On the 10th of June, 1818, William Garnett, sold the estate called Mantipike, to William H. Macon, the defendant, "for the sum of twenty-two dollars per acre; six thousand dollars of which are to be paid on the first day of January next, when possession will be given, and the balance in two equal annual payments from that date, which said two last payments, are to be secured by mortgage on the said land. The said William Garnett farther agrees to put the present corn-field land, in wheat, the said William H. Macon furnishing the seed. And it is farther agreed, that the said William H. Macon is to have power to make this agreement valid in one month from the date hereof, or to make the same null, and of no effect, by giving due notice to the said William Garnett, to that purport, within the time aforesaid."

On the 22d of August, William H. Macon, paid William Garnett, four thousand dollars, in part of the first payment; but having received notice afterward, that George Brooke, who devised Mantipike to Richard, had by his last will, charged his whole estate with the payment of his debts; and had in his life-time, become surety for Carter Braxton, in a large sum, to Robert Campbell, for which a Decree had been pronounced in the Court of Chancery, against Carter Braxton, Robert Price, ex'r of George Brooke, and against the representatives of Robert Page, who was also surety for Carter Braxton, which Decree was affirmed in the Court of Appeals, in October, 1799, and remains unsatisfied; and being advised by Counsel, that he, having notice thereof, the estate called Mantipike, would be charged with the said debt in his hands; he, on the 16th of December, addressed the following letter to the plaintiff:

"Sir, I am informed that Colonel George Brooke, the former owner of the
11 Mantipike tract *of land, became Carter Braxton's security for a large

debt to Robert Campbell, and by his will, charged his lands with the payment of his debts; that the debt to Campbell is still due, and that the Mantipike lands are liable to be sold for the payment thereof. I, therefore, think proper to inform you, that I consider the contract, which I made with you, for the purchase of the said tract of land, as void; and request you, to return me the four thousand dollars, which I paid you, in part of the purchase money, with interest.

"I am Sir, very respectfully,
"W. H. MACON."

On the 26th of the same month, William Garnett, instituted his suit, in the Court of Chancery, of the State, against William H. Macon, and against the representatives of Robert Campbell, praying for a specific performance of the contract, and insists in his Bill, that the estate called Mantipike, would not be chargeable with the debts of George Brooke, in the hands of a purchaser, and insists also, for several reasons, which are dilated at length, that George Brooke, was not liable for the debts to Campbell, and that his devisees were not bound by the Decree against his Ex'r or estopped from contesting the claim.

The Chancellor was of opinion, that Brooke had been released by the conduct of Campbell, and that a specific performance of the contract ought to be decreed, and directed an account of the rents and profits of the state received by the Plaintiff, since the sale; but, information was received of Campbell's death, on which the suit abated, as to him, and was revived against William Keith, his representative, who appeared, and petitioned that the cause should be removed into this Court; which was ordered accordingly. Keith, as the representative of Campbell, has also filed a Bill against the representatives, heirs and devisees of George Brooke, praying that
12 *his debt may be paid; and to this Bill, William H. Macon, is made a Defendant; but this suit is not ready for trial.

In May, 1820, William H. Macon, filed his answer, in which he insists, that he ought to stand discharged from his contract, on account of the lands being incumbered with Campbell's debt, of which he had no notice, and that he purchased, "supposing the said Mantipike tract of land was free from incumbrances and charges of all kinds, except a mortgage by Richard Brooke to General Young, which was represented as of no great moment, and which

the complainant was to pay off, before he made a deed for the land to this defendant, but has failed to do so, as this defendant understands."

He says, that on examining the records, which he did, in consequence of receiving notice of Campbell's debt, he found the question to be so perplexed and intricate, that the controversy would probably not be determined during his life, in consequence of which, he resolved to abandon the contract, and addressed a letter to the Plaintiff giving notice of his resolution. That in consequence thereof, as he presumes, the complainant kept possession of the tract of land, failed to tender a deed to the Defendant for it, or to demand the instalment in January, 1819; and paid for the seed wheat which Macon had purchased to seed the corn-field, according to the written contract; thus exhibiting every mark of a reciprocal abandonment of the contract on his part; and he gave no indication to the contrary till the institution of this suit, several months afterwards.

In argument, the first point which has been made by the Defendant Macon, is, that the contract was abandoned by both parties.

It is not pretended that there has been any express or formal abandonment on the part of the Plaintiff. The allegation is, that it is to be implied from his conduct.

To sustain this implication, the conduct of *the vendor, ought to be such, as to justify a reasonable man, in believing that he acquiesced in the decision of the vendee, to abandon the contract; it ought to be such as might reasonably influence the conduct of the vendee, and induce him to regulate his own affairs on the presumption that he was no longer incumbered by his contract. The attempt of the vendor to re-sell the estate, or the unequivocal exercise of ownership over it, unaccompanied with any explanation showing that he still considered the contract as binding, might be such an act; but there has been no attempt to re-sell the estate, or any unexplained act of ownership over it. On the contrary, a subpoena was taken out within ten days after the date of the letter of abandonment, and the Bill, since filed in consequence of this subpoena, claims a specific performance.

Had the Bill been immediately filed, and the subpoena executed, this point, it is presumed, would not have been made; but the Bill was not filed until June, 1819, and the subpoena was not returned executed, until January, 1820.

From these circumstances, the counsel for the Defendant, claim the same advantages to their client, as if the Plaintiff had acquiesced silently in his letter of the 16th December, 1818, until the service of the subpoena informed him, that a suit was depending. But I do not think this claim can be supported.

No laches are imputable to the Plaintiff. His determination to insist on the contract, seems to have been immediate; and the measures taken by him in pursuance of that determination were sufficiently prompt. A subpoena was issued, on the 10th day after the date of Colonel Macon's letter,

but there was not time to execute it. New process was directed, and the law makes it the duty of the officers of the Court, to attend to that process. I do not think the delay which took place in executing

14 it, *can be justly imputed to Colonel Garnett, nor ought any forfeiture of right to be the consequence of that delay, unless some injury to Colonel Macon, had resulted from it. No injury is shown or alleged, nor is it probable that any can have arisen. From the vicinity of the two gentlemen to each other, their rank in life, the common conversations which grow out of such controversies, the interest which the parties took in it, and the enquiries they would naturally make, it is not reasonable to suppose, that while the vendor was in fact actively pressing his suit, and continually issuing new process, the vendee could act upon the presumption that he had abandoned his contract. But if these circumstances, which generally accompany transactions of this character, cannot be considered as belonging to this cause, the record, I think, furnishes satisfactory evidence, that Colonel Macon, was apprised of the determination of Colonel Garnett, to insist on the specific performance of the contract. Thomas G. Smith, deposes to a conversation with Colonel Macon, in which that gentleman said, that though, the counsel consulted by him had been of opinion that Mantipike was bound for Campbell's debt, the counsel consulted by William Garnett had advised otherwise, and that William Garnett said, he did not think himself at liberty, as a representative, to cancel the bargain.

The deposition of James M. Garnett too, though less explicit, bears on the same point. The very fact, that the vendee did not repeat his demand for re-payment of the four thousand dollars, he had advanced, shews, that he did not suppose the vendor had relinquished the contract.

Since then, the vendor did never in fact, relinquish the contract, but took early measures to enforce its specific performance; since the delay which took place in the service of process, did not proceed from him, and did not produce any real

15 *mischief to the vendee, I cannot think that the right to enforce a specific performance is in any degree affected by that delay.

It has been also argued, that the vendor ought to have done all that was required from him, by the contract. He ought to have tendered possession and a conveyance, on the first of January, 1819.

He certainly might have done so. But when it is recollected that previous to the first of January, 1819, he had received a letter from the vendee announcing his determination not to receive possession, or a conveyance, and had himself resorted to the laws for that remedy, which they afford for a broken contract, I cannot think that the omission, if it may be so termed, ought to vary that remedy, so far as respects a specific performance, whatever might be its influence on other questions which would arise in the cause, should the contract be carried into execution.

I come now to consider the validity of

the objections made by the vendee, to a specific performance of the contract, supposing it not to be abandoned. He complains, that the title is incumbered and embarrassed with liens, of which he had no knowledge when the contract was made; and which would certainly have deterred him from making it, had they been communicated to him.

A Court of Equity, compels the specific performance of contracts, because it is the intention of the parties that they shall be performed. But the person who demands it, must be in a capacity to do, substantially, all that he has promised, before he can entitle himself to the aid of this Court. At what time this capacity must exist, whether it must be at the date of the contract, at the time it is to be executed, or at the time of the Decree, depends, I think, upon circumstances, which may vary with every case. There is no subject which more requires the exercise of a sound discretion. The enquiry in every case of the kind, must be, whether the vendor

16 "could at the time, have conveyed such a title, as the vendee had a right to demand? If he could not then, whether he can now? And if he can, whether there has been such a change of circumstances, that a Court of Equity, ought not to compel the vendee to receive it? The first and great objection to the title, is the lien supposed to be imposed on the Mantipike estate, by the will of George Brooke, for the payment of his debts.

In the year 1781, George Brooke, made his last will in writing, in which he devised as follows:—"After my just debts are paid, I give and dispose of the remainder of my estate, in the manner following" &c. The testator was then seised and possessed of Mantipike, which he devised to his son Richard. Richard Brooke, entered upon the property devised to him, and remained in possession of it, until his death, which happened in the year 1816. By his last will, he empowered his Executors, or such of them as might act, to sell his land. William Garnett the Plaintiff, alone qualified as Executor to the will, and sold the land to the defendant William H. Macon, without any intimation of the existence of Campbell's claim, or that George Brooke had charged his land with the payment of his debts.

He, now contends, that this claim constitutes no obstacle to a specific performance, of the contract, because:—First, it was not one of George Brooke's just debts, at the date of his will, or at the time of his death. Second, if it was a just debt, it does not charge the estate in the hands of William H. Macon.

First. Is the claim now made by Keith, on the part of Campbell, for a debt legally due from the estate of George Brooke, deceased?

As the suit for that claim is now pending, and is not yet ready for hearing, any positive decision respecting it, would, perhaps, be premature. It is, however, in the power of the Court, to form opinions

17 on some points of that case, subject, indeed, to future revision; because the facts on which those points must cer-

tainly depend, are in the record; and it may be proper to do so, because, if the claim be obviously unfounded, the course of the Court would be different from what it ought to be, if any strong presumptions exist in its favour.

The Defendants insist, that the Decree against the personal representatives of George Brooke, is conclusive evidence against his devisee, of the existence of the debt.

The cases cited by counsel, in support of this proposition, do not decide the very point. Not one of them brings directly into question, the conclusiveness of a judgment against the Executor, in a suit against the heir or devisee. They undoubtedly, show, that the Executor completely represents the testator, as the legal owner of his personal property, for the payment of his debts in the first instance, and is, consequently, the proper person to contest the claims of his creditors. Yet, there are strong reasons for denying the conclusiveness of a judgment against an Executor in an action against the heir. He is not a party to the suit,—cannot controvert the testimony,—adduce evidence in opposition to the claim,—or appeal from the judgment. In case of a deficiency of assets, the Executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir, who does not claim under the Executor, should be estopped by a judgment against him.

In the case against Munford's heirs, in this Court, the question was decided against the conclusiveness of such a judgment, and I am not satisfied that the decision was erroneous.

This case, however, varies from that, in a material circumstance. In that case, the heir was bound by the obligation of the ancestor, and was liable to 18 "the creditor directly. In this case, the creditor is bound to proceed against the Executor and to exhaust the personal estate before the lands become liable to his claim. The heir, or devisee, may indeed, in a Court of Chancery, be united with the Executor in the same action, but the Decree against him, would be dependant on the insufficiency of the personal estate. Since, then, the proceeding against the Executor, is, in substance, the foundation of the proceeding against the heir, or devisee, the argument for considering it as prima facie evidence, may be irresistible, but I cannot consider it as an estoppel. The judgment not being against a person representing the land, ought, I think, on the general principle, which applies to giving records in evidence, to be re-examinable when brought to bear upon the proprietor of the land.

It was said, but not pressed, by the counsel for the Plaintiff, that the Decree of the Court of Chancery, was not even prima facie evidence against the representatives of George Brooke. I do not concur with him in this proposition; but if I did, it would not, I think, materially affect this case. The Decree was against Braxton, as well as against the representatives of

Brooke and Page; and is admitted to be conclusive against Braxton and his representatives. They could never be permitted to deny that Braxton owed Campbell the money specified in that Decree.

The undertaking, on which the Decree was pronounced against Brooke's ex'r is dated in 1775, and promises, under seal, to stand security for Braxton to Campbell, for the sum then due. This sum is fixed by the Decree against Braxton; and the defence now set up for Brooke, does not controvert that Decree as to Braxton, but insists on several circumstances which, as they contend, discharge Brooke from the liability incurred by his undertaking, as Braxton's surety.

19 *The first of these is, the release of Broad-neck, which had been mortgaged for the debt, in 1769, when the Bills drawn by Braxton and sold to Campbell, came back protested. William Aylett and George Brooke, became sureties to Campbell for this debt.

On the 21st day of May, in the year 1773, Campbell joined Braxton in a conveyance of the mortgaged premises to John Shermer, which it recorded in September of the same year. On the 15th of December, 1775, Aylett and Brooke transmit to Campbell an instrument of writing under seal, which after reciting a former undertaking as sureties for Braxton, contains these words: "We therefore, in consideration of our former agreement, do promise and oblige ourselves to stand security for the said Braxton to the said Campbell, his heirs, executors, administrators and assigns, for the sum of money now due from the said Braxton to the said Campbell."

It is contended for the Plaintiff, that this suretyship was probably undertaken, in the confidence that the mortgaged property was amply sufficient to discharge the debt, and that Campbell, by releasing this property without the consent of the sureties, discharged them.

There would be great force in this objection, had the release of the mortgaged premises been dated subsequent to the engagement made by Aylett and Brooke. But that engagement was dated in December, 1775, and the deed of conveyance by Braxton and Campbell to Shermer, was recorded in September, 1773. No evidence exists, that either the mortgage or its release, was communicated to Aylett or Brooke, other than the presumption arising from the notoriety of such transactions, and from the fact that both deeds were recorded. These circumstances are precisely as strong to prove a knowledge of the deed to Shermer, as of the deed to Campbell.

20 *were it even proved that the first bond of Aylett and Brooke, anteceded the deed to Shermer. The undertaking made in December, 1775, cannot be presumed to have been induced by a deed of mortgage which had been released more than two years, and although it is expressed to be made in consideration of the prior undertaking, yet that prior undertaking would not have been renewed, under circumstances, which, in the opinion of the parties themselves absolved them from it, both in law and conscience. The fair in-

ference from this renewal is, that the parties being mutual friends, the conveyance to Shermer was with the knowledge and assent of all.

The second objection arises from a fact, which is considered as an implied release of Aylett from his joint obligation with Brooke.

On that instrument, is this indorsement, "August 6th, 1777, I do oblige myself to perform every engagement that Colonel William Aylett, was bound by the within, to perform, and to be considered as one of the securities of Wm. Braxton, in the room of Colo. Aylett. Witness my hand, this 6th day of Aug. 1777. "ROBERT PAGE."

It is contended, that this indorsement must be considered as made with the consent of Campbell, who, from its terms, and from suing the representatives of Brooke and not of Aylett, must be considered as having agreed to discharge Aylett.

The inference is, I think, a fair one. The instrument always remained in possession of Campbell, who must be presumed to have been privy and assenting to the indorsement; and who has avowed it, by his suit.

It is insisted, that the legal effect of this agreement is to discharge Brooke as well as Aylett, because the release of one joint obligor, releases the other.

It is obvious that the release of Brooke was not *contemplated by the parties. If such be the effect of the instrument; an operation is given to the words, which they do not naturally import, and which the parties could never have foreseen or intended. If a positive rule of law require such a construction, the Court must make it; but the construction can be justified only by a positive and well settled rule. The common rule of law, and it seems also, to be the rule of reason, is, that words shall subserve the intent; but when the reverse of this rule is to be adopted, and both the words and the intent of an agreement are to yield to a technical principle, that principle ought to be sustained by decisions of unquestionable authority, the application of which, cannot be doubted.

The principle is, that a covenant never to put a bond in suit, is a release; and, it is also settled, that a release to one of several obligors, is a release to his co-obligors.

Both these points, have been frequently decided; and the Plaintiff is certainly entitled to the benefit of those decisions, as far as they apply to his case.

The principle will be found in any abridgment, (a) or general treatises on the subject, with a reference to the cases, which establish it. In no one of them, does the obligation contain any other party, than him with whom the covenant is made. In all of them, the covenant, if broken, gives a right of action to the parties bound in the obligation, and the measure of their damages is given by the recovery of the obligee in his suit against them. If A. is bound to B. in an obligation, and they enter into a covenant, stipulating that it shall never be put in suit, notwithstanding

(a) See 5 Bac. Abr. Tit. Release (A) 2, p. [688] Ed. Gwill.

which B. puts it in suit, this breach of covenant gives A. an action against B. in which he must recover in damages, precisely the sum to which the judgment obtained by B. may amount. To avoid circuity of action, this covenant may be pleaded as a release.

22 *Thus far the cases go; and if there be one which goes farther, I have not found it. To bring himself within their letter, Brooke, ought to show a covenant, in which Campbell stipulates with Aylett and himself, never to put their bond in suit. To bring himself within their spirit, he ought to show some agreement giving him an action against Campbell, in which his right would be commensurate with any judgment Campbell might obtain against him. In such a case, and in such a case only, would the principle of the decision relied on, apply; because, in such a case only, the sole effect of leaving the instrument to operate according to its language, would be to produce circuity of action. In such a case too, the parties can have no other intention than to defeat the obligation. It is the sole object and effect of their covenant. To construe such an instrument then, as a release, is to give it the effect intended by the parties.

I think the proposition may be stated, without fear of its being disproved by the books, that a covenant containing no words of release, has never been construed as a release, unless it gave to the party claiming that construction, a right of action, which would precisely countervail that to which he was liable; and unless also, it was the intention of the parties, that the last instrument, should defeat the first.

This general view of the precedents on which the plaintiff relies, would be sufficient to satisfy my mind, that they do not apply to the case under consideration, had not the contrary opinion been urged at bar, with all the earnestness of conviction, and been supported by an authority, given on the case itself, which is entitled to the utmost respect. I shall, therefore, look farther into the question, and examine some cases and principles, which are adverse to the construction claimed by the Plaintiff's counsel.

23 *Lacy v. Kynaston, (2 Salk. 575, 12 Mod. 551.) [2 Ld. Raym, 688.] was in substance this.—Articles were entered into by the members of a company of comedians, binding themselves, to pay one hundred pounds, to the representative of the Plaintiff's intestate, who was a member of the company, within three months after his death, should he continue to act during his life. The action was brought against Kynaston, who was also a member of the company, and the declaration avers, that Plaintiff's intestate, did continue to act during his life. The Defendant pleads in bar, articles subsequently entered into, by the same parties, including the Plaintiff's intestate, stipulating jointly and severally, that if the Defendant, Kynaston, should give notice of his intent to give over acting in said companies he should be free and discharged of and from all debts, &c. entered into by him, on account of the company, and that the Plaintiff's intestate, and

the rest, should save harmless and indemnify the Defendant, from all such debts, &c. or any matter or thing relating to the company. To this plea, the Plaintiff demurred and the only question was, whether the articles amounted in law to a defeasance or release, or were to be construed only as a covenant. The Court was of opinion, that it was only a covenant, for several reasons, which are assigned in the opinion. In discussing the question, the principle, that a perpetual covenant amounts to a release, was particularly considered, and the reason given for construing such a covenant as a release, is to avoid circuity of action, "Because" says the Court, "there, one should precisely recover the same damage that he had suffered by the others suing the bond. A. is bound to B. and B. covenants never to put the bond in suit against A., if after B. will sue A. upon the bond, he may plead the covenant, by way of release. But if A. and B.

24 be jointly and severally *bound to C. in a sum certain; and C. covenants with A. not to sue him, that shall not be a release, but a covenant only; because the covenants only, not to sue A. but does not covenant not to sue B. for the covenant is not a release in its nature, but only by construction, to avoid circuity of action; for when he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant, and no more." The same point was determined in Dean v. Newhall, (8 T. R. 168,) in which the authorities were reviewed at length, and a decision of great importance was taken, between an actual and a constructive release.

It has been insisted by the Plaintiff's counsel, that these cases do not apply, because they relate to obligations which were joint and several; whereas, the obligation of Aylett and Brooke was joint.

This objection merits consideration.

It is admitted to be law, that a release to one of several obligors, whether they be bound jointly, or jointly and severally, discharged the others, and may be pleaded in bar, by all. (2 Saund. [48 a] note; 2 Salk. 574; 12 Mo. 550.) That the obligation is joint, or joint and several, then, can make no difference, if there be an actual release. The difference, if there be any, consists in the construction of the instrument. The same words, it may be contended, would amount to a release of a joint obligation, which would not release one which was joint and several.

Has this ever been so determined? I can only say, if it has, I have not found the case. In the absence of authority, the proposition must rest upon its reasonableness, and on analogy.

The reason assigned by the Plaintiff in support of this distinction, is that which is given by the Court in Lacy v. Kynaston. In case of an obligation which is several as well as joint, the Plaintiff may still sue

25 the obligor, to whom the covenant does not apply, *without violating his engagement, or subjecting himself to a suit; whereas, if the obligation be joint only, both obligors must be joined in the action. There is certainly much in this argument, which deserves consideration.

Without admitting its conclusiveness, which I am far from doing, it is necessary, as an indispensable preliminary to its application to the cause at bar, to shew that the indorsement on the bond of Aylett and Brooke, amounts to an agreement on the part of Campbell, not to sue Aylett, on which agreement Aylett might recover damages equivalent to those he had sustained by the suit.

I do not think this is shown. Aylett is no party to the indorsement, and it is only upon the intention, that Campbell can be considered as coming under any stipulation to him. What, then, was his intention? Certainly not to discharge the obligation. The indorsement supposes the obligation to remain in full force, and is received in the confidence, that it does remain in force. It may well be doubted, whether a destruction of the obligation would not also destroy the indorsement; for, Page agrees only to stand in the place of Aylett, in the obligation, and if that be annulled, it is by no means clear, that Page is bound to any thing. Were this even otherwise, it is very certain, that Page would be placed in a situation entirely different from what he intended. If the indorsement is to be considered as a substantive agreement, referring to the obligation, for the sole purpose of ascertaining the sum for which he was bound, and remaining in force after the destruction of that obligation, then Page would be liable to Campbell for the whole debt, without retaining that recourse against Brooke for a moiety of it, which Aylett certainly possessed. He would not then stand in the room of Col. Aylett, as the indorsement imports, but in the room of both Aylett and Brooke, which the indorsement does not import. To construe

26 **Campbell's* assent to this indorsement, then, as an agreement not to sue Aylett, if the effect of that agreement would be to destroy the obligation, would be to defeat the plain intention of the parties, and effect an object they designed to guard against. This is not to be tolerated, if the act can be otherwise construed. I can perceive no difficulty in doing so. The intention of the indorsement, being to secure Col. Aylett, against the claim of William Campbell, and to transfer his liability to Mr. Page, leaving Mr. Brooke still bound, the indorsement must be so construed, as to give full effect to the whole of this intention, so far as its words will justify. Now, if by supposing an agreement on the part of Campbell not to sue Aylett, we plainly defeat the intention of the parties, and probably annul the instrument itself, we ought not to suppose such an agreement, but some other more congenial to their views. Their object would be effected by joining Aylett in the suit on the obligation, and either not proceeding to judgment against him, or not using the judgment when obtained. If it were true, that the suit could never be brought against Brooke without joining Aylett, in the writ, it would be much more rational to suppose that an agreement for his security, omitting to describe the mode by which it was to be effected, was to be carried into execution by means consistent

with other objects plainly intended by the parties, than by means which must defeat those objects.

The respect which the law, in all such cases, pays to the intention with which an instrument is executed may receive some illustration from the difference between the construction of a perpetual and of a temporary covenant, not to put a bond in suit. Precisely the same words, which, in a perpetual covenant, is a bar to an action, cannot, if used in a temporary covenant, be pleaded to an action brought during the suspension. Why is this? If the perpetual covenant can bar the action for ever 27 why **may* not the temporary covenant be pleaded to an action brought while the suspension exists? The reason of the distinction is founded in the principle, that a personal action once suspended, is gone for ever. Although, therefore, it is the intention of the parties to suspend the action, and although this intention is expressed by their words; yet as the consequence of giving effect to this intention would be to destroy another more important object;—the validity of an instrument not designed to be destroyed,—such a covenant is not allowed to constitute, even a temporary bar, but the party injured by its breach must take his remedy by a cross action upon it.

On general principles, then, I should, in the absence of express authority, be led to the conclusion, that a covenant with one of several joint obligors not to sue him, could not be pleaded as a release. But the very case, has, I think, been decided.

In *Hutton v. Eyre* (1 Marshall, 603, [6 Taunt. 289,]) which was cited by Mr. Call, the action was brought for money paid to the use of the Defendant. The Plaintiff and Defendant being partners, entered into a deed on the 26th August, 1809, to dissolve their partnership, on the 1st of January, 1810; and agreed that neither would in the meantime, contract any debt on the credit of the firm. On the 27th of October, 1810, the Defendant executed an assignment of all his property to Trustees, for the benefit of his creditors; in consideration of which, the creditors covenanted and agreed with the Defendant not to sue him, on account of any debt due to them from him; and that in case they did sue him, the deed of assignment should be a sufficient release and discharge for him. The Trustees sold the property assigned to them, and paid five shillings in the pound, to the creditors, after which, the Plaintiff paid the residue of certain debts, contracted by the defendant between the date of the agreement and the time of dissolution, on the credit 28 **of* the firm, for which this suit was brought. It was contended for the Defendant, that the covenant not to sue him, being perpetual, was a release, not only to him, but to his partner also; and that the payment, being voluntary, gave no cause of action.

It is observable, that this case, is stronger than that under consideration would be, did the indorsement made by Page, on the bond of Aylett and Brooke, even contain a stipulation that no suit should be brought against Aylett, because, the instrument pro-

vides expressly, that in case suit should be brought, the deed of assignment should be a sufficient release and discharge.

In delivering the opinion of the Court, Lord Chief Justice Gibbs, noticed the cases of *Lacy v. Kynaston*, and *Dean v. Newhall*; but observing the circumstance, that those cases were on joint and several obligations, and were therefore, not direct authority for the case before the Court, he added, "we must look at the principle on which the rule has been applied, that a covenant not to sue, shall operate as a release. Now, where there is only A. on one side, and B. on the other, the intention of the covenant by A. not to sue B. must be taken to mean a release to B. who is accordingly, absolutely discharged from the debt, which A. undertakes never to put in suit against him. The application, therefore, of the principle, in that case, not only acts in prevention of the circuitry of action, but, falls in with the clear intention of the parties. But in a case like the present, it is impossible to contend that, by a covenant not to sue the defendant, it was the intention of the covenantors, to release the Plaintiff, who was able to pay what his partner might be deficient in. It would have been an easier and a shorter method to have given a release, than to make this covenant. The only reason, therefore, for their adopting this course, was, that they did not choose
29 to execute "a release to the Defendant, because, that would also, have operated as a release to the Plaintiff; whereas they considered that a bare covenant not to sue the Defendant, would not extend to his partner. As, therefore, the terms of the covenant do not require such a construction, and as such construction would be manifestly against the intention of the parties, we are decidedly of opinion, that it ought not to be permitted so to operate."

I can add nothing to the language of Chief Justice Gibbs, to show farther the direct application of this case to that under the consideration of the Court. That this, was not a joint obligation, but a joint assumption, constitutes, I think, no difference in the cases.

In considering a principle of construction, which rests entirely on a technical and positive rule, as defeating a plain intention it may not be altogether improper to consider the action of other technical principles on the case.

It is clear, that if this indorsement be construed as an agreement between Campbell and Page, who is a stranger to the bond, it cannot release Brooke, the obligor. This is expressly stated by the Court in the case of *Lacy v. Kynaston*. But if it be considered as an agreement between Campbell and Aylett, still, it is an agreement by parol only, and an agreement by parol, cannot release an instrument of writing under seal. This subject is discussed in 2 Saunders, 47 in a note of Mr. Williams. Brooke does not allege satisfaction of the contract, but a discharge from it. He does not allege performance, but that he is not bound to perform. The instrument which will sustain such a defence,

must be of equal dignity, with that which it professes to dissolve.

According to the best view I can take of the question, I cannot consider the indorsement made by Page on the bond of Aylett and Brooke, as implying any
30 *agreement on the part of Campbell, which could be used by Brooke in Law or Equity as a release.

The next objection to Campbell's claim is, that the estate of Robert Page, ought to be exhausted, before recourse is had to Brooke; because in June, 1792, Braxton mortgaged sundry slaves to Page and White, to indemnify Page, on account of his suretyship, and White, for suretyships entered into by him. Braxton was afterwards taken in execution at the suit of Richard Adams, upon which, Page and White, agreed that a sufficient portion of the mortgaged property should be sold to discharge the execution. It is contended on the part of Brooke that he has an equal interest with Page, in this mortgage, that it was the duty of Page, to see to its application to the discharge of the debt, for which they were both bound, and that he is liable first, for his negligence in allowing the property to be wasted; and secondly, for having allowed a part of it to be applied to a different object.

As Campbell was not party or privy to this transaction, it can give Brooke no claim on Campbell, were it even admitted to give him an equity against Page. It is undoubtedly the course of the Court, to Decree in the first instance, against the party who is ultimately responsible; but this is only done where the parties are before the Court, at the time of the Decree, and their several liabilities, are clearly ascertained. It would be alike unprecedented and unreasonable, to anticipate, in this action, the liability of Page to Brooke, for a transaction not before the Court; and to compel Campbell to resort to that liability, and to forego his direct claim on his immediate debtor, and that without any proof of the competency of Page's estate, to satisfy the unascertained equity of Brooke. The unreasonableness of such a pretension seems so obvious, that I presume it is brought forward only on account of its connection with a subsequent transaction between Page and Campbell.

31 *On the 6th of June, 1821, articles of agreement were entered into between the representatives of Page, and the Attorney in Fact, of Campbell, in which Campbell agrees in consideration of one moiety of the whole debt paid by Page's representatives, not to proceed against them, for satisfaction of any part of the Decree which might be obtained against the representatives of Page and Brooke; but this agreement is to be without prejudice to his right to pursue the other Defendants, till the other moiety of the debt should be satisfied, "and the said Campbell farther covenants, that the representatives of Page, shall never be made to contribute any thing to the estate of George Brooke, on account of any payment, the said Brooke's estate may be Decreed to make to the said Campbell."

This agreement not to levy the Decree,

which might be obtained against the representatives of Brooke and Page, upon the estate of Page, which had already paid one moiety of the whole debt, is in terms, which exclude the idea of being technically a release of the action, for that is to proceed, as if the agreement had not been made. The representatives of Brooke, can avail themselves of it so far only, as it raises an equity in their favour, against Campbell. What is this equity? It cannot be contended, that receiving one moiety of the debt from Page, is an injury to Brooke; *Ex Parte*, Gifford, (6 Vesey, jun. 805;) nor can he be injured by the agreement, not to levy Brooke's moiety, in any possible state of things, on Page. The liability of Brooke cannot be increased, nor his burden augmented by this transaction. It may be diminished, because his possible liability for more than a moiety of the debt, is removed. Can the covenant that the representatives of Page shall never be made to contribute any thing to the estate of

George Brooke on account of any payment the *said Brooke's estate may be decreed to make to the said Campbell, give Brooke an equity against Campbell?

To sustain this, it will be necessary to prove, that the estate of Brooke has an equity against that of Page, and that it is deprived of that equity, by this agreement. The amount of this injury, is the precise extent of Brooke's claim upon Campbell.

Brooke's equity against Page, is founded on the agreement that a part of the property mortgaged to White and Page, might be applied in payment of the debt due from Braxton to Adams, and on the failure of Page to apply the mortgaged property to Campbell's debt.

This mortgage was obtained for the benefit of Page and White, in proportion to their respective responsibilities, and it will not, I presume, be denied, that they are to be completely exonerated, before any equitable claim on the fund, can accrue to Brooke. How far Mr. White may have been relieved, does not appear, nor is it shown that one cent arising from this property, has ever been applied to the use of Mr. Page. Admitting him to be responsible for the sum paid to Adams, his responsibility can be only for the excess of that sum, over the debts the mortgage was intended to secure, and Brooke ought to show that excess. Its existence is not, and cannot be pretended.

As little foundation is there for the claim growing out of the alleged negligence of Page.

It will scarcely be pretended, that one of two sureties who obtained an indemnity for himself, becomes thereby responsible to the other, for that other's moiety of the debt, however insufficient the thing given as an indemnity may be, even to secure himself. If this cannot be pretended, it will certainly be required from the person who claims the residue, to show, that there was a residue, and that it has been lost to him, by the fault of the party whose

responsibility *he alleges. His difficulties would not, even then, be overcome. The enquiry would still be, why did

he not himself proceed to assert his equity, by calling on the mortgagee and mortgagor to apply the fund to its proper object, and thereby relieve him to the extent of his right. But I enter not into this enquiry because the subject is not, and probably never will be, before the Court. It is enough to say, that this equity cannot be assumed in this suit, to the discharge of Brooke's debt to Campbell.

I will barely add, to prevent my being understood as deciding any thing, which might affect a point, not strictly before the Court, that I do not mean to indicate any opinion whether the contract between Campbell and Page, could, or could not, influence any claim of Brooke on Page, growing out of the conduct of Page respecting the mortgage of 1792. In deciding on the right of the Plaintiff to demand a specific performance of his contract with Macon, that question must be considered as remaining open.

An additional objection to Campbell's claim on the Mantipike estate, is derived from the length of time which has elapsed, since the Decree, by which his debt was established.

The Decree of affirmance, was entered on the 3d of March, 1800, in the Court of Chancery; and on the 29th of September, in the same year, all attempts to find the mortgaged property having failed, executions were directed by the Court to issue against the estate of Brooke and Page, respectively, in the hands of their respective representatives, who, on the 18th of March, 1801, were ordered to settle their several accounts of administration, before a Commissioner of the Court. From that time, till the 27th of October, 1820, when the supplemental bill was filed, no step whatever has been taken, against Brooke's estate. By this gross negligence, the Plaintiff alleges, that his testator has been greatly injured, if Campbell be now permitted to charge his debt upon Mantipike.

*There is undoubtedly, great weight in this objection; but, the extent of its influence on Campbell's claim, depends on circumstances, the testimony concerning which, is not to be found in the record before the Court. It will form a very material part of the case, in which Keith is Plaintiff. That case being not ripe for a hearing, the claim of Campbell upon Mantipike, even while it remained in the hands of the devisee, must, for the present, be considered as uncertain. Previous to any discussion of the effect of such a claim, on this contract, the Court will proceed to the second point, made by the Plaintiff, in the argument, which is, that

Second. If Campbell's is one of George Brooke's just debts, and is chargeable on his lands, still, it cannot charge Mantipike, in the hands of William H. Macon.

In considering this point, I shall assume for the present two propositions:

1st. Had Keith's suit, praying a sale of Mantipike for Campbell's debt, been instituted before the contract between Garnett and Macon, was entered into, the subsequent sale, made by the Executor, without the assent of the Court or creditor,

could not have relieved the land from the charge created by George Brooke's will.

2d. Had the conveyance been made, and the purchase money been paid, before notice of the claim, the purchaser would not have been affected by it.

It is unquestionably true that, whatever doubts may exist, respecting the liability of a purchaser, for the application of the purchase money, to schedule debts, with which lands are charged, he is exempt from all liability for its application to debts generally. Had the contract then, been fully executed before this claim was asserted, Mantipike would have been clearly exonerated from it.

These propositions are stated, for the purpose of clearing the way, to the very case before the Court; *the case of a contract for the purchase of land, equitably charged with the payment of debts, and notice of a debt given to the purchaser between the date of the contract, and the time when it is to be executed.

In considering this case, the question immediately occurs, whether there is any distinction between a charge on lands, which descend to the heir, or pass to a devisee, subject to the charge; and a devise to executors or other trustees, for the payment of debts.

In Moseley, 96, [Anonymous] and in Nelson's Ch. Rep. 36, this question was answered in the affirmative by the Court; and it was determined, that where lands were charged with debts generally, they remained liable to creditors in the hands of a purchaser. This distinction was, however, overruled in the case of Elliott v. Merryman, (Barnard, Ch. R. 78, 81-2) in which The Master of the Rolls determined, that in such a case the purchaser was not liable for the application of the purchase money, and said that "otherwise, whenever lands are charged with the payment of debts generally, they could never be discharged, without a suit in Chancery, which would be extremely inconvenient."

There are many circumstances in the case of Elliott v. Merryman, showing, that the creditors acquiesced in the sales and looked to the vendor for their money, which might have had great influence on the mind of the Judge; and, if that case stood alone, the question might not be considered as settled. But it does not stand alone. The principle laid down by The Master of the Rolls, appears to have been followed ever since; and in Walker v. Smalwood, (Amb. 676,) which was a charge on land for debts generally, the Chancellor said, "the Court has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase money." This rule has been pursued invariably in the

English Courts for near a century, and may *therefore, be considered as well settled. Although the charge creates no legal estate, it manifests a clear intent that the person in whose favor it is made, shall receive so much out of the land, which a Court of Equity considers as a trust, and converts the owner of the legal estate, into a trustee. The heir or

devisee, being once considered as a trustee, and the charge considered as a trust, public convenience, and uniformity of decision, would lead to an assimilation of these charges, or implied trusts, to those which are express; and, in general, where no other question arises, than that what relates to the construction of the trust, and the respective duties it imposes on a vendor and vendee, in a case attended with no peculiar circumstances, a Court of Equity perceives no ground of distinction between them. But, if it be admitted as a principle, that in a case of direct and culpable, or of negligent and constructive collusion between the vendor and vendee, by which the trust may be defeated, the purchaser may become responsible for the application of the purchase money; or, in other words, the land may remain charged in his hands; it is possible that there may be a difference in the testimony required to establish this constructive collusion, in the one case, and in the other.

If lands be devised to trustees or executors, to be sold for the payment of debts, the devisee possesses a legal, but not a beneficial estate in the premises. He can sell for the purposes of the trust only; and the vendee can consider him as acting no otherwise, than in the execution of a trust for which he has been selected by the owner of the property. This confidence being placed in him, by the person who had the sole right to dispose of the property, at his will, no other can question the correctness of his proceeding, or can be justifiable in suspecting any intention to violate the trust. The *payment of the purchase money, therefore, to the trustee, is an act, which is the regular consequence of the contract; and, if that be made fairly, the purchaser has no right to enquire in what manner the residue of the trust will be executed. He has no right to suspect, that the person who has been selected by the Testator, for its execution, will violate the trust reposed in him, and no collusion between him and the trustee, ought to be implied from equivocal acts. The existence of a debt, is the very circumstance which justifies a sale, and notice of its existence, can never excuse the purchaser for withholding the payment of the purchase money.

But where lands descend to the heir, or pass to the devisee, he does not necessarily sell, in execution of the trust, but for his own purposes. The trust is, in a great measure, the creature of a Court of Equity; and the heir, or devisee, is made a trustee by the Court. When he sells, he is not executing a power confided to him for the purpose of paying debts, but is parting with an interest vested in himself, for his own use, which interest is charged with debts. The purchaser does not consider the seller as executing a trust, nor does he so consider himself; but each considers him as acting for his own benefit. If in such a case, the charge still remains unsatisfied, the purchaser, who has notice of it, may be considered as aiding in, and conniving at, a violation of the trust, under circumstances which would not justify the same conclu-

sion, if the trustee professed to act in the execution of his trust.

It becomes, therefore, material to inquire, what degree of connivance on the part of the purchaser, in acts which may defeat the trust, will leave him responsible to the creditor.

It is scarcely necessary to say, that positive fraud, or direct collusion for the purpose of defeating the trust, will charge the purchaser. It is unnecessary to urge this proposition, because the principle is, I
38 believe, conceded by all, and because too, the transaction before the Court, has no taint of that description. Its moral fairness is not questioned; and the sole enquiry is, whether the purchaser by proceeding with the contract, and paying the purchase money, would have exposed himself to the hazard of such a constructive collusion as to leave him subject to the claim of the creditor.

In pursuing this inquiry it is proper to recollect, that Mantipike, was devised by George Brooke, to his son Richard, charged with the payment of his debts. This devise gave Richard, an absolute estate at Law, subject to an Equity, which could be asserted only in a Court of Chancery. Richard Brooke, would be considered, in this Court, as a trustee for the creditors of his Father, and had they applied to a Court of Equity, a sale of the property would, if necessary, have been decreed. Richard, survived his Father upwards of thirty years, during which time, no claim was asserted on Mantipike; and in his last will, devised his estate to be sold, and the money divided among his children. One clause is supposed to charge his real, as well as personal estate, with his debts.

Although a Court of Equity, will consider the trust with which Mantipike was chargeable in the hands of Richard, as passing with the land, to his devisee, yet the devisee might naturally consider himself as acting under the express trust, contained in the will of his immediate testator. The purpose of his sale, would be, to comply with the will of Richard, and any presumption, that he might possibly hold himself bound to pay the debts of George, is prevented so far as respects Campbell's claim, by the fact, that he denied all liability for that claim. If the purchaser should, after receiving notice of that claim, proceed to pay the purchase money to the seller, who contested its validity, and did not hold himself responsible for it,
39 the question arises, whether payment under such circumstances, might not be considered in a Court of Equity, as so far implicating the purchaser in an act tending to defeat the trust, as to charge him, in the event of a failure on the part of the trustee, with the amount of the debt, so far as the purchase money was liable for it. With full notice of the claim, he pays the money to a person, who receives it, not for the avowed purpose of applying it to the objects of the trust, but of applying it to distinct trusts created by the Will of which he is executor.

This state of things, presents a case entitled to very serious consideration.

It is an old rule, that all persons acquiring property bound by a trust, with notice, shall be considered as trustees. The ancient cases on this point, are collected in Equity Cases Abridged, under the title Notice; and the modern decisions, maintain the principle. The purchaser is subject to all the consequences of notice, if he receives it before payment of the purchase money. In one case, *Wigg v. Wigg*, (1 Atk. 382, 384) this rule has been carried so far, as to affect the purchaser who had paid his purchase money, but had not received his conveyance. Whatever may be thought of the rule, as applying generally to cases of this description, it has, I believe, never been doubted, that notice after the contract, and before the payment of the purchase money, made the purchaser a trustee.

That the charge created by the clause in George Brooke's will, which subjects his lands to the payment of his debts, is a trust in the view of a Court of Equity, is admitted, and the purchaser, with notice, must take the land clothed with that trust, unless he can bring himself within the principle, that he is not bound to see to the application of the purchase money.

I have, certainly, no disposition to contract this principle within narrower
40 limits than have been heretofore assigned to it. On the contrary, I am strongly inclined to the opinion that, if the instrument by which the trust is created, contains no provision contradicting the presumption, that the person who is to make the sale, is also to execute the trust throughout, it will be found difficult to maintain the dicta which are scattered thick through the books, declaring the purchaser bound to see to the application of the purchase money, in cases of scheduled debts, or legacies. The principle, however, which supports this opinion, must be examined, to determine how far it will carry us. The person creating the trust, has confided its execution to the trustee, where he has named one; and it is a part of his duty to sell the trust property, and, generally, to receive the purchase money, and dispose of it for the purposes of the trust. The trust could not be executed without a sale, and sales would be very much embarrassed, if the purchaser, by the mere act of purchase, became a trustee. In all cases, therefore, where the objects are not so defined, as to be brought, at once, to the view of the purchaser, it is settled, that he is not affected by them, and has only to pay the purchase money. The same rule is established in the case of a charge, where the lands descend, or are devised, liable to the payment of debts. In such case, a Court of Equity considers the heir, or devisee, as a trustee, and exercises the same controul over him, as over a trustee named by a testator.

In either case, if there be nothing to show that the trustee is acting in violation of his trust, the purchaser must consider him, as acting in pursuance of it; and as the sale may be a necessary part of it, the purchaser has done every thing incumbent on him, when he pays the purchase money, and is, consequently, relieved

from the necessity of enquiring into the conduct of the trustee.

But trusts, whether express or implied, are the peculiar objects of care to
41 Courts of Equity, and are *guarded from abuse, with great vigilance. In the exercise of this vigilance, they extend their control, not only over the trustees themselves, but over all those who have transactions with the trustees. Their endeavours to secure the faithful execution of trusts, would often be defeated, if their regulations could not comprehend and bind those who contract for the trust property. To prevent the abuse of trust by the trustee, it is necessary to annul his acts, so far as they constitute an abuse; or, in other words, to consider the property in the hands of a purchaser, who has aided in the abuse, as still charged with the trust. In affirmance of this principle, The Master of the Rolls said, in a late case, [Balfour v. Welland,] (16 Ves. jun. 156.) "Where the act is a breach of duty in the trustee, it is very fit, that those who deal with him should be affected by an act, tending to defeat the trust, of which they have notice."

Plain as this principle is, and strictly conformable as it is to the general doctrines of a Court of Equity, there is some difficulty in applying it to particular cases. It is not easy to mark the precise act, which constitutes such a breach of duty in the trustee, as will affect the purchaser. If William Garnett be considered in this Court as a trustee for the execution of George Brooke's Will, by the sale of Mantipike, it would defeat the trust, to sell that estate for the uses described in Richard Brooke's Will, unless the debts of George Brooke, are to be considered as the debts of Richard Brooke, provided for by that clause in his will, which respects his own debts: And if William Garnett, sold with the avowed purpose, of excluding the debts of George Brooke, or if he should proceed to distribute the money according to the will of Richard Brooke, disregarding the claims of George Brooke's creditors, if there be any, the trust, so far as respected those claims, would be defeated; and a purchaser intending to aid in thus

42 defeating the trust, could *not be perfectly secure. But if William Garnett sold with the intention of paying George Brooke's creditors first, and then of distributing the residue of the money according to the will of Richard Brooke; the act of sale would be no breach of trust, since a sale would be necessary for its performance. A purchaser therefore, of the Mantipike estate might be placed in some peril. After receiving notice from a creditor George Brooke, he might be considered, if he proceeded with the contract, as taking upon himself a responsibility for the subsequent transactions of William Garnett, which was no part of his engagement, and which he did not mean to take.

I very readily admit, that if a trustee sells for the payment of debts generally, he is at liberty to contest any particular debt, and no notice to the purchaser can involve him in the contest. But, in such case, the trustee is in the fair execution of his trust,

and regular performance of his duty; and the purchaser, having no right to intrude himself into the trust, cannot be made responsible for its execution. But if the trustee, not professing to seil under the trust, holds himself absolved from it, and this is made known to the purchaser, the question, whether by completing the purchase, he assists in defeating the trust, and will be held responsible in a Court of Equity, becomes a much more serious enquiry. In pursuing it, all the circumstances must be considered, in order to determine, whether they prove satisfactorily, that the trustee is not acting in pursuance of the trust, but under the opinion that it does not bind him.

In this case, William Garnett is the immediate trustee of Richard Brooke, charged with the execution of his will, which directs the sale of Mantipike for the benefit of his children, and probably for the payment of his own debts. Although a Court of Equity will consider the land as charged with any debt due from George

43 Brooke, and treat the devisee *of Richard Brooke, as a trustee for such creditor; yet the devisee would assume a very great responsibility, were he to undertake to pay this debt, without the direction of a Court. If the existence of the debt might be presumed, of which great doubts have been suggested at the bar, the extent of his testator's liability for it, is far from being certain. The personal estate of George Brooke ought to have been exhausted before his real estate became chargeable, and the proportion of the debt with which Mantipike ought, under all circumstances, to be charged, could not safely be settled by the Executor. No counsel could have devised William Garnett, to incur this responsibility. No Court could censure him, for not incurring it. Wm. H. Macon, then, who purchased without suspicion that any creditor of George Brooke remained unsatisfied, had great reason for the apprehension, that Mr. Garnett, not considering himself, as a trustee for the benefit of such creditor, would apply the money to the uses prescribed in the Will of Richard Brooke. This apprehension could not be removed by any enquiry. The bill filed by William Garnett, to enforce a specific performance, alleges expressly, that Campbell's debt was not due from George Brooke, and that if it was, Mantipike is not charged with it. Whether any direct communication took place, between the parties, on the subject, is unknown; but as none is stated, none can be presumed. The fact, however, is sufficiently obvious, that any enquiry respecting it, must have been answered, by the assurance, that the justice of the claim was denied. Whether going on to complete the contract, by paying the purchase money, under these circumstances, would be considered by a Court of Equity, as such a concurrence in "an act tending to defeat the trust" as would affect the purchaser, is a question of real difficulty. Some light may be thrown upon it by analogies drawn from the liability of the purchaser *of lease-hold estates. It is well settled, that the purchaser of a

chattel from an Executor, is not liable for the application of the purchase money, although such chattel be given in trust for a special purpose, or be itself a specified legacy. [Elliott v. Merryman] (Barnard, Ch. R. 78, 81.) [2 Atk. 42:] [Ewer v. Corbet,] (2 P. Wms. 148; [Burting v. Stonard,] (2 P. Wms. 150.) The reason is, that no man can exempt his personal estate from the payment of his debts, or make any disposition of it, which shall prevent its passing to his Executors, to be sold by them, if his debts require it. Consequently, whenever an Executor sells, in execution of his trust, the purchaser takes the property, freed from any charge with which the testator may have burthened it by his will. But if the sale be a breach of trust, and the purchaser have notice of the fact, he is affected by it. If the Executor sells to a person who knows that there are no doubts, or that all the debts are paid, and that the sale is not a fair execution of the trust, the purchaser may take the property, subject to the trust. (2 P. Wms. 148, 150.) So too, if the Executor sells at such undervalue, as to indicate fraud; or for payment of his own debt. [Crane v. Drake, et al.] (2 Vern. 616, Ed. Raithby; [Scott v. Tyler,] (2 Bro. C. C. 433, 477; [Andrew v. Wrigley,] (4 Bro. C. C. 125, 130; [Hill v. Simpson,] (7 Ves. jun. 151, 167; [Lowther v. Ld. Lowther,] (13 Ves. jun. 95; [M'Leod v. Drummond,] (17 Ves. jun. 169.)

These cases proceed upon the principle that the executor does not sell in pursuance of his trust, but in violation of it; and, that the purchaser knowing this fact, aids him in its execution by making the contract. The purchaser is not bound to make any enquiry. The general power of the executor to sell, protects him in buying; but if he buys with notice that the sale is a breach of trust, the property remains charged with it.

45 *I feel much difficulty in resisting the application of this principle, to freehold estates charged with the payment of debts. It would seem to me, as if the enquiry must always be into the fact. The question must always be,—is the sale, taking its object into view, a breach of trust? And are the circumstances such as to charge a purchaser, having express notice with a participation in the breach? The purchaser of a chattel, from an executor, with notice that no debts are due, or in payment of his own debt, seems to me to present the same questions.

Two cases have been cited by the counsel for the Plaintiff, as bearing very strongly on that, under consideration of the Court. The first is, Walker v. Smalwood, (Amb. 676.) John Smalwood devised his estate to his son Thomas, charged with the payment of his debts; and Thomas, afterwards, mortgaged the estate, and then devised it to his wife, charged with the payment of debts. The bill was brought by bond creditors of John and Thomas Smalwood, against the wife, and mortgagee. Pending the suit, they joined in selling the land to Yeomans, against whom, a supplemental bill was filed, to set aside the sale. It was set aside, upon the principle, that the execution of the trust had been taken out of

the hands of the trustee and transferred to the Court. The Chancellor said, "Though a general charge does not make a purchaser before the suit see to the application of the money, yet after a suit commenced, I should hold him bound to it; and I hold it as a general rule, that an alienation pending a suit is void." He also states, that actual notice was admitted.

The propositions stated by Lord Camden, in this case, have not, I believe, been questioned, but those propositions do not reach the point now in controversy. A part of the purchase money was applied to the mortgage made by Thomas Smalwood, *and the case does not inform us, that any objection was made on this account; but the case does not inform us either, whether this mortgage was made in satisfaction of a private debt due from Thomas, or for money generally, which might have been applied to the debts of the Father, or for a debt actually due by the Father. Notice was admitted, but of what? Probably, of the application of the money, and of the pendency of the suit. But these facts do not imply a breach of trust, since it is not shown that the mortgage itself, which is an alienation pro tanto, was made under circumstances, which could involve the mortgagee in the application of the money. This case then, has no positive application to that at bar.

The other case is, Hardwick v. Mynd, (1 Austr. 109.) William Mynd, devised considerable estates to his son Wm. Mynd, charged with certain legacies to his daughters. He also devised other estates to George Mynd and John Roberts, in trust for payment of debts, and appointed them his executors. George Mynd and John Roberts renounced the executorship, and conveyed their interest in the freehold estates to William, the son, subject to the trusts of the will. William mortgaged great part of the estate for his own debts; and about eleven years after the death of his Father, became a bankrupt.

The creditors of the father, then filed this bill, for the satisfaction of their demands; and it was admitted, that, the most considerable of the mortgagees took, with notice of the situation of the property.

Eyre, Chief Baron, said, (and it is to be presumed the Court concurred with him)—"If the trustees had made these mortgages, they would not have been disturbed; in fact they are made by them; for they have assigned their whole interest to William Mynd to act for them in trust."

If the case stopped with this opinion, it would be, perhaps, conclusive, certainly very strong, in *favour of the Plaintiff. The mortgagees took with notice of the misapplication of the purchase money, and were yet not held responsible for that misapplication. This decision would certainly go far in showing, that a purchaser, knowing that the sale was made not for the purposes of the trust, but of the trustee, would yet hold the land discharged from the trust. But other points were determined which deduct considerably from the application of this opinion to the case at bar, if they do not entirely destroy it, the Court held the trustees liable to

make good the whole deficiency arising from the misapplication of the fund.

This case then, considering the two points which were decided in connexion with each other, amounts to nothing more than this. Where there has been a collusion between the trustee and purchaser, which results in an abuse of the trust, the trustee shall be chargeable in the first instance; but the case does not decide on the ultimate responsibility of the purchaser, should the trustee prove insolvent. Applying it to the case at bar, it would prove, that had William H. Macon, proceeded, after notice, to complete the contract, and to pay the purchase money; and a suit been brought by the creditors of George Brooke, William Garnett, would have been liable in the first instance; but does not, I think, prove that William H. Macon, would not have been liable, in the event of the trustee's insolvency. The Court professed to found its opinion on the case of *Burt. v. Dennet*, (2 Bro. C. C. 225.)

Dennet, was trustee in a mortgage deed from Godfrey to Burtenshaw, by which an annuity of £30 per annum, was secured to the Plaintiff. Dennet having transactions with Burtenshaw, assigned the mortgage to him, without the privity of the Plaintiff; and afterwards assigned his property to trustees for payment of his debts.

48 Burtenshaw paid the annuity of the year 1784, after which he stopped *the payments, upon which the Plaintiff filed her bill against Dennet. The Chancellor said, "the Plaintiff ought to have made Burtenshaw and the assignees of Dennet's estate parties, by which she might have gotten the mortgage-deeds: he then should have decreed Burtenshaw to have paid the annuity, and Dennet to stand as a security, for having broken the trust."

This case is not supposed to be applicable to that at bar, for the assignee of the mortgage, was undoubtedly responsible for the annuity. It is cited solely, because it was referred to by the Court, as an authority for the opinion given in *Hardwick v. Mynd*, and may, therefore, tend to explain that opinion. It would countenance the idea, that in the case in which it was cited, the Court did not suppose that the liability of the original trustee discharged the assignee.

Taking together the two parts of the opinion given in *Hardwick v. Mynd*, I cannot consider them as showing what would have been the decision of the Court, with respect to the mortgagees, had the trustees been insolvent. The report is very unsatisfactory, in as much as it assigns no reason for the decision, nor does it give the principle on which it stands. If the bill was dismissed as to the mortgagees, because the receipts of the trustees, or of their agent, even under the circumstances of the case, amounted to an absolute discharge, it would be an express authority for the Plaintiff in the case at bar. If the bill was dismissed, because the trustees were liable in consequence of their breach of trust, and were able to make up all deficiencies, it does not affect this case. If the Court meant to say, that if the trustees had made these mortgages to secure a debt

due from themselves, the mortgagees would yet have held the property discharged from the trust, the decision would appear to me, to be in direct opposition to the principle settled in the sales of chattels 49 *by an executor, and to the general principle, that where the act is a breach of duty in the trustee, those who deal with him knowing the fact, are affected by it. To mortgage the property to secure their own debt, would seem to me, to be a direct and palpable breach of duty in the trustees, in which the mortgagee must have fully participated; and, I cannot conceive, that the Court meant to say, that such a transaction could be innocent. I must therefore suppose, that the decision turned upon the fact, that the trustee himself, who was before the Court, was of himself unquestionably competent to pay the money, and ought to pay it. It is true, that if the Court proceeded on this idea, the land ought to have been held still responsible; but the report is too defective and unsatisfactory to warrant any confidence in its being full, as to this point.

These cases then, though they have a strong apparent bearing on that under consideration, are too loosely, and too carelessly reported, to satisfy the Court that they were decided on principles which they are cited to support. I cannot consider them as proving that land sold for other objects, in exclusion of a debt charged upon it, is relieved by the sale, from that mortgage, if the purchaser pays with notice of the intended misapplication of the purchase money. I repeat then, that it is a question of fact. Did the circumstances under which Mantipike was sold, prove that the purchase money was to be diverted from the payment of George Brooke's debts, to other objects, with such reasonable certainty, as to leave it probable that a purchaser with notice, would be liable for the application of the purchase money; or, in other words, that the land would, in the event of misapplication, and the insolvency of the trustee, remain charged in his hands?

These circumstances have already been stated. The most prominent are, that William Garnett was the immediate trustee of Richard Brooke's Will,

50 *though considered in a Court of Equity, as being also a trustee for George Brooke's creditors, whose claim was prior to that of Richard Brooke's creditors or legatees, but whose claim the vendor not only did not, but could not safely, mean to satisfy, unless directed by a Court of Equity, so to do. The purchaser had, certainly, reason to believe, that the sale was not made with a view to satisfy the charge created by George Brooke's Will, and that the purchase money, if paid before the institution of a suit by Campbell's representative, would be applied to the purposes of Richard Brooke's Will. If a suit should be instituted before the purchase money became due under the contract, or before it was paid, the whole affair would then be transferred to the Court of Chancery, and he would no longer be master of his own conduct. In the one event, he would take

upon himself the hazard of paying with full notice of the charge, money which he had reason to believe, was to be diverted to different objects; in the other, he would be involved in a Chancery suit, the course and duration of which, he could not anticipate. Do these difficulties constitute a valid objection to a decree for a specific performance?

It cannot be doubted, that these difficulties, if presented to the mind of a prudent man, contemplating the purchase of an estate, and desirous of performing his contract according to its terms, might have a serious influence on his conduct, and might deter him from making the purchase. If informed of them, after making the contract, but before its execution by the paying of the purchase money and receiving a conveyance, he would have such strong motives for stopping entirely, or at least, for pausing, until the impediments could be removed, as would, I think, justify him, for so doing, in the opinion of any reasonable man. Had this suit come to a hearing as between the vendor and vendee only, on the day on which it was instituted,

51 could a *Court of Equity have pronounced the objections to the title so frivolous, as to decree that Macon should take it, without having those objections removed? Is the exoneration of the land from Campbell's debt, by a sale to a purchaser, with notice of all the circumstances which had come to the knowledge of Col. Macon, so perfectly clear, that a Court of Equity ought to decree him to take the land and pay the purchase money, without any security against the future demands of Campbell's representative?

Both on principle and authority, I think it very clear, that a specific performance will be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make, be unquestionable: [Marlow v. Smith,] (2 P. Wms. 201;) [Rose v. Calland,] (5 Ves. jun. 186, 189;) [Roake v. Kidd,] (5 Ves. jun. 647;) [Stapylton v. Scott,] (16 Ves. jun. 272;) [Sloper v. Fish,] (Ves. and Beam. 149;) and it is equally clear, that a purchaser, under such a contract as that between Garnett and Macon, had a right to expect that an unincumbered estate in fee simple would be conveyed to him. [Omerod v. Harde-man,] (5 Ves. jun. 722, 734;) [Flureau v. Thornhill,] (2 Wm. Bl. R. 1078.) In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate, and a Court of Equity will not impose its extraordinary power of compelling a specific execution of the contract, unless the person demanding it, can himself do all that it is incumbent on him to do. It has been said at the bar, that the declarations of the Chancellors to this effect, have been made in cases where the title itself was doubtful, not where there was a money charge upon the estate, which would not materially affect the purchaser, and which might be paid off by him, without any material change in his contract, and without inconvenience.

52 *This allegation is not, I think,

entirely correct. The objection is not entirely confined to cases of doubtful title. It applies to incumbrances of every description, which may, in any manner, embarrass the purchaser in the full and quiet enjoyment of his purchase. In 5 Ves. jun. 189, [Rose v. Colland,] the property was stated to be free of hay tithe; and there was much reason to believe that the statement was correct. But the point being doubtful, the bill of the vendor, praying a specific performance, was dismissed. There is, certainly, a difference between a defined and admitted charge, to which the purchase money may, by consent, be applied, when it becomes due, and a contested charge which will involve the purchaser in an intricate and tedious law suit of uncertain duration. There can, I think, be no doubt, that Campbell's claim, controverted as it necessarily was by Brooke's representative, is of this character, and that the continuance of the charge on the land in the hands of a purchaser with full notice of that claim, and of all the circumstances under which the sale was made, was too questionable to be disregarded as entirely frivolous, if alleged in a suit between Garnett and Macon only, for a specific performance. If it could not be entirely disregarded by a Court, Macon was certainly justifiable in refusing to proceed while this cloud hung over the estate. He was certainly justifiable in refusing to take the title which could have been made in January, 1819.

But although it was not in the power of Garnett to make a perfectly secure title, previous to a Decree which would dispose of Campbell's lien, it is undoubtedly now in his power. All the parties are now before this Court, and, if a specific performance should be decreed, the title which can be made to Macon, will undoubtedly stand clear of Campbell's lien. The question, therefore is, whether the contract ought now to be enforced.

53 *It has been repeatedly declared, both in the Courts of England and of this country, that time is not of the essence of a contract; and, that a specific performance ought to be decreed if a good title can be made at the time of the decree.

This principle is sustained by many decisions, and by the practice of the Court of Chancery in England to refer it to a Master, to report whether the title be good at the time. But, I do not think that the English Court of Chancery has ever laid down the broad principle, that time was never important, and that an ability to make a clear title at the time of the Decree, arrested all enquiry into the previous state of things. On the contrary, if a person sell an estate, to which he has no title, he cannot, though he should afterwards acquire it, enforce the contract. There is an implied averment in every sale made without explanation, that the vendor is able to do what he contracts to do. If he is not, and the vendee sustains an injury in consequence of this inability, it would seem unreasonable, that the contract should be enforced; it would be the more unreasonable, if the amount of the injury should not be the subject of exact calculation. It is a

general rule, that he who asks the aid of a Court of Equity, must take care that his own conduct has been exactly correct. It would be strange, if this general rule should be totally inapplicable to time, in the execution of a contract. If the day be carelessly or accidentally passed over without making a conveyance, and no serious inconvenience result from the omission, the objection would be captious, and would very properly be discountenanced; but if the vendor was unable to clear up the title, until such an alteration had taken place in the state of things, as materially to affect the parties, time I think, cannot in reason be deemed unimportant. It is settled, that mere inadequacy of price, is not a sufficient ground for a Court of Equity, to re-

54 fuse its assistance, unless the "difference between the sum to be given and the value of the land, be so enormous, as to countenance the idea of fraud or imposition. Yet, if an unreasonable contract be not performed according to its letter, equity will not interfere. (Sugd. on Vend. & Pur. 190) [2 Am. Ed.] Between a contract which is unreasonable when made, and one which has become so before it can be executed, if the application be made by the person in fault, for the aid of the Court against the party who has suffered by his inability no clear distinction is perceived.

In the case of *Gibson v. Patterson et al.* (1 Atk. 12,) Lord Hardwicke, is reported to have paid no regard to the negligence of the vendor in producing his title deeds. But that case is said by subsequent Judges, who have inspected the record, to be misreported; and if it were not, it does not appear that there was any incumbrance on the estate, or that the condition of the parties had been affected by the delay.

In *Morgan v. Shaw*, (2 Meriv. 140,) The Chancellor said, "The inclination of my opinion is against the old doctrine, that time is in no case of the essence of the contract," and in 4 Bro. C. C. [Fordyce v. Ford, 498.] The Master of the Rolls said, I hope it will not be supposed, "that a man is to enter into a contract, and think that he is to have his own time to make out his title." In *Harrington v. Wheeler*, (4 Ves. jun. 686;) and *Lloyd et al. v. Collet*, (4 Bro. C. C. 469.) time was held material.

I think that the present doctrine of the Court of Chancery of England, is clearly in favour of the opinion, that where time is really material to the parties, the right to a specific performance may depend upon it; and I think that the same doctrine prevails in the Courts of the United States. *Hepburn and Dundas v. Colin Auld*, (5 Cranch, 262,) was a suit for a specific performance, which was objected

55 "to by the vendee, because 6,000 acres of land, sold by *Hepburn and Dundas*, was not held by a title in severalty, but was an undivided interest in a much larger tract, and that the time of executing the contract was, in that case material. On that point the Court says, [p. 276.] "It is not to be denied that circumstances may render the time material; and the Court does not decide that this case is not of that description. But the majority of the Court is of opinion, that the estate is to be con-

sidered as an estate held in severalty." It was also said in *Pratt et al. v. Law and Campbell*, (9 Cranch, 456, 494,) that time is made material to the specific performance of a contract, whenever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible.

In *Brashier v. Gratz et al.* (6 Wheat. 528,) the case was this: Michael Gratz residing in Philadelphia, sold in March, 1807, to Walter Brashier, residing in Kentucky, a tract of land lying in Kentucky, which Gratz had purchased, and for the title to which a suit was then depending, Brashier gave his notes for the purchase money, and agreed to attend to the prosecution of the suit, for which service an allowance was made him in the price of the land. The land was sold at 22 dollars 50 cents by the acre, and it was agreed, that if any part of the land should be lost by the decision of the Court, Gratz should repay 11 dollars 25 cents for each acre that might be so lost.

The suits were not pressed to a decision, and in 1811, the fees were demanded from Gratz, and were paid by him. In 1811, Brashier came to Philadelphia and his notes being protested for non-payment, Gratz required that they should be paid, or that the contract should be rescinded. Brashier was unwilling to do either, and the question, whether, Gratz was still bound by it, was left to Arbiters, 56 who decided that he "was. Brashier became insolvent, and Gratz took the management of the suits into his own hands, which were decided in his favour, in 1813. About this time, the lands rose suddenly in value, on which Brashier tendered payment of his notes, and demanded a conveyance of the land. Gratz refused and the bill was brought for a specific performance. It was dismissed in the Circuit Court, and the Plaintiff appealed to the Supreme Court, where the Decree was affirmed.

It will be readily admitted, that the case of *Brashier and Gratz*, was a strong one, against the Plaintiff—much stronger—than that now before this Court; but the principles laid down in its decision, apply to all cases where the party demanding the aid of the Court, has failed to perform his part of the contract, and a change in circumstance, unfavourable to the party resisting the demand has taken place. The Court says, [p. 533-534.] "The rule, that time is not of the essence of a contract, has certainly been recognized in Courts of Equity; and there can be no doubt that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. It may be in the power of the Court to direct compensation for the breach of contract in point of time, and in such case, the object of the parties is effectuated by carrying it into execution. But the rule is not universal. Circumstances may be so changed, that the object of the party can be no

longer accomplished, that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a Court of Equity will leave the parties to their remedy at Law."

57 "If then, a bill for a specific performance be brought by a party who is himself in fault, the Court will consider all the circumstances of the case, and decree according to those circumstances."

In re-viewing the circumstances of the case, the Court says, [p. 539-540.] "Another circumstance which ought to have great weight, is the change in the value of the land. It was purchased at 22 dollars 50 cents per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years after the last payment has become due, the land suddenly rises to the price of 80 dollars per acre. Then he tenders the purchase money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase money. This total want of reciprocity, gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article."

The change in the value of the article in the case which had been cited, between the time when the money ought to have been paid, and the time when the money was tendered, was certainly enormously great, much greater than can take place in ordinary times; but the principle does not depend entirely on the excessiveness of that change. The principle undoubtedly is, that a very great change in the value of the article, constitutes a serious objection to a decree for a specific performance, when claimed by the party whose fault it is, that the contract has not been executed.

In the case under consideration, a considerable change has taken place, in the value of the article; and that change has been produced by a general declension in the price of lands. It must therefore materially affect the arrangements to be made by the purchaser for a compliance with his contract.—The same property which,

58 if sold in time, would *probably have enabled him to pay for Mantipike, would not on any reasonable estimate, now enable him to do so. If, then, William Garnett was unable to convey a perfectly safe title in January, 1819, Mr. Macon has sustained an injury by the suspension of his proceedings, the amount of which admits of no certain calculation, and which is probably equivalent to the difference in

the value of Mantipike at that time and at this.

Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment to which blame in moral point of view, can be attached; yet a Court of Equity considers the vendor as responsible for the title he sells, and is bound to inform himself of its defects. The purchaser in making a contract may be excused for relying on the assurance of the vendor, implied in the transaction itself, that he can perform his agreement.

As I think Campbell's claim, was a cloud lowering over the title Garnett could convey to a purchaser with notice, which justified Macon in refusing to go on with the contract, which cloud cannot be dissipated but by the Decree of a Court of Chancery, and as before such a Decree was attainable, the value of the article has greatly changed, that circumstance creates a strong objection to a specific performance. At the same time, it must be perceived that the vendor, who has committed no moral wrong, and who is now able to perform his contract, will sustain all the loss arising from the depreciation of the property, which he might have sold to another, had not Macon purchased. I felt some hesitation between a Decree dismissing the bill, and a Decree for carrying the contract into execution, considering the vendor who has retained possession of the property as entitled to the profits, and the vendee who was justifiable for not proceeding with his contract, as exempt from the payment

59 *of interest. But on reflection I have come to the opinion, that as there is no fault in the purchaser, and as there was some remissness in the seller in not communicating Campbell's claim, that the whole disadvantage ought to fall on the vendor, and that his bill ought to be dismissed.

The point which has weighed heaviest on my mind, and about which I have felt the greatest difficulty, concerning which I have indeed at different times inclined to different opinions, is whether the sale under the Will of Richard Brooke, is, under all the circumstances of the case, to be considered as such a breach of trust, as respects the creditors of George Brooke, as will involve a purchaser, having notice before the contract of sale is carried into execution, in the consequences. I am rather disposed to the opinion that it is such a breach of trust. At all events, I am satisfied that it wears such a serious aspect, as to justify a purchaser in refusing to proceed.

Decree, Bill dismissed,—each party to bear his own costs.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
THE COURT OF APPEALS
OF
VIRGINIA:
TO WHICH ARE ADDED, REPORTS OF CASES
DECIDED IN THE
GENERAL COURT OF VIRGINIA.

VOL. V.

BY PEYTON RANDOLPH,
Counsellor at Law.

Eastern District of Virginia, to wit:

{ L. S. } BE IT REMEMBERED, That on the fifth day of June, in the fifty-second year of the Independence of the United States of America, Peter Cottom, of the said District, hath deposited in this Office the title of a Book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Court of Appeals of Virginia: To which are added, Reports of Cases decided in the General Court of Virginia.—Vol. V. —By Peyton Randolph, Counsellor at Law."

In conformity to the Act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."

R'D. JEFFRIES, Clerk of the
Eastern District of Virginia.

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*Resigned 23d Feb. 1837.

†Appointed 3d March, 1837.

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CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Green v. Judith, &c.

March, 1837.

Demurrer to Evidence—What It Should Contain, &c.—The practice of inserting in a demurrer to evidence, the evidence on both sides, is established by repeated decisions, in this State.

Same—**Effect**—**Rule Stated**.—In such case the demurrant must be considered as admitting all that can reasonably be inferred by a jury from the evidence given by the other party; and as waiving all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence, which do not necessarily flow from it.

Same—**Rule Examined**.—The propriety of this rule examined.

Same—**Error**—**Effect**.—If a party finds out, after a demurrer to evidence, that he ought not to have demurred, but should have left his cause to a jury, the Court cannot award a venire de novo. By two Judges.

This was an appeal from the Superior Court of Law for Culpeper County.

Judith and her children and grand-children, brought an action to recover their freedom. The usual issue was joined; and at the trial, the defendant Green, demurred to the evidence, which was joined in 2 by the plaintiffs. In *this demurrer, the evidence on both sides was spread upon the record. This evidence is stated with sufficient minuteness in the opinions which follow, and particularly in that of Judge Cabell; so that it will be unnecessary to insert it again in this place. The cause was submitted without argument.

***Demurrer to Evidence**.—See on this subject monographic *note* on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt 364.

†**Same**—**What It Should Contain**.—To the point that a demurrer to the evidence should contain the evidence on both sides, the principal case is cited in *Muhleman v. National Insurance Co.*, 6 W. Va. 514; *Adkins v. Fry*, 33 W. Va. 555, 18 S. E. Rep. 740.

‡**Same**—**Effect**—**Rule Stated**.—The rule set out in the principal case—that, on a demurrer to the evidence, the demurrant must be considered as admitting all that can reasonably be inferred by a jury, from the evidence given by the other party, and as waiving all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence, which do not necessarily flow from it has repeatedly met with approval in subsequent cases. See citing principal cases on the subject, *Hansbrough v. Thom*, 3 Leigh 154, 157, 158; *Clopton v. Morris*, 6 Leigh 290; *Rohr v. Davis*, 9 Leigh 34; *Fairfax v. Lewis*, 11 Leigh 241; *Patterson v. Ford*, 3 Gratt 28; *Tutt v. Slaughter*, 5 Gratt 373; *Union Steamship Co. v. Nottinghams*, 17 Gratt 120; *Trout v. Va. & Tenn. R. Co.*, 23 Gratt 619, 620, and *foot-note*; *Horner v. Speed*, 2 Pat. & H. 653; *R. & D. R. Co. v. Moore*, 78 Va. 97; *Clark v. R. & D. R. Co.*, 78 Va. 712; *Richmond & Danville R. Co. v. Williams*, 89 Va. 167, 9 S. E. Rep. 690; *Newberry v. Williams*, 89 Va. 800, 15 S. E. Rep. 865; *Norfolk & Western R. Co. v. Dunnaway*, 93 Va. 33, 24 S. E. Rep. 993; *Miller v. Insurance Co.*, 12 W. Va. 123; *Peabody Ins. Co. v. Wilson*, 26 W. Va. 536, 2 S. E. Rep. 993; *Gunn v. Ohio River R. Co.*, 42 W. Va. 689, 36 S. E. Rep. 650; *Bowman v. Dewing*, 50 W. Va. 445, 40 S. E. Rep. 576.

March 2. The Judges delivered their opinions. §

JUDGE CARR.

The plaintiffs in the Court below brought their suit against the appellant (an agent of the Commonwealth) to recover their freedom. Judith, the mother and grand-mother of the others, was once the property of Ball. The State insists that they are still slaves, belonging to Ball's estate, and subject to her judgment against Ball. They claim to be free, either under the will of Barrow, or of Hackley, and their chain of title is this: that Ball, some 45 or 50 years past, sold or gave Judith (then a girl) to Mr. and Mrs. Barrow, his brother and sister: that Barrow, after many years possession, sold Judith and her descendants to his nephew Hackley, reserving his and his wife's life in them: that Hackley, by his will, set them free at the death of Mr. and Mrs. Barrow; and that Barrow, by his will, confirmed to them their freedom. On the trial of the cause, the defendant demurred to the evidence. The Court gave judgment on the demurrer for the plaintiffs, and the defendant appealed. The demurrer contains all the evidence on both sides. This, I believe, is not in conformity with the practice in England or our sister States; but it has long been the settled practice of this State, sanctioned by decisions of this Court. I have always understood a demurrer (whether to pleadings or to 3 *evidence) as raising a question of law purely; the demurrant alleging that the pleading or the facts demurred to, are not sufficient in law to sustain the adversary. These indeed are the express terms of the demurrer. As the law arises upon the facts, it cannot arise until the facts be settled; and this is exclusively the province of the jury. I have seen this subject nowhere treated with more perspicuity or ability, than in the opinion of Ch. J. Eyre, in *Gibson v. Hunter*, 2 H. Bl. 187. He says, "In the first stage of that process under which facts are ascertained, the Judge decides whether the evidence offered conduces to the proof of the fact, and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question how far it conduces to the proof of the fact which is to be ascertained, is not for the Judge to decide, but for the jury exclusively. When a jury have ascertained the fact, if a question arises whether the fact thus ascertained maintains the issue joined between

§The PRESIDENT and JUDGE GREEN absent; the latter being a nominal party.

the parties, or in other words, whether the law arising upon the fact is in favor of one or other of the parties, that question is for the Judge to decide. Ordinarily, he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But, if the party wishes to withdraw from the jury, the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the jury, and to refer to the Judge, the application of the law to the fact. In the nature of things, therefore, and reasoning by analogy to other demurrers, and having regard to the distinct function of Judges and of juries, and attending to the stage of the proceeding in which the demurrer takes place, the fact is to be first ascertained." The opinion, from which this extract is made, is of the very highest authority, and all the books acknowledge it as settling the law. This Court has,

in several cases, referred to it as the ablest exposition "of the doctrine on this subject. The misfortune is, I think, that we have not acted up to the rules it establishes. One of these is, that the demurrant "shall distinctly admit upon the record every fact and every conclusion, which the evidence demurred to conduced to prove." Our practice has been to put all the evidence on both sides into the demurrer, and then to consider the demurrer, as if the demurrant had admitted all that could be reasonably inferred by the jury from the evidence given by the other party, and waiving all the evidence on his part, which contradicts that offered by the other party. or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. I confess the English practice seems to me much the safest and best. In the first place, it is the simplest. The facts being settled one by one, the parties distinctly see the naked case, and understand precisely on what facts the Court will act; and passing these facts thus in review, the demurrant can more clearly see, before the step is irrevocably taken, whether he can safely demur; and the adversary is likewise enabled to discover, whether there be not some weak point in his evidence, which he has it in his power to strengthen. This analysing process, reducing the case to its elements, would also have a strong tendency to discourage demurrers to evidence; an effect, which Courts have generally thought would be beneficial. When the evidence merely is all put into the demurrer, and no facts settled, the parties can have little idea from this confused mass, what the case will be when the Court shall come to act upon it; and the Court itself (it seems to me) is inevitably led to assume the functions of a jury. I have thought it not amiss to express this opinion, thought I have not the slightest idea, in the present case, of attempting to disturb the practice.

I must also be permitted to regret, that it has been settled by the cases in this Court, that in demurrers to evidence, all

the evidence on both sides is to be put into the record. It is a departure from the settled practice elsewhere; and

5 "this alone, I think, is a solid objection, unless it could be clearly shewn, that by such a change a material advantage was gained. But here, the change seems to me to be much for the worse. I can conceive few cases, in which the insertion of the demurrant's evidence can be proper; few, in which it does not tend to confuse, perplex, and complicate the case. When a defendant demurs to the plaintiff's evidence, he says, admitting it all to be true, it is insufficient in law to maintain the action. Putting himself thus, upon the law of the case, and thus withdrawing it from the jury, what propriety is there in his introducing evidence on his part? The practice of putting the evidence on both sides into the record, is calculated to mislead the country. They suppose, that it must be for some purpose that the demurrant's evidence is inserted; and they naturally conclude that the purpose is, that the Court, from the whole evidence, shall collect the facts of the case, and then pronounce the law arising on them. I have very little doubt that the demurrer in the case before us was filed under this delusion; and it seems to me a strong illustration of the mischief of the practice; for, it has lost a cause to the defendant, about which, I believe, there would have been little doubt with a majority of the Court, if the same facts had appeared in the form of a special verdict, or a case agreed; and I have no doubt they would have appeared in one of these forms, or have been left to the jury, had the counsel supposed that by demurring he was to give up every title of his evidence. This however is the effect, as that evidence is considered as contradictory to, or making out a case inconsistent with, that of the plaintiffs. So strongly persuaded am I of the injustice of this decision, that I have looked carefully through the record for some circumstance which might avert it; and I thought that I had found one in the agreement of the counsel filed in the record. That agreement authorised us (it seemed to me) to consider the record of the judgment of the Commonwealth against Hackley's executor,

6 as if pleaded "in bar; and then I should have had but little difficulty. But, it is discovered on a closer inspection, that the agreement bears date prior to the demurrer. Its terms, which to me seem doubtful, are regarded by my brethren as amounting only to a waiver of formal exceptions to the use of the papers filed, as evidence; and its effect is considered as done away by the demurrer subsequently filed. This is all perhaps correct; but I confess that my mind assents to it with great reluctance. I should have been much better satisfied to have awarded a venire de novo, as is sometimes done, when "the evidence is so uncertain, or of such a nature, that the Court feel doubtful what facts to infer." This, I feel assured, would have been a more probable means of obtaining the real justice of the case. The rest of the Court, however, think differently, and with them I leave the cause.

JUDGE COALTER.

This is an action by the appellees against the appellant, in forma pauperis, to recover their freedom. The declaration is the usual one of false imprisonment; to which the defendant pleads that the plaintiffs are slaves, on which issue is joined.

The plaintiffs being negroes, and it being admitted by them that Judith, the mother and grand-mother, was originally a slave, the property of one Ball, they place their title to freedom on this ground, that she was sold by Ball to Barrow, who had married his sister, and by whom she and her children were sold to his nephew Hackley, by whose will they were set free. The onus probandi was thus at once thrown on them to prove these facts.

They accordingly produced evidence of such facts and circumstances as it was in their power to do; and the only matter of controversy which this evidence did not fully establish in their favor, was, whether Judith was a gift of sale or a mere loan to Barrow. If the former, then,

7 *without doubt, the title passed to Barrow, and from him to Hackley; by whose will they are free. If the latter, then it might have been a question, whether, as Barrow had possessed Judith and her children, without claim or interruption for twenty years or more, before the alleged sale to Hackley, he (Hackley) had such knowledge of the original loan, as that he could not acquire title, as it regarded Ball or his creditors, or rather the latter; for neither Ball in his life-time, either before or after the death of Hackley, nor his executor since his death, although 30 or 40 years had elapsed from the time he parted with Judith, ever asserted any claim to her or her issue.

Considering the case then as depending merely on the nature of the first transaction, and whether that was a sale or gift, or only a loan, the evidence on both sides, consisting of a variety of circumstances pro and con, was before the Court and jury. How the jury would have decided as to this matter, we cannot say. I will only observe, for my own part, that had they found for the plaintiffs, I think the Court would not have been justified in setting aside their verdict as contrary to evidence. Suffice it, however, at present to say, that the counsel who conducted the defence withdrew the question from them, and demurred to the evidence; and, according to what was supposed to be the law of this State, included in the demurrer all the evidence, as well that of the plaintiffs as of the defendant. This course has been sanctioned by many cases in this Court; but, this is the first one that has come under my notice, which brings the propriety or impropriety of that practice, as a general and universal one, directly and in most of its bearings, to the view of the Court. It is necessary, therefore, that the propriety and effect of this practice should be examined into, at least so far as it touches this particular case; and that it should be settled, so far as a bare Court can do so. Any remarks, therefore, which I may make, and which may seem to go farther than such a case as this, will only be considered as incident to

8 the enquiry *we are at present bound to make, and not as intended to oppose the former cases, further than must necessarily result from the present decision. I feel the less restraint too on this subject, because as to mere matters of practice, the quo modo in which justice shall be administered, they can hardly be judged of except as cases arise. Any dictum or broad proposition, therefore, which may be laid down, and which, in the particular cases, may not trench on the great and leading principles on which our judicial system is founded, can have no weight, whenever found in conflict with those principles.

The position that the jury alone must find the fact, whilst it is the province of the Court to pronounce the law, is a first principle, a maxim in our system. A jury may find a special verdict, or the parties may agree a case, or move for instructions to the jury; or, there may be a demurrer to evidence, *Syme v. Butler, &c.* 1 Call, 105; in which case, if the evidence is positive, the demurrant must admit its truth; if circumstantial, he must admit, and if called upon must put on the record all the inferences which a jury might draw from it; and in this way ascertain the fact, without possible injury to the other party, and without any invasion of the trial by jury, *Stephens v. White*, 2 Wash. 203; and the facts being ascertained in either of these ways, the law remains open to be decided by the Court.

But, here is a case in which the whole evidence, consisting of both sides partly of written documents and partly of the oral testimony of a great number of witnesses, detailing many facts and circumstances tending on the one hand to prove a sale or gift of Judith, and on the other hand, a loan, is put into the record; and the question is, what are we to do, according to the decisions of this Court, with this mass of testimony? If we weigh it in equal scales, as a jury would, and say, on the whole, what it proves, it seems to me that we at once assume the province of a jury.

If we reject the evidence of the demurrant, or, *(which is the same thing,) give it no weight at all, then the question is, do we conform to the decisions of this Court?

Again: If there is a case in which any part of the demurrant's evidence ought to be considered as a part of the case, though other parts ought not, as some of our decisions seem to indicate, it would seem to follow that as all the evidence ought to be in the record, the Court may judge what ought, and what ought not, to be considered by them. There is certainly a want of precision and clearness in our decisions on this point, calculated to mislead the country, and which has mislead the counsel in this case, the consequences of which ought to be obviated as far as possible.

I have looked into all the cases which have been before this Court on this subject, and it seems to me that few or none of them, in practice, at least, have gone the length we must go in this case, if we weigh any portion of the demurrant's evidence.

In *Hoyle v. Young*, 1 Wash. 150, an action of slander on the plea of not guilty,

the defendant, after introducing evidence in mitigation of damages, tendered a demurrer to the plaintiff's evidence. This was objected to, because he had examined witnesses; and the Court sustained the objection. In this Court, that point was given up by the counsel, as properly decided. But this Court take it up and say, the proper rule is to allow a demurrer to evidence at any time before the jury retire, although the demurrant may have examined witnesses on his part, the whole evidence on both sides being stated, (which in all cases ought to be done,) unless the Court think the case clear against the demurrant; in which case, the books agree that the Court may refuse to receive the demurrer. This is the first case in which this doctrine of stating all the evidence is laid down. There was no argument pro or con from the bar. It was a case, too, in which the evidence did not conflict with

10 but was "merely to weigh in mitigation of damages, in case his evidence supported his declaration. The jury were to assess damages, either conditionally, before the trial of the demurrer, or on a writ of enquiry afterwards; and this evidence merely related to those damages. If put in the record, it could have no weight on the question, whether the declaration was supported, and but for the requisition to put it in the record, (the reason for which I cannot perceive, in that case,) I see no objection to that decision.

The cases of *Hyers v. Green*, 2 Call, 554, and *Hyers v. Wood*, 2 Call, 574, were writs of right, and the defence, in both cases, was non tenure, which was not pleaded, but offered in evidence to the jury on the mise joined. If this had been pleaded, and the evidence offered in support of the plea had not been such as it was proper only for a jury to weigh, being evidence of boundary, depending on surveys and a variety of facts and circumstances, no one would have doubted the right of the demandant to demur to the evidence adduced to support the plea. But, in the first place, here was no plea, and one question, and the main one, was, whether it was proper evidence on the general issue. In the first case, the demandant sought to try this question merely, by a demurrer to the evidence; and this demurrer, after stating the evidence of the tenant, says, to which the demandant demurred, &c. and produced in support of his right a copy of a patent, &c. and an Act of Assembly, &c. and a copy of a will, &c. (all written documents of record,) and prays judgment, &c. The tenant objected to join in demurrer, but for what reason is not stated; and the objection was sustained. The District Court reversed, because it was improper to permit the evidence to go to the jury, and because the Court refused to receive the demurrer.

The other case was like this in all respects, except that, in addition to offering a demurrer, the demandant objected to the evidence, which was also overruled, and except also, that the demurrer was objected to on the ground that it

11 *contained the evidence on both sides. There was a similar judg-

ment in the County and District Courts.

The first case was argued altogether, at first, on the question whether the evidence was proper on the mise joined. The Court afterwards directed the point, whether, in a demurrer to evidence, it was necessary to state all the evidence on both sides, to be spoken to.

Call, of counsel for the demandants, argued ably and at length that it was proper. Williams, on the other side, said he did not contest the doctrine. In this case, the Court give no reason for their opinion, but simply reverse the judgment of the District Court, and affirm that of the County Court.

In the last case, Judge Roane says, "As to the first objection stated by the tenant to the demurrer, I shall only say, that in the case of *Hyers v. Green*, this Court were of opinion, on consideration of the case of *Hoyle v. Young*, and other authorities, that the plaintiff ought, especially in a writ of right, also to set out his own evidence; and, in that case, justified the rejection of the demurrer, on the ground that the demurrant had not stated a title to recover, in respect of his own identity. I am not certain," he says, "whether the Court, in *Hyers v. Green*, considered the ground of the second objection, although the demurrers in the two cases are, in that respect, substantially alike; but, I take the rule to be, that though the Court ought to award a joinder in demurrer, where the evidence demurred to is in writing, or, being parol, is explicit, and will not admit of variance, yet that when the parol testimony is loose, indeterminate, and circumstantial, the party offering it shall not be compelled to join in demurrer, unless the party demurring will distinctly admit every fact and conclusion which such evidence or circumstance may conduce to prove;" and he adds, "the evidence in question, respecting the boundaries, the understanding of the country, &c. is entirely of this kind. The demurrer, therefore, may be thrown out of the case."

12 *Here, it would seem that the Court looked into the evidence of the demurrant, to see whether he had identified himself with his title, and thought he had not. Had the case turned on that point, it would seem to me, with great deference, that the Court would have invaded the province of the jury, in weighing the evidence.

But, in both cases, it was a mere question of boundary, as to the fact of the case; and as to the law, a mere question, whether such evidence was proper under the general issue; and all that is decided on the point now before us, is, that in a writ of right, if the plaintiff demurs, he must also set out his own evidence, so far at least as to identify himself with his title. The case before us is not a writ of right, nor is the demurrer offered by the plaintiff.

In the Case of *Harrison v. Brock*, 1 Munf. 22, which was an action of assumpsit, the plaintiff proved that Brock owed him a sum of money for work and labor. Brock introduced a witness to prove that his agent had paid the debt. The plaintiff introduced witnesses to discredit this evidence, and to prove that the agent cheated him,

&c. The defendant demurred, and stated all the evidence on both sides. The plaintiff refused to join in demurrer, but was compelled to do so by the County Court, who finally gave judgment for him on the demurrer. The District Court reversed this, because of an award pendente lite, &c. This Court decided that there was no ground for a reversal, and affirmed the judgment of the County Court. Judge Roane says, "In a demurrer to evidence, it has been decided that the whole evidence must be stated, and thereupon the judgment of the Court is to be pronounced."

"The question, therefore, becomes important, whether, in the case before us, the Court rightly ruled the appellant to join in demurrer? It is admitted that a discretion exists, at least in cases depending on loose or contradictory testimony, and the question is, was the discretion rightly exercised here? The appellee's testimony is contradictory to, and in conflict with, that of the appellant. It is true it is

13 *not opposed to the testimony originally adduced by him, but to that which came out, if I may be permitted so to say, in the replication. But, in principle, that can make no difference. If the right of the appellee to compel his adversary to join, be absolute, what is it but to give credit to his own witness, or at least to carry it to be adjudged by an improper tribunal? This would be intolerable, and a good reason itself, to refuse to compel a joinder." He proceeds; "As the County Court compelled the appellant to join in demurrer, without an explicit admission on the part of the appellee of the truth of the appellant's testimony, so far as it conflicted with his own, or, what is the same thing, without a waiver of his own conflicting testimony," he thinks the judgment was erroneous. But, as the error was in favor of the appellee, in compelling the plaintiff to join in demurrer, and as the final judgment would have been, a fortiori, for the appellant, if the appellee's conflicting testimony had been excluded, and would, in that case, have been altogether correct, he affirms the judgment of the County Court. This case shews that, where the demurrant has offered evidence which conflicts with that on the other side, it ought to be waived; and if it is not, still it is not to be weighed at all. But, if the evidence of the party demurred to is sufficient to maintain the action or plea, judgment shall be given accordingly. Possibly, if the party had not demurred, but had taken his chance before the jury, he might have succeeded; but by demurring, he virtually waived his evidence.

It would seem, however, from other parts of Judge Roane's opinion in this case, that he confines the doctrine to cases of credibility of evidence. When that is assailed, as was that case, he must waive such evidence; so that "whilst it does not confer on the Court," says he, "the power of judging of credibility, it does not take from it the power of inferring the facts admitted to be true." The idea intended does not seem expressed with the usual perspicuity of that learned Judge; for, if

14 the facts are admitted, *any in-

ference from them would seem unnecessary. I presume, therefore, he must have intended inferences from circumstances proved by witnesses, whose credit is not impeached by opposing testimony. That would be very much the case now before us; and I think it will not be difficult to shew that such case is within the reasoning of the Judge on the main point, as I shall attempt thereafter. But that was a case of credibility, and when the Judge came to apply the rule, that all the evidence, on both sides, must be in the demurrer, it was soon found that it could not be weighed in that case, as I think it will be found that it cannot in this.

The case of *Biggers v. Alderson*, 1 Hen. & Munf. 54, was in detinue for slaves. The plaintiff had been long in possession; which the defendant seemed at once to admit, and that it threw the onus probandi on him; and he accordingly offered in evidence an attested copy of a bill of sale from the plaintiff to Joseph Smith, under a clause in whose will the defendant claimed them. This bill of sale was all the evidence offered by the defendant. It was objected to, because a copy was offered; but the objection was overruled. The plaintiff then offered parol testimony to prove an implied verbal release by Smith, of his right under the bill of sale: which was objected to by the defendant, but admitted. The defendant excepted, and also demurred to the plaintiff's evidence; inserting also the bill of sale, which was all the evidence he produced. The demurrer was argued and overruled in the County Court, and judgment entered for the plaintiff. On removal to the District Court that judgment was reversed, and the cause retained there; and finally, a verdict and judgment were rendered for the plaintiff.

The question argued in this Court was, as to the admission of the plaintiff's parol evidence. But it was deemed admissible. The judgment of the District Court was reversed, and that of the County Court affirmed. Here there was no dispute about the execution of the bill of sale, which

15 *had been recorded. The only controversy was about the evidence going to prove the verbal release; and though the bill of sale was put in by way of inducement, the implied release was the only matter of dispute. It was not a case in which to try the merits of the matter now before us, and may, in fact, have been a proper case for a demurrer, inasmuch as the effort to prove a release admitted the bill of sale, and went in avoidance.

So in the case of *Hyer v. Shobe*, 2 Munf. 200. It was an ejectment; and the evidence of the plaintiff demurred to, and that of the defendant put in also. The plaintiff claimed as devisee of A. who was heir at law of B. who had a lease for lives of himself, two sons, and a grand-son, renewable forever. The defendant claimed under the grand-children of B. who, after his death, sold the land to him, A. the heir at law, being then in captivity with the Indians, but afterwards returning, devised it to the plaintiff. The plaintiff was bound to make out a good title, whether the defendant had any or not. This being the case, there

was nothing more natural, than by a demurrer to evidence, to submit the questions of law; one of which was, whether it was necessary for the plaintiff to prove that the lives had not expired, or that the lease had been renewed; and also, whether, being out of possession, the heir could devise. In short, the plaintiff was to prove title in himself, or he could not succeed; to that the deed of the defendant, which was the only evidence offered by him, might have been thrown out of the case.

The case of *Norvell v. Camm*, 2 Rand. 68, was a writ of right, before a Special Court of Appeals, and which had formerly been before a like Court, and came up again after the second trial. The demandant offered a demurrer to evidence, which the tenants objected to join in for various reasons, and amongst others, that they would contend that the jury might infer from their evidence, that a patent had issued to some one under whom they claimed; also,

because the demandant's title did not cover the land in controversy, *and contested both the credit and sufficiency of the proof as to that.

It was contended on the other side, that the Court, and not the jury, had, in that case, a right to infer a patent, if one could be inferred; and the authorities pro and con, were before the Court on that point. As to the difference between the witnesses, it was said to be unimportant; and as to the credit and sufficiency of the demandant's evidence to prove that his patent covered the land in controversy, it was said, the parties were directly at issue, and it being a question for the Court, the tenants ought to have been compelled to join in demurrer. The Court was of opinion, that the evidence offered by the tenants, and by the demandant to rebut it, made a proper case for a demurrer: that the evidence of the demandant was consistent with that of the tenants, from the whole of which the conclusions of law would be more correctly drawn by the Court than the jury; and as to the uncertainty in regard to the identity of the land in controversy, if the demandant is entitled to recover as much of the 433 acres described in the count, as his patent for 669½ acres will include, the Court was of opinion that it sufficiently designates that quantity by metes and bounds, to enable the Court to identify it, upon the final decision of the cause.

As to this case, I will in the first place observe, that it was a case before a Special Court, which, from its organization, does not admit of that time for deliberate consideration, which justifies us in holding those decisions of the highest authority, in case there shall appear any substantial objections to them. This too, as before said, was a writ of right, and had been formerly before a similar Court; and it was complained that the decision of that Court had been evaded by the proceedings on the second trial. But, on the subject of the conflicting evidence, as it regarded the power to infer a patent from it, if it was decided that the Court were the proper tribunal to infer, if inference in that case

could be made, then the evidence
17 "to rebut that presumption would, of course, be before the Court. But, if the inference was one which might be made, and it was proper that it should be made by the jury, and not the Court, then it seems to me, that this is a case, in which, by reason of the demurrer, the Court was considered as invested with the power to examine the circumstances on both sides, and to find as if it were a special verdict. So too, as to the boundary; there may have been something in the case, as doubtless there was, to take it out of the principles established in *Hyers v. Green* and *Hyers v. Wood*, where it was settled that contrariety of evidence, &c. on a subject of this nature, was not proper for a demurrer, but for the jury.

Whittington v. Christian, 2 Rand. 353, is the last case in this Court, and seems to place this question perhaps on a clearer ground, than any of the preceding cases, and to combine in it the whole doctrine, under our practice, which could be fairly extracted either from the decisions themselves, or the principles recognized by the Court in former cases; and perhaps ought to have saved me the trouble of so minute an examination of those cases. There may be this excuse, however, for my doing so. It will be found that most of the doctrines there laid down, on this subject, were merely dicta, and so may be considered obiter, so far as they touch the case now before us. That was an ejectment by *Christian* against *Whittington*; and the Reporter having given no statement of the case, it does not clearly appear what evidence was adduced on the one side, and what on the other. The defendant, however, demurred to the evidence of the plaintiff; in which the plaintiff refused to join, but was overruled by the Court, who finally gave judgment for him. The ground why he objected to join, is not stated. One thing, however, seems certain; that at least the patents to *Norvell*, under whom *Whittington* claimed, were put in the record. So far as this, it is seen that evidence on the part of the demurrant was in the record; and so far the case was like that
18 of *Hyer v. Shobe* above mentioned.

If this was all, and if the naked possession of the defendant would have protected him equally unless the plaintiff shewed title, then it was no more, in substance, than a demurrer to the plaintiff's evidence, as in the case of *Hyer v. Shobe*. But this was not all. The plaintiff claimed under an ancient patent, on which judgment of forfeiture had been pronounced by the Old General Court for non-payment of taxes; and although the long possession and other circumstances detailed in the evidence, might have been sufficient to sustain an ejectment against any one not claiming under the Commonwealth; yet as *Norvell*, by the patents aforesaid, and those claiming under him, did so claim, it was necessary that the patents should appear in the case, in order to raise and try the question of law, whether lands so situated could be granted by such patents as those produced; and instead of moving for an instruction on this point, the course

by demurrer to evidence, and placing the patents, which alone constituted the defence as to this matter, on the record, was resorted to. This case, then, was not like the one before the Court, but presents one of a peculiar kind, of which I will say something hereafter.

The dicta then, in this case, will only apply to the case before us; and if they are not a correct summary of the law as contained in previous cases, could hardly be taken as a decision overruling those cases. But, as this case may overrule any, if any there be, against it, it became necessary to review them.

Judge Green, in his opinion, goes into the doctrine generally, and his views seem to have been concurred in by the other Judges; at least so far as concerned that case. He says, "the authorities on this subject, shewing the original practice of the English Courts, have been brought to the attention of the Court, and ably commented on. From these it appears, that the former practice was, to require the party demurring to admit upon the record the

19 existence of all facts, which the evidence offered by the other *party conducted to prove. Those facts were to be ascertained by the Court, and in this respect, the Court might err in opinion, and if it did, and the other party refused to make the admission, he lost the benefit of his demurrer; or if he made the admission on record, it bound him irrevocably," &c.

"To avoid this inconvenience, the modern practice is, especially in Virginia, where it has been sanctioned by repeated decisions of this Court, to allow either party to demur, unless the case be clearly against the party offering the demurrer, or the Court should doubt what facts should reasonably be inferred, from the evidence demurred to, in which case, the jury is the most fit tribunal to decide: to put all the evidence, on both sides, into the demurrer; and then to consider the demurrer, as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given against him, and had waived all the evidence on his part, which contradicts that offered against him, or the credit of which is impeached; and also all inferences from his own evidence, which do not necessarily flow from it. With these limitations," he says, "the party whose evidence is demurred to, has all the benefit of the ancient practice, which it was intended to give him, without subjecting the other party to its inconveniences; and no disputed fact is taken from the jury, and referred to the Court."

Now, I am free to admit that this modern practice, especially in this State, where, in the hurry of jury trials, the party might be called on to admit facts which a jury ought not to infer, or lose his demurrer, is a very reasonable one, so far as it is considered independent of, and apart from, the practice, peculiar to this State I believe, of putting all the evidence on the record, the object and bearing of which practice is now under consideration. As to this practice, so far as it submits evidence to the Court which the party demurred to refuses so to

submit, insisting on his right to a trial by jury, unless the demurrant will, according *to ancient practice, confine himself to objections to the sufficiency of his evidence, it is certainly an innovation; and the question is, whether it trenches on the trial by jury. If it does, or so far as it does, it cannot be supported.

20 In regard to this matter, it seems to me, that until cases from time to time arise, by which that practice can, in each case, be brought to the unerring standard, recognised by all, that the law is for the Court, the fact for the jury, we may err in laying down any general rule. Thus, according to the case just cited, where the demurrant introduces evidence on his side and then demurs, what part of his evidence is he to be considered as waiving? 1st. All that contradicts that which is offered by the other party. That is, for instance, where a fact is proved circumstantially on one side to be so, and on the other side, to be otherwise; this latter, being the demurrant's evidence, must be waived. 2d. He must waive all his evidence, the credit of which is impeached; as well where the witnesses are in conflict as to the fact, each standing fair, but one clearly mistaken; as where the party demurred to produces evidence impeaching the character of the witness. 3. He is also to waive inferences from his own evidence, which do not necessarily flow from it. This seems to imply that he may have the benefit of parol evidence on his part, from which inferences may be drawn, the witness not being impeached. Who then is to decide, whether the inference necessarily flows from the fact proved by such a witness? This dictum, if it goes as far as I have supposed, would perhaps cover the case before us; and if correct, enable us to look at some of the evidence. Has the party demurred to a right to say that the inference does not necessarily flow from it, and I will not admit it, or will he be compelled to admit it? And if not, must the demurrant waive it, although the Court may think with him, that it does necessarily flow from the fact? If it was left to the jury, could the Court tell them, they must infer the fact? If

21 they could, probably the Court itself might *infer it. But as I understand, unless perhaps as to what may be termed a conclusion of law, the Court could only tell the jury that they might, not that they ought, to infer the fact. But how comes this primary evidence, from which the fact is to be inferred, to be put into the record, without the party demurred to admitting it such, and assenting to it? Can the Court say to a jury, "an unimpeached witness has proved so and so, from which you ought to infer so and so?" I presume not. If the Court could not thus instruct as to the weight of evidence, it would seem to follow that they could not weigh it when presented by demurrer; and the demurrant would be obliged to waive every inference that the other party would not admit. This would reduce the cases in which the demurrant's evidence would have any avail, to a few indeed. But, if the party demurred to voluntarily admits the inference, it is then not a demurrer to

evidence, which coerces him, but a case agreed. He may be coerced to join in demurrer, because the other party admits all he can ask, and so makes a reference to a jury unnecessary; but he cannot be coerced to admit any thing, which it is his right to have tried by a jury. Nor will the bare fact of his joining in the demurrer, enable the Court to infer any thing against him, which they could not, had he refused. This new practice cannot have the effect to do away all the principles hitherto governing in cases of demurrers to evidence. According to this view of the matter, then, the demurrant cannot say in this case, "It is true, according to the evidence against me, I ought to admit so and so, as you demand; but my evidence shews I ought not; for, according to it, the fact is otherwise, and my witness is not impeached." He must waive his evidence, or the Court must do it for him, as to this matter. Nor will he be permitted to set one set of circumstances against another, from which opposite conclusions may be drawn; but must go before the jury, who are to compare

22 them and draw the inference one way or *the other; or he must surrender such evidence, and it is to have no weight in the cause.

But, say that his evidence may be such as, if true, sets up a matter of avoidance, altogether consistent with the fact proved by the party demurred to, and which, admitting that fact, shews that he is nevertheless not responsible. What is to be done in this case? Here the demurrant would have no hesitation in admitting the fact as proved on the other side; his whole defence depends on avoiding it, by a substantive and distinct fact. The facts proved by the party demurred to, we will say, then, are set down on the record, as admitted; and the demurrant then proceeds to insert his evidence in the demurrer. The demurrer, then, will not conclude in the usual form, "that the matter so offered by the plaintiff," for instance, "is not sufficient to maintain his action;" and that "he (the demurrant) is not bound by law to answer to it;" but precisely the reverse, to wit, that it is sufficient, and that he is bound to answer, and does answer thereto, by shewing in evidence so and so. If he can do this in substance, though it may not assume this precise form, then it will be thrown on the plaintiff to say, (also in substance, if not in form,) either that the fact is not so, "your evidence is not true, and I put myself on the country," or he will say, "your evidence of this new fact is circumstantial, loose, &c. and I will admit no inference from it." Or, if it is not circumstantial, but direct, he will say, "I have impeached the credit of the witness, either by assailing his general character, or by shewing that though I cannot impeach his general character, he must be mistaken, the thing itself being incredible;" or, "I have proved such and such facts, which are inconsistent with those supposed to be proved by your evidence." What can the demurrant answer to this? He will be deluded, if he supposes that his evidence is to be weighed by the Court in equal scales, against that of his

23 opponent. On the contrary, he will be *called on to waive his evidence, and admit the facts which destroy his defence; for, if this would not be the course, the Court is to be put, as to both parties, in the place of a jury, and to find in fact a special verdict.

I believe the above investigation of the cases in this Court will shew, whatever dicta there may be, that the principles recognized have not gone this far, so as thus to sanction the invasion of the jury trial. A practice, then, which might thus delude, ought not to prevail, except under proper guards and explanations.

But, suppose this substantive and independent defence consists of an undisputed fact, such, for instance, as the patent in the case of *Whittington v. Christian*, about which the jury ought not to hesitate, and the only doubt is, whether in law, it is a defence. It may be said, that if the Court are called on to instruct the jury, they may, nevertheless, differ with the Court as to the law, and the party may have no remedy but a new trial; and, after two such verdicts, he could, by our law, get no other trial. This is an argument, rather of inconvenience resulting from our law as to new trials, than one which answers the objections urged from the very nature of a demurrer to evidence, to shew the dangerous tendency of innovations upon it. Other means, perhaps, less dangerous, might be devised to obviate the inconvenience above stated. And if nothing better could be done, ought not the law as to new trials to be changed, so as not to prevent fifty, if necessary, in such a case, and that at the costs of the party thus persisting to insist on a general verdict? Whilst I would protect the trial by jury from invasion, I would equally protect the right of the Court to pronounce, what belongs to them, the law of the case. I am not to be understood as saying what ought to be done; but surely such a case as last put, seems to me more proper for an instruction to the jury as to the law, than for a demurrer to evidence. However, as a demurrer has been sustained

24 in the case of *Whittington v. Christian*, it may be that in "such cases as that, and *Hyer v. Shobe*, and *Biggers v. Alderson*, above referred to, (where the demurrant's evidence consisted altogether of matter of record,) that no harm would be done. Such cases would be few; but surely where the jury may find the fact differently even from what seems to be proved by the witnesses, the trial ought not to be withdrawn from them, but on terms that he who does withdraw it shall admit every thing which a jury might infer or find against him, and waive every thing disputed, though the evidence is in his favor, and perhaps not disputable. Such a practice well understood, would restrict to a few cases this complicated kind of demurrer to evidence, which, it seems to me, has hitherto not been defined with sufficient accuracy, and of which, the more I think, the more I doubt.

This case, however, is one about which there can be no doubt. The whole of the demurrant's evidence consists of a train of circumstances, the only object of which is

to shew a state of things precisely opposite to that which is to be inferred from the evidence on the other side, and not to set up a distinct defence consistent with it.

The judgment, then, must be affirmed, unless there is some ground on which this Court could award a *venire de novo*. It seems to me, that we cannot do this.

Suppose that the plaintiff introduces a witness, who is discredited, but as to whose evidence, if taken to be true, there are doubts whether it would support the issue on the part of the plaintiff. The defendant demurs, and puts his evidence in the demurrer. This is taken to be waived, and the demurrer overruled, and judgment for the plaintiff. Would it be a ground for a new trial in the Court below, that he had been mistaken, had been deluded by this practice, and had been obliged to waive his best defence, and to rest his case on the sufficiency of the plaintiff's evidence to prove the issue? Perhaps not; but if it would; this Court cannot hear an original motion for a new trial. We must

25 say, whether the issue on the *part of the plaintiff is supported or not; that must be our judgment, as decided in the case of *Humphreys' adm'r v. West's adm'r*, 3 Rand. 516. If it is, we must affirm; if it is not, then we may reverse and enter judgment the other way. Here the defendant had a clear right to demur to the plaintiff's evidence, subject to the rule that his must be waived, &c. It was not the business of the Court below to apprise him of his danger in doing so; and it does not appear to me that we can relieve him from the consequences, and give him another chance before the jury.

As that Court, then, could not have refused a demurrer to the evidence, nothing was left for them, nor is there any thing left for us to do, but to pronounce the law on that demurrer. It is true that Court might have heard a motion for a new trial, and I will not say that it would have been wrong to have granted it; but we cannot do it.

This would be our course, it seems to me, in a case of property; and surely we ought not to go farther in a case for liberty.

On the whole, I think the judgment must be affirmed.

JUDGE CABELL.

Judith and her descendants were plaintiffs in the Court below, suing for their freedom. Green, as agent for the Commonwealth, claimed them as slaves belonging to Ball's estate, and subject to the payment of a debt due from that estate to the Commonwealth. The plaintiffs admitted that Judith was, at one time, the property of Ball; but they claim now to be free, on the ground that Ball either gave her, or sold her, when a small girl, to Barrow and his wife, who was Ball's sister: that Barrow, afterwards, sold Judith and such of her descendants as were then born, to Hackley, who, by his last will and testament, emancipated them, at the death of Barrow. It is admitted that the situation of Judith determines that of the other plaintiffs. If she is free, they are free also.

26 *The defendant demurred to the testimony of the plaintiffs; putting, however, his own testimony also, into the demurrer.

As this is a demurrer tendered by the defendant, the first subject of consideration, must be the evidence of the plaintiffs; for, if that be insufficient, the plaintiffs must be cast, on the ground of that insufficiency; and there could be no necessity for looking at the testimony of the defendant.

Although it is not the practice in England, to compel a joinder in demurrer, unless the demurrant will distinctly admit on the record, every fact, which the evidence demurred to conduces to prove, yet even there, after a demurrer has been joined, it is always considered that the demurrant admits, by the demurrer, every fact which the jury could have found upon the evidence demurred to. (See the opinions of Lord Mansfield, and of Buller, Justice, in *Cocksedge v. Fanshaw*, Douglas, 132, 134.) This is, a fortiori, the case in this country, where it is not the practice to require admissions to be made on the record, before the party can be compelled to join in demurrer.

Let us apply this principle to the case before us.

The plaintiffs proved by a witness, Field, that he boarded with Ball, two years, about the years 1770, 1771, and 1772; and went to school to Barrow: that Barrow had in his possession, during these two years, a negro girl about 10 or 11 years of age: that he knows not by what title Barrow held her, but supposes it was by loan from Ball, as Barrow was insolvent: that Barrow had no other negro in his possession: that Ball was a man without children, possessed of much property, and very kind to his relations. The plaintiffs also proved by Cardwell and Gray, that Barrow had undisturbed possession of Judith and her descendants, for thirty years previous to his death, which happened in the year 1809. They also gave in evidence, without objection on the part of the defendant, a statement in the hand-writing of Barrow, in which

Barrow says, that in the year 1767, or 27 1768, Ball gave to him and his *wife a negro girl by the name of Jude, then about 6 or 7 years old, to go under the denomination of his wife's servant, in order to prevent her from being sold to pay his debts, he being much involved: that he raised her and her children, and had peaceable possession of them, from the time of the gift to the time of making the statement, viz: in 1808, without interruption from any person whatever: that at the time of the gift, Ball was in flourishing circumstances, and had no children; and that there was great friendship existing between him and Barrow. Strode proved that Ball told him he had sold Judith to Barrow; and that Barrow told him he had sold her and her descendants to Hackley, on consideration of Hackley's paying his debts. Gray also said that Barrow was always considered insolvent. Two of the witnesses for the plaintiffs speak of a report of Judith and her children then born, having been sold in the year 1788, or 1789, on an execution against Ball's property,

and having been bought by Hackley; but they were not present at the sale, and knew nothing of it, of their own knowledge. Hackley died before Barrow and Ball. His will is in the demurrer, and by it he emancipates the plaintiffs at the death of Barrow. Barrow's will is also in the demurrer, and by it he confirms to them their freedom. This, as I understand it, is the sum and substance of the evidence of the plaintiffs.

What conclusions would a jury have drawn from this testimony? If it be considered alone, unaffected by the testimony of the defendant, it would be impossible to raise a doubt about it. It proves unquestionably that Judith was given or sold by Ball to Barrow: that Barrow had uninterrupted possession, under that gift or sale, for 30 years, to the day of his death; and that he sold her and her children to Hackley, who emancipated them by his will. If there had been no other testimony, no body could have questioned the propriety of overruling the demurrer.

But the important question in this case is, what effect shall be allowed to the evidence of the defendant, inserted in the demurrer?

28 "Before we proceed to the solution of this question, it is proper that we should determine with precision, the nature of the testimony relied on by the defendant. I have examined it with great care, and have come to the conclusion that the whole of it is in conflict with the evidence of the plaintiffs. The evidence on the part of the plaintiffs clearly shews a gift or sale of Judith by Ball to Barrow, and a sale by Barrow to Hackley. The whole of the testimony of the defendant goes to prove only a loan from Ball to Barrow, and a fraudulent purchase by Hackley from Ball. The facts relied on by the defendant cannot be true, if those relied on by the plaintiffs be true. They are inconsistent with each other, and cannot stand together.

The real question then, in this cause, is, what shall be done in a case of such contradictory testimony? The opinion delivered by Judge Green, in the case of *Whittington v. Christian*, 2 Rand. 357, in which opinion, (so far as relates to this point) I understood the whole Court to concur, furnishes a ready answer. Although it is the practice in this country, sanctioned by repeated decisions of this Court, to allow the whole of the evidence on both sides to be inserted in a demurrer, yet we are "then to consider the demurrer, as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence, which do not necessarily flow from it." I do not perceive in the case before us, any direct impeachment of the credit of the witnesses. But, evidence is not necessarily exempt from the charge of being contradictory, merely because there is no direct impeachment of the credit of witnesses; nor because the witnesses are not found to give contradictory accounts of the same transaction.

That evidence is clearly contradictory, which seeks to establish a case, not only different from, but inconsistent with, the case already proved. It is unquestionable, *that the demurrant would not be permitted, after demurrer, to rely on testimony directly disproving the case proved by the other party, and admitted by the demurrer. It is equally clear to my mind, that he cannot be permitted to rely on testimony, which indirectly disproves it, by proving a case inconsistent with it.

This principle is decisive of the case before us. The plaintiff's testimony shews a good cause of action. The defendant has shewn nothing, which, admitting the truth of the plaintiffs' testimony, is calculated to avoid it. His whole testimony is contradictory of that of the plaintiffs; and being of that character, the demurrer is to be considered and decided, as if he had "waived" it. The demurrer was, therefore, rightly overruled, and judgment entered for the plaintiffs.

Whether the defendant ought, in regard to his own interests, to have demurred under the circumstances of this case, was a matter for his own consideration, and with which we can have nothing to do. He surely had a right to waive the benefit of his own contradictory testimony, and to rely on the supposed insufficiency of the testimony of his adversary. If he has been mistaken in the estimate which he formed of the evidence of his adversary, or even if he has been mistaken in the opinion he entertained of what he would be considered as waiving by the demurrer, and has, in consequence of that mistake, adopted a course injurious to his interests, it is not for us, when there is no error in the judgment of the Court, to remedy the inconvenience by reversing the judgment. It would be beyond the legitimate powers, even of a Court of Chancery, to grant relief in such case, by means of a new trial. *Oswald, Deniston & Co. v. Tyler*, 4 Rand. 19.

If it be said that the demurrer should be set aside and a venire de novo awarded, under the authority of the case of *Taliaferro v. Gatewood*, 6 Munf. 320, I reply that that case was very unlike this. There, the Court saw that a fact had been omitted, "which it judicially *knew had existence, and for want of which, a decision contrary to the right of the case may have taken place;" and it was held error in the Court, not to have called for the insertion of the fact. As to that case, I would farther observe, that the Court were not unanimous in the decision; and although was of the majority, yet I am, on subsequent reflection, inclined to doubt the correctness of the decision.

If, in the case before us, the defendant's testimony, instead of contradicting the evidence of the plaintiffs, had admitted its truth, and, as in the case of *Whittington v. Christian*, 2 Rand. 353, had merely set out a different case, not inconsistent with that made out by the plaintiffs, but presenting a question whether, on the whole evidence, the plaintiffs had exhibited a cause of action, it would be a fit occasion for discussing the propriety of the practice

of introducing into the demurrer, the evidence on both sides. When the case shall really occur, I hope we shall have a fuller Court, when the question may be put at rest.

Judgment affirmed.

31 *Caton & Veale v. Lenox, &C.
Two Suits.

March, 1827.

Evidence—Testimony at Former Trial—Witness Dead.—Where a witness has given evidence in a suit, in which a new trial is granted, and the witness dies before the second trial, the substance of his testimony may be proved on the second trial, and it is not necessary to repeat his very words.

Nonnegotiable Notes—Suit by Assignee.—Where a note, not negotiable, is endorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, and not a remote assignor, before the Act of Assembly of 1807.

Same—Same—Witnesses—Remote Assignee.—And therefore a remote assignor might have been a competent witness, before that Act, to prove that the immediate assignor was discharged, in a suit between him and the last assignee.

Evidence—Witnesses—Competency—Interest.—It seems, that if the interest of the witness was apparent on the face of the paper, and he was not objected to on the first trial, but on the contrary, was cross-examined, it is too late to make the objections, on the second. Per CARR. Judge.

Assignments—Suit by Assignee against Assignor—What Necessary to Sustain.—In general, due diligence must be used by the assignee, in bringing suit against the maker before the assignor can be sued; but there are many cases in which no suit need be brought against the maker, as where the note was a forgery, and the assignor has received the money from the maker, or where the assignor

***Nonnegotiable Notes—Suit by Assignee.**—In *Long v. Pence*, 93 Va. 587, 25 S. E. Rep. 593, it is said: "Prior to the statute authorizing a recovery from an assignor, an assignee had the right, upon the principles of the common law, to recover from his immediate assignor, under the contract implied from the assignment, that the assignor would repay the consideration he had received for the chose in action assigned, if payment thereof, by the use of due diligence, could not be obtained from the obligor or maker. This implied promise was not considered, however, to extend at law to any other than the immediate assignee, and consequently no assignee could recover at law from a remote assignor." *Mackie v. Davis*, 2 Wash. 219; *Caton & Veale v. Lenox*, 5 Rand. 31, 42; *Mandeville & Jameson v. Riddle & Co.*, 1 Cranch 200; *Yeaton v. Bank of Alexander*, 5 Cranch 40. But although not assignable at law, the implied contract was deemed transferable in equity, and a court of equity would enforce it. *Riddle & Co. v. Mandeville & Jameson*, 5 Cranch 322; *Bank of U. S. v. Weisiger*, 2 Peters 381. See on the same point the principal case cited in *Drane v. Scholfield*, 6 Leigh 396.

†**Assignments—Suit by Assignee against Assignor—What Necessary to Sustain.**—In *Morrison v. Lovell*, 4 W. Va. 350, it is said "as a general rule, the assignee cannot recover from the assignor the amount paid for the assignment, unless due diligence is used, without effect, against the debtor; but it is in no case necessary to pursue the debtor, if it be clear that such pursuit would be unavailing; as, if the obligor be insolvent at the time of the assignment; or when the note falls due; or where the note is a forgery; or where the maker is a married woman." *Mackie v. Davis*, 2 Wash. 219; *Violett v. Patton*, 5 Cranch 142; *Brown v. Ross*, 6 Munf. 391; *Caton & Veale v. Lenox*, 5 Rand. 31; *Burrill v. Smith*, 7 Pick. 391; *Erwin v. Downs*, 15 N. Y. 575. And in *Shifer v. Howell*, 9 W. Va. 307, it is said: "the contract of assignment of what is commonly called 'cash paper,' has undergone judicial investigation, and the obligation of the assignor is well defined and understood. It is that he warrants the solvency of the debtor and the existence and justice of the debt. Upon the assignee using or exercising due diligence to collect the debt, and failing, because of the inability of the debtor to pay, or because the debtor shows that he ought not, in law, to be required to pay the same, and thus defeats a recovery; then the law raises an implied promise, on the part of the assignor, to repay the price which he received for it. A suit is not always necessary to entitle the assignor to recover back, but he must show that a suit would be unproductive of good, and that the as-

signor has suffered no loss from the want of such suit; such as the notorious insolvency of the debtor, or some reason why a judgment could not be had." *Mackie v. Davis*, 2 Wash. 219; *Caton & Veale v. Lenox*, 5 Rand. 42, and many other cases in Virginia.

Instructions—Abstract Point of Law.—A Court cannot be called upon to give an instruction on an abstract point of law.

Assignments—Suit by Assignee against Assignor—What Necessary to Sustain.—There is no obligation on the assignee to pursue the ball of the maker, before the assignee can sue his assignor.

These were two suits brought in the Borough Court of Norfolk, by Lenox and others, against Caton & Veale. As the two cases are exactly alike, only one of them will be noticed.

An action on the case was brought by the plaintiffs against the defendants, as endorsers of a promissory note in these words:

"Norfolk, May 8th, 1806.

"Sixty days after date, I promise to pay to Caton & Veale, or order, at the Office of Discount and Deposit of
32 *the Bank of the United States at Norfolk, (without offset,) six hundred and fifty dollars. Value received."

(Signed)

"William Hartshorne, jun'r."

Caton & Veale assigned this note, by a blank endorsement, to Robert Gibson, who assigned it by a like endorsement back again to Caton & Veale, who assigned it in blank to the Bank of the United States. This note was protested on the 12th of June, 1806, for non-payment. Suit was brought against Hartshorne, the maker, on the note, in December, 1807; and judgment was obtained in June, 1809. A ca. sa. was issued, and returned non est inventus. Before this time, Hartshorne had removed to Baltimore; and the Bank brought suit against Caton & Veale, as endorsers of the note. The defendants pleaded non assumption, and the jury found a verdict for the plaintiffs. The Court granted a new trial.

At the second trial, William A. Armistead was examined as a witness, to prove what Robert Gibson had deposed at the first trial, the said Gibson having died since the first trial. Armistead had been a jury-man on the former trial. The defendants objected both to the competency of Gibson to give evidence at all, in that suit; and that if he were competent, it was not proper for Armistead to give evidence as to the substance merely of what Gibson had said on the former trial. But, the Court over-ruled the objection, and admitted the evidence. The defendants excepted.

The defendants then moved the Court to instruct the jury, that there is no difference in point of law, between the responsibility of the endorser of a promissory note for money payable at Bank, and the assignor of a bond for money, not payable at Bank. This instruction was given by the Court.

The Court refused to instruct the jury,

signor has suffered no loss from the want of such suit; such as the notorious insolvency of the debtor, or some reason why a judgment could not be had." *Mackie v. Davis*, 2 Wash. 219; *Caton & Veale v. Lenox*, 5 Rand. 42, and many other cases in Virginia.

The principal case is also cited with approval on this subject in *Smith v. Triplett*, 4 Leigh 600, 603; *Thompson v. Govan*, 9 Gratt 600. See further, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

that the law did not imply a promise of the defendants, as endorsers of the

33 *two notes of Hartshorne, to pay the money to the plaintiffs as assignees, on the failure of the maker to pay them; but imposes on them, as endorsers, an obligation to pay if the money were not recovered of the maker, due diligence being used by the holder to recover the money of him. To this refusal, an exception was taken by the defendants.

The third instruction asked for by the defendants, was, that the plaintiffs, as assignees were bound to bring suits on the notes, against the maker, (Hartshorne,) unless he were insolvent, or could not be found. This instruction was refused, and the defendants excepted.

Fourth. The defendants moved the Court to instruct the jury, that the failure or stoppage of payment of Hartshorne, while he remained in possession of valuable property which was his own, was not, in law, such an insolvency as excused the plaintiffs from suing Hartshorne. This instruction was given.

Fifth. The defendants moved the Court to instruct the jury, that if they should be of opinion on the evidence, that there was not due diligence, but improper delay, in instituting or prosecuting the plaintiffs' suit against Hartshorne, the defendants are discharged from their liability as endorsers. This instruction was refused, as moved for, but given with this addition: "unless it appeared to the jury, that the notes were exchanged notes, in which case the Court consider due diligence unimportant."

The sixth instruction asked for, was, that if the jury should be of opinion on the evidence, that Thomas Seaman, the special bail of Hartshorne, was able to pay the amount of the judgment obtained by the plaintiffs against Hartshorne, who was out of the country, it was the duty of the plaintiffs to pursue legal measures to recover the money from the bail; and if the plaintiffs have failed to use due diligence against Seaman, the defendants are not liable in this action. The Court refused to give this instruction.

34 *The seventh instruction asked for, was, that it is not competent to the plaintiffs, in this action, to go into an enquiry into the consideration for which the notes were given by Hartshorne to the defendants, nor into the state of accounts between Hartshorne and the defendants, and that they are to disregard so much of the evidence as is intended to prove that the notes now sued on, were exchanged notes, or that they were given by Hartshorne, in consideration of other similar notes given by the defendants to him. This instruction was refused by the Court.

An eighth instruction was asked for by the defendants, that if, from the evidence, it appears to the jury, that the notes now sued on were exchanged notes, the nature and degree of the liability of the defendants as endorsers thereof, to the plaintiffs, is the same as if the notes had been given for money or other valuable consideration. This instruction was also overruled.

The plaintiffs then moved the Court to

instruct the jury: 1st. That if they should be of opinion that the notes in question were given by Hartshorne to the defendants, in exchange for two other notes of cotemporaneous date, and for the same sums given by them to him, which latter notes have never been paid, but were stolen and lost; then the doctrine of diligence has nothing to do with the case, inasmuch as the defendants could not, in that event, be injured by any negligence on the part of the plaintiffs. 2d. That if the jury should be of opinion, that Hartshorne was insolvent in May or June, 1806, and that the plaintiffs could not have recovered the amount of these notes from him, even if they had brought suits against him when the notes became payable, then the omission to bring these suits at that time, is not such negligence as discharges the defendants.

These instructions were given by the Court, and the defendants excepted.

The jury rendered a verdict for the plaintiffs, and judgment was given accordingly. The defendants appealed to the Superior Court of Law, who affirmed the judgment of "the Borough Court; upon which they took an appeal to the Court of Appeals.

These causes were ably argued in this Court, by Wickham for the appellants, and Tazewell for the appellees. But, as all the points of argument are fully examined in the opinions which follow, the topics discussed at the bar will be found in those opinions.

March 3. The Judges delivered their opinions.*

JUDGE CARR.

It being agreed that the two suits between these parties are precisely alike in all their parts, I shall, for brevity, notice but one. The following is a copy of the note, which is the foundation of the proceeding: "Norfolk, May 8th, 1806. Sixty days after date, I promise to pay to Caton & Veale, or order, at the office of discount and deposit of the Bank of the United States at Norfolk (without offset) six hundred and fifty dollars. Value received. (signed,) William Hartshorne." Caton & Veale passed this note by a blank endorsement to Robert Gibson, who passed it by a blank endorsement, back to Caton & Veale, who then endorsed it in blank to the Bank of the United States. On the 12th of June, 1806, the officers of the Bank had this note protested for non-payment. In December, 1807, they sued Hartshorne on the note. In June, 1809, judgment was obtained, a *ca. sa.* issued, and returned *non est inventus*; Hartshorne having, before that time, removed to Baltimore. The Bank then brought an action of assumpsit against Caton & Veale, as endorsers of the note. Upon the plea of non assumpsit, a jury was sworn, who found a verdict for the plaintiffs. A new trial was granted. At the second trial, the plaintiffs introduced Armistead, a juror in the first trial, to prove what Robert Gibson, since dead, had testified to at that trial. Armistead stated,

*The PRESIDENT and JUDGE CABELL absent.

at some length, and with considerable minuteness, "the evidence of Gibson; but said he did not pretend to repeat his words, but to give the substance of his testimony, to the best of his recollection. Thereupon, the defendants' counsel moved the Court to exclude the evidence, on two grounds: 1st. That Armistead ought not to be received to prove the substance of what Gibson had said. 2dly. That Gibson himself, at the time he had given evidence, was interested and incompetent.

The first is an important question upon the law of Evidence. It was contended in the argument, that what a witness, (since dead) had sworn to at a former trial, could not be given in evidence, unless the very words he had used could be repeated and sworn to; and the dictum of Lord Kenyon, in *Rex v. Jolliffe*, 4 Term Rep. 290, was cited. That was a case of this kind. An information had been granted against the defendant for a misdemeanor as a magistrate. The case was sent down to be tried at Nisi Prius. Just before the trial was to come on, the defendant distributed several papers, vindicating his character, and charging the prosecutor with malice. On affidavits to the Judge of this fact, the trial was put off; and a motion was made in the Court of King's Bench, to which the affidavits had been returned by the Nisi Prius Judge, for a rule nisi, for another information against the defendant, for this attempt to prejudice the jury who would try the cause. The rule was granted. In shewing cause against it, the counsel contended that the affidavits taken at Nisi Prius could not be taken into consideration, because they were not taken in the same Court, nor in the same cause. To this position, Lord Kenyon was entirely opposed. Among other things, he remarked, "It has been said, that in no case whatever, can the proceedings in one cause be made use of in another; but the contrary is every day's practice. In the Court of Chancery, depositions taken in one cause are frequently read in another, saving all just exceptions, &c. So in Courts of Law, the evidence which a witness gave on a former trial, may be used on a subsequent

37 "one, if he die in the interim; as I remember was agreed on all hands, on a trial at bar, in the instance of Lord Palmerston; but, as the person who wished to give Lord Palmerston's evidence, could not undertake to give his words, but merely to swear to the effect of them, he was rejected." Here, we see a clear and explicit recognition of the rule. Lord Kenyon refers to a particular case, where it "was agreed on all hands" to be the rule. He then adds, in the most general manner possible, the reason why, in the case referred to, the witness was rejected. Now, it would seem very strange, that Lord Kenyon should lay it down as a general rule, admitted on all hands, and annex to it, in the same breath, a restriction which would, in ninety-nine cases out of a hundred, prevent its application; which would, in truth, destroy it as a rule; and yet this would be the effect, if we understand him to say, that what a witness (since dead) swore to in a former trial, cannot be given in evidence, unless

the precise, identical words which he spoke, can be proved. A man who has listened attentively to a witness, especially a jury-man, (as here,) whose oath binds him to listen, may, if called upon within twelve months, (as in our case,) give substantially a correct detail of what the deceased witness stated. But, if you call upon him to repeat the words, and to swear that they are the very words, no man, who had the least respect for his reputation, would venture to do it; unless he had written down the words at the moment of their delivery. Thus the restriction would destroy the rule. I should not believe that Lord Kenyon meant this, if there were no other cases establishing the rule; but there are many, which lay it down without any such restriction. I will state a few of them.

Buckworth's Case, Sir Thomas Raymond's Rep. 170, (decided about 1668.) Information against Buckworth, &c. for perjury in Ejectment. One was produced to prove what one that is since dead, swore upon the first trial; and by Kelyng, C. J., it shall not be allowed, because 38 "betwixt other parties; but Twisden and Morton contra; and it was allowed. I understand from this brief note, that in a trial in a case of ejectment, Buckworth committed perjury: that in prosecution for this, a witness was called to prove what one (since dead) had sworn to in the ejectment case (hence Kelyng's objection that it was "betwixt other parties;") but the evidence was received.

Pyke v. Cranch, 1 Lord Raym. 730, (about 1697.) It was resolved in a trial at bar, that "if a man was sworn as a witness at a former trial, and gave evidence and died, the matter that he deposed at the former trial, may be given in evidence at another trial, by any person who heard him swear it, at the former trial." Here we find the rule very clearly expressed; and in such a manner as to exclude the restriction contended for. It is said that the matter (not the words) of the deceased witness, may be given in evidence.

Coker v. Farewell, 2 P. Wms. 563. There had been an issue directed out of Chancery, which was tried at law, and found for the plaintiff. A motion was made to the Chancellor for a new trial. He sent it to the law Judge to certify whether it was proper to be tried again; who certified that he should have thought it proper to be tried again, but that one of the witnesses examined for the plaintiff was since dead, by means whereof the plaintiff might suffer on such new trial; and that, therefore, he rather inclined against a new trial.

After this certificate, another motion for a new trial was made; when, the Master of the Rolls being in Court, the Chancellor desired his thoughts on this matter, and the Master said, "the only objection to the new trial appeared to be the death of the witness; and though it had been said that the weight of a living witness would be greater than depositions, yet it was his opinion, that since this witness had been examined in the cause, and was dead, the depositions might be read; also, as the testimony which the witness had given

at the former trial, might be given
39 *again in evidence against the same parties, he should rather think that the other side had suffered by the death of the witness, since they had thereby lost the advantage of cross-examining;" and the Court ordered a new trial accordingly. Here we find the rule laid down again, without any qualification as to proving the words; and further, we see, that though a witness may have given a deposition in a Chancery suit, yet if the Chancellor directs an issue at law, and the witness is examined on that trial, and dies, the testimony which he then gave, may be proved in another trial of the issue.

Mayor of Doncaster v. Day, 3 Taunt. 261. A new trial was given, and counsel moved for a rule of Court, that if any of the witnesses should die, or become unable to attend, their evidences given on the former trial might be read on the next. Mansfield, C. J. "You do not want a rule of Court for that purpose. What a witness since (dead) has sworn upon a trial between the same parties, may, without any order of the Court, be given in evidence, either from the Judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any other person who will swear, from his memory, to its having been given." This case, seems to me, to lay down the rule as broadly as any of the former. A Judge's notes will furnish proof of the evidence. These notes, we know, never pretend to contain the very words of the witness. The Judge notes the substance only of the facts which he deems material. The same doctrine is also distinctly laid down as settled in White v. Kibbling, 11 Johns. Rep. 141, and Miles v. Ohara, 4 Binney's Rep. 111. I think, upon the whole, that it is the doctrine both of reason and authority, that where a witness, who has been examined in a cause, dies, his evidence may be proved in any subsequent trial of the cause, if the person proving it will swear, that he gives the matter substantially; though he does not pretend to repeat the words of the witness.

40 *If we examine Armistead's testimony, we shall find that it comes clearly within this rule. He stated distinctly the facts to which Gibson had deposed: that the two notes given by Hartshorne to the defendants, were in exchange for two notes of the same dates and for the same sums, given by the defendants to Hartshorne: that these last notes, after Hartshorne's failure, were received by Gibson as one of his trustees: that Gibson was afterwards robbed of them, and that neither of the said notes had ever been paid by the defendants: that on his cross-examination, Gibson stated that the reasons which induced him to say that the notes were exchange notes, were, that as well as he could recollect they were the same in sums and dates, and he moreover well knew, that Hartshorne and the defendants were in the constant habit of exchanging notes for their mutual accommodation; but that he spoke of sums and dates from memory only. Armistead also

stated, that he himself did not pretend to use the language of Gibson, but had given the substance of his testimony, to the best of his recollection. I conclude that the Court did not err in admitting this evidence; unless it should be, upon the ground, that Gibson himself was an interested and incompetent witness. Let us examine that point.

The defendants, the payees of the note, endorsed it in blank to Gibson; he, again, to the defendant; and they, to the plaintiffs. Was Gibson liable on this endorsement, to either the plaintiffs or the defendants? If not, he was a good witness. We know, there are two classes of paper among us; the one governed by the law merchant, the other, by the common law as contradistinguished from it. To the first class belong bills of exchange, and negotiable notes; to the second, bonds, notes of hand and other obligations. Bills of exchange (as Judge Roane says in Norton v. Rose, 2 Wash. 249) were always assignable. "They did not owe this quality to statutory provisions," but to the law merchant. From the same source spring those

other rules, which distinguish commercial paper from all other; as
41 first, that the holder has a right to resort to the drawer, and every person whose name is on the paper, each endorser being, as to him, a new drawer. Secondly, that the innocent holder of a bill holds it free from any equity existing between any of the former parties to it, (except in cases of usury and gaming,) this being necessary to its quality as a currency. The Statute of Anne, having declared promissory notes, assignable in like manner as bills of exchange, has placed them in England on the same high ground. Lord Mansfield says, (in Peacock v. Rhodes,) "The holder of a bill of exchange or promissory note, is not to be considered as the assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency." The law merchant, as part of the common law, is in force with us, where it is unchanged by Statute. As regards bills of exchange, our Statutes have taken up the subject, and fixed them on the basis of commercial law. The Statute of Anne was never in force with us. Promissory notes, therefore, which derive their commercial qualities from it, are left, with us, to stand on common law ground; except that the Statutes incorporated the Farmers' Bank, (1812,) extending the charter of the Bank of Virginia, (1814,) and establishing the North Western Bank and Bank of the Valley, (1817,) enact, "that all bills or notes, negotiable at these Banks, shall be placed on the footing of bills of exchange." At common law, we know, that bonds, notes, and other evidences of debt, were considered as mere choses in action, not capable in their nature of being assigned, so as to transfer the legal title. The assignee acquired an equitable interest, but subject to all the legal and equitable defences which could have been set up against the obligee or payee. Turton v. Benson, 1 P.

Wms. 497. By Act of Assembly in 1705, it was enacted, that any person might assign a bond or bill for debt; and that the assignee might prosecute *suit in his own name, allowing all discounts, &c. In 1730, this power of assignment was extended to promissory notes, classing them, in this respect, with bonds and bills. These Statutory provisions have been continued to the present day. Their effect on bonds, notes, &c. was very ably discussed and settled in the early cases in this Court. See *Mackie v. Davis*, 2 Wash. 219; *Norton v. Rose*, 2 Wash. 233, and other cases, both in this and the Federal Court. "These cases decided, that it was not the intention of the Legislature, to place bonds and notes on the footing of commercial paper; but merely so far to change the common law, as to enable the assignee to sue in his own name; taking the paper subject to all the equity of the obligor or maker."

There is another striking difference between common and commercial paper. Upon refusal of the drawee to accept, or of the acceptor or maker of a bill or negotiable note, to pay, the holder had only to get the paper protested, give due notice, and might immediately resort to any name upon it. With respect to bonds and common notes, it was seriously contended that there was no resort at all to any assignor; it being like the sale of any other personal chattel; but the Courts, on solemn argument, decided, that though the Act of Assembly gives no action against the assignor, yet that such action results (on common law principles) from the debt which the assignment implies, and the promise which the law raises by the assignor to the assignee, that if the assignee (using due diligence) fails to recover of the obligor or maker, the assignor will re-pay him the consideration which he received for the paper. This implied promise, however, is decided to extend only to the immediate assignee, and to give to no other a right of action against the assignor; so that no assignee could sue a remote assignor. See in addition to the cases before cited, *Mandeville v. Riddle*, 1 Cranch, 290; *Yeaton v. Bank of Alexandria*, 5 Cranch, 49.

43 *Having thus pointed out some of the distinctions which characterize these two classes of paper, let us examine to which of them we must assign the note before us; and here there is no difficulty. It is a promissory note, payable to Caton & Veale, or order, at the office of discount and deposit of the United States' Bank at Norfolk, dated May, 1806, and payable in sixty days. At this date, all promissory notes in this State were mere common law choses in action; evidences of debt, and nothing more; and subject to all the common law doctrines before stated. This is evident from all the cases, both those before cited, and many others in our books. In some of these cases, the notes were exactly like the one before us. In others, they were made negotiable at Banks. Yet this could not change the law. This is shewn, not only by the judicial decisions, but also by the laws creating Banks, in

1812-14-17. These Acts expressly place notes made negotiable at the Banks created by them, on the footing of bills of exchange; which would have been a vain and nugatory thing, if such notes already occupied that ground. This, then, was a common note of hand, and the assignee could maintain no action at law on it, against any, but his own immediate assignor. Caton & Veale were the immediate assignors of the plaintiffs, and Gibson a remote assignor. Against Gibson, then, the plaintiffs could bring no suit at law; and, if there were no other resort, he would, unquestionably, be a disinterested witness. But, it may be said, that though not at law, the plaintiffs might recover of Gibson in equity; and the case of *Riddle v. Mandeville*, 5 Cranch, 322, may be cited. That was a case of a note very like the one before us; on which, the endorsee had first sued a remote endorser at law; and failing in that action, on the ground before stated, had filed a bill in equity against the same remote endorser, and obtained a decree. But, this was expressly on the ground, that the remote endorser was fairly proved by the evidence, to be liable to his immediate endorsee; and the Court considered,

44 that this liability was *transferred in equity, though not at law, by the endorsement of that endorsee; and that this being an equitable interest, equity would, of course, afford a remedy. But the Court expressly declare, that in such case the defendant may defend himself as effectually in equity against the holder, as he could against his immediate assignee, in a suit at law. Under this decision, and indeed upon the broad ground which distinguishes common from commercial paper, Gibson could not be liable to the suit of the plaintiffs, unless he would have been liable to Caton & Veale, his immediate assignees; and that to them, he would not have been liable is most clear, when we look at the note and observe, Caton & Veale were the payees, and that they endorsed it to Gibson. They were then the endorers of Gibson before he was their endorser; and the one liability balanced the other. Gibson, then, being liable to nobody on this note, was a competent witness.

Having shewn this, it may seem unnecessary to discuss the matter further; yet as the point was ably argued, I will add, that I doubt exceedingly, whether, under the circumstances of the case, the evidence could be objected to now, even admitting that there was such an interest in Gibson, as would have excluded him, if objected to at the first trial. His interest (if any) was apparent on the face of the paper. He stood on it as endorser. With this fact before them, the defendants suffered him to be examined, and made him their own witness by cross-examining him. If, on this cross-examination, they had drawn from him evidence the most conclusive in their favor, they would have had the full benefit of it. Ought they then to be permitted, because they could not turn his evidence to their own account, to bring forward this objection, with a full knowledge of which they had made him their own witness, and

thereby given him credit? See *Turner v. Pearte*, 1 Term Rep. 717. Again. If, at the first trial, the objection had been made, the plaintiffs, as the record shews, were ready to have released Gibson, and

45 had given him notice that they were ready; but no objection was taken. He has died since; and if what he swore then, cannot now be proved, the plaintiffs are clearly deprived of his evidence, by the admission of the defendants, at the first trial, that he was above exception. Whether, if Gibson had lived till the second trial, his evidence might then have been objected to, is a question which I have not considered, and which stands on somewhat different ground; for, then, the plaintiffs might still have executed a release. But after his death, there could be no release; for, it could not look back to the evidence formerly given. Upon this question, I give only the present inclination of my mind. The case does not call for an opinion.

Before quitting this subject, it may not be amiss to remark, that the Act of 1807, giving the right to assignees to sue any previous assignor, does not apply to this case; and if it did, would not vary the result, as it gives to the remote assignor the same defence which he would have, against his immediate assignee.

We come now to the other bills of exception; of which my examination will be brief, as the principles already discussed, will, in a great measure, govern them.

The Court instructed the jury, that there was no difference between the responsibility of the endorser of a promissory note payable at Bank, and the assignor of a bond for money not payable at Bank: that the failure of Hartshorne, while he remained owner of valuable property, was not such insolvency as excused the plaintiffs from suing him; but, that if he was insolvent when the note became due, no suit was necessary. These instructions were not excepted to. It may be enough to say of them, that as general, abstract propositions, they are true.

The Court further instructed the jury, that if they should be of opinion that the notes were exchange notes, and that the one given by Caton & Veale, to Hartshorne, had never been paid, but was stolen and lost, due diligence had nothing to do with the case. This was excepted to.

46 *Was it erroneous? I think not. Due diligence implies a suit against the obligor, except in cases where it can be proved that a suit would be useless. We have seen that insolvency is one case. Suppose it could be shewn that the note was a forgery; that the assignor had received the money, &c. These cases would equally put the question of due diligence aside; because they would equally shew, that a suit would have been fruitless. Suppose it could be shewn, that in the assignment, the assignor practised a fraud on the assignee. This, I have no doubt, would make him immediately liable to the assignee, without any resort to the obligor. If we consider the passing these exchange notes as a fair transaction, the one is the consideration of the other; and not being commercial paper, the equity arising from

the failure of the consideration, follows the note. If then, the note which Caton & Veale gave Hartshorne for his, was lost, so that they could not be called upon to pay it, this would be a good defence for Hartshorne, in a suit brought against him by the assignees of Caton & Veale; and therefore, such suit would be useless. If it be objected, that Hartshorne had assigned the note, before its loss, to his trustees, and that they might recover the money of Caton & Veale, as on a lost note, the answer is, that they took the note with full notice of the nature of the transaction: that Gibson, one of the trustees, is the witness, who proves these facts, in order to charge Caton & Veale, on their assignment; and that they could never afterwards come on Caton & Veale. This is all predicated on the hypothesis, that the passing exchange notes is a fair transaction; and if these had been bills of exchange or negotiable notes, there is no doubt that the transaction would have been considered fair. See *Rolfe v. Caslon*, 2 H. Bl. Rep. 570; *Cowley v. Dunlop*, 7 Term Rep. 565; *Bucker v. Buttivant*, 3 East. 72; *Sarrate v. Austin*, 4 Taunt. 200; *Bayly on Bills*, 298. It is laid down in these cases, that counter acceptances are good mutual

47 considerations for such "acceptances.

Therefore, if two traders exchange acceptances, and afterwards become bankrupt, each may prove the other's acceptances under his commission, though the acceptances of neither be due at the time of such bankruptcy. I have not formed a decided opinion, whether in common paper, the passing of these exchange notes should be considered a fraud upon the public, so as to estop the maker from setting up the want, or failure, of consideration, against the innocent holder. My brethren think it should have that effect. If so, it would not follow that Caton & Veale could say to their assignees, "go upon Hartshorne. He and we have practised a fraud, and therefore, though he might resist us, he cannot defend himself against you." The law does not tolerate, that any person, from his own fraud, should raise up to himself a right; or by that fraud, should transfer to another a right, which he has not himself, and thereby protect himself. Taking it as a fraud, therefore, Caton & Veale would be immediately liable to the plaintiffs, and thus, either way, the Court were right.

The Court refused the second instruction asked for by the defendants, and rightly. It is an abstract proposition, not universally true; and, as I have just shewn, not true in this case.

The third was properly refused, because it was neither true, nor applicable.

The fifth instruction might have been wholly refused, for the reasons already given. The Court, however, gave it with a restriction, to which the defendants could not object.

The sixth instruction asked, was, "that if the jury should think the bail of Hartshorne was able to pay, the plaintiffs ought to proceed against the bail, and if not, that the defendants were not liable." The instruction, thus generally asked, was properly refused; for, if it was unnecessary to

sue Hartshorne, it could not be necessary to pursue his bail to insolvency.

48 The question, whether, "where a suit is necessary against the maker of the note, it is also necessary to pursue the bail to insolvency, is one of some importance; on which, as it was earnestly argued at the bar, I will give my present impressions. It does not seem to me necessary to take proceedings against the bail. All that is requisite to give the assignee recourse to his assignor, is to ascertain the insolvency of the maker. This, we have seen may be done without any suit. But, if it were necessary to pursue the bail to insolvency, it would, on the same ground of reason, be necessary to ascertain, in all cases, whether the debtor could not give bail; and this could only be by suit. It would be still more clearly necessary, in every suit brought, to require bail; but this Court decided, in *Harrison's adm'r v. Raine's adm'r*, 5 Munf. 456, that the assignee of a bond may recover of the assignor, after suing the obligor, and getting judgment, and a return of nulla bona, although the attorney endorsed on the writ in the first suit, that no bail was required. All the cases tell us, that a return of no effects, fixes the liability of the assignor; and yet in all cases, proceedings might be had against the bail. In the record before us, a ca. sa. was taken out, and a return of "not found;" with full proof that the debtor had left the country insolvent. Nothing could have established the fact of his insolvency, more clearly than this. But it is said, this fixed the bail. What then? It imposed no obligation on the plaintiffs to pursue him. They had gone far enough in ascertaining the insolvency of Hartshorne.

The next instruction asked, is, "that the plaintiffs had no right to go into an enquiry, as to the consideration of the note." The answer is, that the plaintiffs had an unquestionable right to go into such enquiry. The subject of the last instruction has been already discussed. The Court were right in refusing to give it.

I am clear, upon the whole case, that the judgment must be affirmed.

49 *JUDGE GREEN.

Gibson was clearly a competent witness. The note endorsed by him, not being negotiable, neither the Bank nor Caton & Veale could, in any possible event, claim any thing against him; and as it was competent to the party to prove, upon the second trial, what he swore at the former trial, (he being then dead,) the substance of that evidence might be proved. For, if it were indispensably necessary to prove positively the very words of the witness, it would hardly be possible to do so in any case.

The question as to what diligence is necessary to be used by an assignee of paper not negotiable, turns upon the enquiry, whether a failure in that respect on the part of the assignee, could, by possibility, do an injury to the assignor.

If no such injury is or can, by possibility, be done, then no diligence is required, as if the debtor be insolvent, or the debt

has been paid to the assignor. In this case, there being no consideration for the notes exchanged, but the notes themselves mutually given, whilst the notes remained in the hands of the parties respectively, no action could have been maintained upon them by either party against the other. When Caton & Veale assigned Hartshorne's note to the Bank, for a valuable consideration, Hartshorne was bound to pay the note to the Bank, because the note being given expressly for the purpose of enabling Caton & Veale to raise money by discounting it, the advance of money by the Bank to Caton & Veale, was virtually at the request of Hartshorne; and as between him and the Bank, there was a valuable consideration. This right on the part of the Bank, was not derived from Caton & Veale's assignment, they having no right to demand the amount of the note against Hartshorne, who retained in his hands Caton & Veale's exchange note, without using it, for nearly two years after these notes were given. If, therefore, Caton & Veale had paid the amount of the note to the Bank,

50 "at maturity, they would only have re-paid the money advanced to them upon the note; and every thing being in the state it was, when the notes were exchanged, they could have maintained no action against Hartshorne; and if the Bank had recovered in an action against Hartshorne, and he had paid the money, he could have recovered against Caton & Veale, either upon their note in his hands, or as for money paid for them. The privilege on the part of the Bank to claim against Hartshorne, being their's, and not Caton & Veale's assigned to them; and it being impossible that they could suffer any injury by a failure to assert this claim, no diligence against Hartshorne was necessary, in order to subject Caton & Veale as assignors. Nor does the assignment by Hartshorne, of Caton & Veale's note to Gibson, in trust to pay his debts, near two years after the note was protested, at all vary the case. The moment the note was protested, Caton & Veale became liable for its payment to the Bank: and that liability was an equity, on the part of Caton & Veale, against their note in the hands of Hartshorne; and if the money had been paid by Caton & Veale, as it ought to have been, would have been a legal set-off against their note then in the hands of Hartshorne; and if this equity would not have attached to it in the hands of a bona fide subsequent assignee, for valuable consideration, and without notice, it certainly would against an assignee with notice, as Gibson was. Indeed, he was not an assignee for valuable consideration. Neither he nor any other advanced any money or other thing, upon the credit of the note.

There was no obligation on the part of the Bank, to pursue Hartshorne's bail. If they had, and he had paid the money, he would have had the right, by substitution, to stand in the shoes of Hartshorne, the principal, for whom he paid the money, and to recover it from Caton & Veale.

I think the judgment should be affirmed.

JUDGE COALTER concurred, and the judgment was affirmed.

51 *Coleman, Administrator De Bonis Non of Wernick, v. M'Murdo and Prentis.

March, 1827.

Administrator D. B. N.—Right to Sue for Devastavit of Former Administrator.—An administrator de bonis non cannot sue the representative of a former executor or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator; but such suit may be brought directly by creditors, legatees, or distributees.

Same—Same—Statute.—This remedy was given to the administrator de bonis non by the Act of 1661; but that Act was repealed by the Act of 1711.

Practice—Long Prevalence of—Effect.—The long prevalence of a practice which is not sanctioned by law, will not give it validity, if it affects the rights of persons.

This was an appeal from the Richmond Chancery Court.

The suit was brought by William Coleman, administrator de bonis non of Wernick, against M'Murdo, administrator of Douglas, and Prentis. As the merits of this suit are not now in question, it will suffice briefly to state, that Wernick died intestate in the year 1783, and Marks qualified as his administrator, and the complainant, Coleman, became one of his sureties in the administration bond: that Coleman, being apprehensive that he might suffer by this engagement, pressed Marks for counter-security; whereupon the said Marks deposited in the hands of a certain William Douglas about \$1500, to cover any deficiency which might appear in his administration of the estate of his intestate: that Marks afterwards died intestate and insolvent, having left no effects whatsoever, except the sum above mentioned, and his estate was committed to Prentis, Sergeant of the town of Petersburg: that Douglas died, leaving the said M'Murdo his executor; and the complainant, Cole-

man, became administrator de bonis non of Wernick. This suit was brought against M'Murdo and Prentis, to obtain accounts of their administration of the estates of Douglas and Marks, respectively, and to have satisfaction for the balance due to the estate of Wernick for the said Marks. The Chancellor dismissed the bill, and Coleman appealed. Pending the appeal,

52 *William Coleman died, and Thomas Coleman became administrator de bonis non of Wernick. He obtained a scire facias to revive the appeal.

Johnson, for the appellant.

Stanard, for the appellee.

This case was twice argued very elaborately, on the question whether an administrator de bonis non was competent to maintain a suit against the representatives of the first administrator, for assets of the first intestate, which had been wasted or converted to his own use, by the first administrator. But the ample discussion which the question received from the Court, supercedes the necessity of giving the arguments at the bar.

March 14. The Judges delivered their opinions.†

JUDGE CARR.

This case brings before us, for the first time, the question whether an administrator de bonis non can, by bill in equity, call the representative of the first administrator to account, for assets of the first intestate, wasted or converted by the first administrator. This is a question, not of practice, but of sheer law; depending on the extent of the commission of the administrator de bonis non, what are his powers, and how far he represents the estate of his intestate.

Before I enter on the consideration of this subject, I will say a word with respect to the practice of the country, so much relied on. If it had been a general practice for administrators de bonis non, to bring such suits, I should have thought that during an attendance at the bar of fifteen

53 *years, and a service in the Court of Chancery of twelve, I should sometimes have met with bills of this kind. Yet this is the first that I have the least recollection of ever having seen. I am equally free to admit, that I have never known a suit brought by creditors against the representative of an executor or administrator, for waste committed by him. In stating my own experience, I would by no means be understood to doubt the accuracy of those, who say they have known this practice, but merely to question whether it has been of such wide extent, or frequent occurrence, as to entitle it to be called the settled practice of the country. But, admit that such is the practice; yet, when this tribunal is called upon to declare the law, I apprehend that such practice deserves so much weight only, as to insure a close and attentive examination of the foundation on which it rests, and a determination not to disturb it, unless we are convinced that it is in violation of law. But, if we be so convinced, then, I hold, that however general, however ancient the error, we are bound by the highest

*Administrator D. B. N.—Right to Sue for Devastavit of Former Administrator.—In *Hinton v. Bland*, 81 Va. 595. it is said: "In *Wernick v. M'Murdo*, 5 Rand. 51. the question as to the rights of an administrator de bonis non was elaborately discussed, though the point decided was, that an administrator de bonis non cannot sue the representative of a former executor or administrator for assets wasted or converted by the first executor or administrator, but that suit may be brought directly by creditors, legatees or distributees. The administrator de bonis non 'is appointed,' it was said, 'to finish a business already commenced. It is not, therefore, a full and immediate administration which is committed to him, such as is granted to a temporary administrator, but an administration de bonis non administratis; that is to say, he is entitled to all the goods and personal estate which have not been converted by the former executor or administrator." To the same effect the principal case is cited in *Salling v. McKinnay*, 1 Leigh 53; *Heffernan v. Grymes*, 2 Leigh 523; *Frazier v. Frazier*, 3 Leigh 649; *Allen v. Cunningham*, 3 Leigh 400; *Cheatham v. Burfoot*, 9 Leigh 594, 595, 597; *Tyler v. Nelson*, 14 Gratt. 223, 224, 225; *Livesay v. Helms*, 14 Gratt. 444; *Burwell v. Fauber*, 21 Gratt. 454; *Harman v. M'Mullin*, 85 Va. 190, 7 S. E. Rep. 349; *Estill v. McClintic*, 11 W. Va. 409; *Gilmer v. Baker*, 24 W. Va. 91; *Crickard v. Crouch*, 41 W. Va. 509, 23 S. E. Rep. 729. In *Bishop v. Harrison*, 2 Leigh 534, JUDGE CABELL takes issue with the statement by JUDGE CARR in the principal case (p. 55), that there is no privity between an administrator de bonis non and his predecessor, and JUDGE CABELL states that that question was not before the court. In this same case (*Bishop v. Harrison*), JUDGE CARR (p. 537) explains his proposition above referred to, and admits that his statement was too broad; he says that the statement taken as he intended it is correct, but that it is not correct in its broadest sense.

The principal case is also cited in *Paup v. Mingo*, 4 Leigh 177, 182; *Burwell v. Burwell*, 78 Va. 582.

See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 6 Gratt. 6.

†The PRESIDENT absent.

of all sanctions, to correct it with an unshrinking hand; for, to this Court is confided the duty of expounding the law in the last resort.

In the discussion of this question, I will enquire: 1st. What is the law in that country from which we derive the general features of our system. 2d. Whether our own statutes have altered the law as settled there.

1. Testaments are of high antiquity, coeval with the first rudiments of the law. When a person dies without disposing of his personal property, he is said to die intestate; and in such cases, it was said (though this is doubted in 1 Com. Dig. 491,) that by the old law, the King was entitled to seize upon the goods as *patres patriæ*. The Crown invested the prelates with this branch of its prerogative, upon the intendment of law saith Perkins, that spiritual men are of better consciences than laymen, and have more knowledge what things would conduce to the benefit of the soul of the deceased. The

54 goods of intestates *being thus vested in the ordinary, he might give or sell them, and dispose of the money in pious uses, being, as to this the King's Almoner. For their conduct in the discharge of this solemn trust, the reverend prelates were accountable to God and their own consciences only. They abused their trust most iniquitously; taking to themselves the whole of the property, after the *partes rationabiles* (two thirds) of the wife and children were deducted, and leaving the debts unpaid. To remedy this abuse, the Statute of Westminster, 2d Chap. 19, enacted, that the ordinary should be bound to answer the debts of the intestate, so far as his goods would extend. Though this bound them to pay the debts, the residuum still remained in their hands, till the Statute of 31st Edw. 3, chap. 11, took that, together with the administration, from them; enacting, that in cases of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased, to administer his goods; which deputies the statute places on the same footing with executors, with regard to suits and accounting. This is the origin of administrators, who were only the officers of the ordinary, appointed in pursuance of this statute.

The 21st Hen. 8, chap. 5, enlarges a little the power of the ordinary, permitting him to grant administration, either to the widow or the next of kin, or both, at his discretion; and where two or more are in the same degree, to appoint which he pleases. An executor being the creature of the will, and his power founded on the special confidence of the deceased, he is allowed to transmit that power to another, in whom he has equal confidence. The executor of A's executor, therefore, is to all intents and purposes, the executor and representative of A. himself. But the administrator, being merely the officer of the ordinary, prescribed to him by law, and in whom the deceased had reposed no trust at all, could not transmit his office to another; but, if he died before closing his administration, it resulted back to the ordi-

55 nary to appoint him a successor. *So, too, when an executor died intestate, his administrator did not represent the testator; and in this case also, it devolved on the ordinary to commit administration afresh, with the will annexed. It is the officer thus appointed, whose powers we are now to examine.

He is appointed to finish a business already commenced. It is not, therefore, a full and immediate administration which is committed to him, such as is granted to a temporary administrator; but an administration *de bonis non administratis*. Between himself and his predecessor, there was no privity. His commission gave him power to act, and to represent the testator or intestate, so far, (and so far only,) as there remained unadministered "goods, chattels and credits, which were of the testator or intestate, at the time of his death." This definition turns our minds at once to the question, what amounts to an administration of assets, so far as regards the administrator *de bonis non*. Executors and administrators took the legal title to the goods and chattels of the deceased; nor were they, before the Statute of Distributions, 22d and 23d, Char. 2d, (1670,) bound to distribute the surplus after the payment of debts and legacies. Both held in *autre droit*; and therefore, neither could dispose by will of the property remaining in specie; but both had the power, while living, of changing, altering, and converting the property; and whatever was thus altered or converted, became their own goods, and descended, on their deaths, to their own representative. Such change or conversion of the goods, was, (so far as regarded the administrator *de bonis non*,) a complete administration, and put them as effectually beyond the reach of his commission, as if they had never belonged to the testator or intestate. To shew that this is so settled in England, I will cite a few out of a vast multitude of cases.

In 2 P. Wms. 340, Attorney General v. Hooker, Lord Chancellor King said, "As to what has been urged, that if an executor dies intestate, all the personal estate, the property whereof is not altered, shall

56 go to the administrator **de bonis non*, and not to the next of kin of the executor. This is true; because, from the time the executor dies intestate, the first testator dies intestate also, and it was the executor's own fault, that he did not, as he might, alter the property."

In *Rutland v. Rutland*, 2 P. Wms. 210, the same doctrine is explicitly laid down.

In 1 Bos. & Bull. 310, *Tangry v. Brown*, C. J. Eyre, and the Court say, "that every thing is unadministered, which has not been reduced into actual possession, and converted by the administrator."

3 Bac. Abr. 20, tit. "Executors," it is said, "that an administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c. which remain in specie, and were not administered by the first administrator; as also, to all debts due the intestate."

In *Wankford v. Wankford*, 1 Salk. 306, C. J. Holt, after laying down the rule that

the same hand having to pay and to receive, is an extinguishment. puts this case: "If the executrix of the obligee take the obligor to husband, that is no extinguishment; for he may pay her money, as executrix, and she lay this money so paid her by itself, the administrator de bonis non of her testator, (if she die intestate,) shall have that money, as well as any other goods that were the testator's; for, (says he,) if the goods of the testator remain in specie, they shall go to the administrator de bonis non, because in that case, it is notorious, which were the goods of the testator, and they are distinguishable; and there is the same reason where money is kept by itself, and the husband permits it so to be; but if the husband seizes it, it will be his, and will be a devastavit."

Barker v. Talcot, 1 Vern. 473. If A. die intestate, and his son take out administration to him, and receive part of a debt being arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate; this acceptance of the note

is such an alteration of the property,
57 *as vests it in the son, and therefore, on his death, it shall go to his administrator, and not to the administrator de bonis non."

Beaumont v. Long, Sir W. Jones's Rep. 248. "Baron and Feme, administratrix of a former husband, recover a debt due to the intestate; the Feme dies and the Baron sues out a sci. fac. to which the defendant demurs. Per Curiam. The action does not lie, because the recovery does not convert this to the proper debt of the Baron; as it would be, if the Baron and Feme recovered a debt due to the Feme, and then the Feme had died; for there, by the recovery, it has become the proper debt of the Baron, if he survive; but here it remains the debt of the intestate, and of him who shall be his administrator."

These are a few of the many cases scattered through the Reports of the last three centuries, shewing the settled course of the law. I might bring to my aid many others, where the contest was between the representative of the administrator, and the administrator de bonis non; and the question uniformly turned upon the point of conversion; all agreeing that a conversion extinguished the right of the administrator de bonis non, as it was an administration, and his commission reached only to the goods and credits unadministered. Sometimes equity will follow the property, where at law, there might be said to be a conversion; as, if the first administrator vested money of his intestate, in the funds, or transferred it from one fund to another. This, as it shewed no intention of making the money his own, would not be considered, in equity, a conversion. Sometimes there will be a conversion in equity, where none exists at law; that is, where some act is done by the administrator, shewing a clear intent to convert. These differences result from the different modes of administering justice in the two systems; and do not, in the least, affect the question; for, before whichever forum the case is brought, if it be decided that the subject matter of dispute has been

converted, that is regarded as decisive to *shew, that the administrator de bonis non has no power over it. In addition to all this, the statute of 30th Ch. 2, ch. 7, explained and perpetuated by the 4th and 5th Wm. & Mary, expressly declares, in its preamble, "that executors and administrators of executors and administrators, for want of privity, were not before answerable, nor could be sued, for debts due by the first testator or intestate, notwithstanding such executors or administrators had wasted the estate of the first testator;" and to remedy this evil, it makes such second executors or administrators chargeable. How? To the administrator de bonis non? No; but chargeable "in the same manner as the first executor or administrator should or might have been;" that is, liable directly to the creditors, "who," (as Sergeant Williams, in a learned note on this statute, 1 Saund. 219, e, says,) "may sustain an action against them, in every case, where the executor, in his lifetime, was in any way guilty of any act, which amounts in law to a devastavit, such as exhausting the assets by the payment of debts of inferior degree, before those of a superior, and the like." This review shews us, that in all contests for the property of the intestate, between the administrator de bonis non, and the representative of the first administrator, a conversion has uniformly been held to withdraw the goods from the administrator de bonis non: that the statutes declare the second executor or administrator not suable for the devastavit of the first; and that the statute making them thenceforward suable, does not give power to the administrator de bonis non to sue them; but gives it to the creditors.

To meet this formidable array, what is there on the other side? Not one single case; not the dictum of a single Judge; not the assertion of an elementary writer, that the administrator de bonis non, either at law or in equity, can support an action, or file a bill for account, against the representative of a delinquent executor or administrator. This absence of authority alone, is conclusive evidence, that in England, such a right was never claimed.

59 *The law of executors and administrators came to this colony, as thus settled, by the mother country; and we are now to enquire, how it has been affected by our own legislation. A minute examination into our early laws, would be rather matter of curiosity, than of useful application to this case; for the question here must be governed by the revival of 1819, which repeals every law not re-enacted by it. I will, however, take a brief notice of some of our early statutes.

The probate of wills, and granting administration, which belonged to the ordinary in England, was given to our Courts. At first, it seems that the Court of James City (the General Court I presume) performed these functions for the whole colony. In 1645, (20th Ch. 1st; 1 Hen. Stat. at Large, 302, (there is a statute, which, stating that theretofore the estates of deceased persons had been much wronged by the great charge and expenses which have

been brought in by administrators, by pretence of their attendance at James City, &c., for remedy thereof, &c., enacts that all administrations shall be granted at the County Courts, where the deceased resided, and all probates of wills there made, &c.

The next Act which it is material to notice, is one passed in March, 1661-2, (14th Ch. 2d; 2 Hen. Stat. at Large, 91.) It is headed "Administrations, to whom to be granted," and relates solely to that subject. The recital states, that commissions of administrations had been suddenly disposed of, under pretence of greatest creditor, or next of kin, and thereby the persons really entitled defrauded; and enacts, "that no administration shall be granted for nine months, except to the widow or child." In case of no wife or child, then it is enacted, "that the estate be, by the Court, sold at public outcry, the purchasers putting in security, and acknowledging judgment: for their debts, which the Court shall assign to the several creditors," according to their priorities; the surplusage

to be held three years, for any who will prove himself next of kin; "and if none prove himself such within that time, the Court to give an account of the surplus, to the Assembly, to be disposed of by them for the use of the country." This law clearly dispenses altogether with the appointment of an administrator, where the decedent leaves neither wife nor child. A subsequent part of this law, (it is not, as the modern practice is, laid off into sections) states, "And whereas, it hath been the frequent evil practice of administrators, as soon as they have obtained an order to administer, to act as administrator, by virtue of that order, without giving security, or taking out their commissions, so that the estate being embezzled away, no account can be given thereof: Be it therefore enacted, that whoever pretends to administer upon any estate, shall bring into the Court sufficient security, before the order shall be granted; and an order thus obtained legally, by giving such security to be truly accountable, to bring in a true inventory, and to perform such things as the administrators by law are enjoined, shall not, at any time, be reversed, unless the party that obtained the same, die before he hath given an account of the estate, and obtained his quietus; in which case, the Court is empowered to grant the administration of the estate so not accounted for to some other person, who may by virtue thereof, call the heirs, executors or administrators of the former administrator to an account, who shall pay out of the said deceased administrator's estate all such debts as shall be found due to the estate he administered upon, in the first place."

I have given this statute nearly entire, that we may the better judge of it. It contains a striking departure from the established law; for it will be recollected, that it was passed eight years before the Statute of Distributions; and a much longer time before the Statutes of Charles and William & Mary, subjecting executors and administrators of executors and administrators to the suits of creditors. It does

not touch the case of executors, but goes to a radical change of the existing law of administrators. That law granted to the administrator de bonis non, a partial administration of the goods and credits unadministered. This seems to contemplate a full administration; for it is, that if the party die before he hath given an account of the estate, the former order of administration shall be reversed, and administration shall be granted of "the estate," (the whole estate,) "so not accounted for." The administrator, then, is not an administrator de bonis non administratoris, but of the whole estate; and the Act is careful to vest in him the power "by virtue thereof," to call the heirs, executors or administrators of the former administrator to account. As he was made administrator of the whole estate, it was certainly proper that he should have power over the whole; but it could not have been necessary for the law to give him power to call the representative of his predecessor to account, by virtue thereof, if such power existed independent of the law. This provision, then, is clear proof that the Legislature who passed the law, understood that a second administrator could not, as the law then stood, call the representative of a former administrator to account. It is very clear to me, that if this Act of 1661-2 were in force when the case before us arose, it governed it, and gave the right to bring the bill; but it is equally clear to my understanding, that the Act was not then in force. In 1705, (4th Anne, 3 Hen. Stat. at Large, 371,) we have an Act, "For distribution of intestates' estates, &c.," which is nearly a copy (so far as I have been able to compare them,) of the 22d and 23d of Charles 2. This Act unquestionably repealed so much of the Act of 1661, as disposed of the estate of intestates, where there was no wife or child, by making, in such cases, a different disposition of the estate.

In 1711, (9th Anne, 4 Hen. Stat. at Large, 12,) we find "an Act directing the manner of granting probates of wills and administration of intestates' estates." This Act treats these subjects very much at large, and with much more legal science than the former. It not only goes into the details, so necessary to clearness, but prescribes the forms of the bonds to be given in all cases. When it comes to speak on the subject of unfinished administrations, it says, "And if it shall so happen, that any executor shall die intestate, not having fully performed his executorship; or any administrator shall depart this life, not having fully administered the goods of his intestate; in every such case, it shall and may be lawful for the Court that granted the certificate for obtaining such probate or commission of administration, to hear and determine the right of administration, and to grant certificate for obtaining letters of administration. of the goods not administered, to such person as by this Act shall have right thereto."

Now, I say, that this Act repealed the statute of 1661. The provisions of the two Acts are inconsistent with each other. The first, in case the party dies before he obtains his quietus, reverses the former

order of administration, and grants de novo complete administration of the whole estate; the second, where the administrator dies, not having fully administered, grants administration "of the goods not administered" only. The former gives the second administrator power to call the heirs, executors or administrators of the first, to account; and this was necessary; for, as he had to account for all the estate, he ought to have the power to call it all in. The latter law gives no power to the second administrator to call the representative of the first to account; and for this there was no need, as he had to do only with the goods unadministered. When the Legislature used these words, their meaning had been perfectly fixed and settled; and we are bound to suppose that they used them in the sense which such a numerous train of decisions had affixed to them. This law, then, would repeal the former, upon the ground that *leges posteriores, priores contrarias abrogant*. But it has also a repealing clause, most strongly and emphatically expressed; that "all and every other Act and Acts, and every clause and article thereof, heretofore made, for so much thereof as relates to any matter or thing whatsoever, within the purview of this Act, is and are hereby repealed and made void, to all intents and purposes, as if the same had never been made." I conclude, then, that this Act repealed the former.*

63 The repeal of the Act of 1661-2, restored things to the standing here, which, I have shewn, existed before its passage. That this was the Legislative understanding of the matter in 1730, is most clear from an Act then passed, in which they say, "Whereas executors and administrators of such persons as possess themselves of personal estates of other dead persons, and convert the same to their own use, are not liable, by the rules of the common law, as it now stands in this colony, to pay the debts of such persons, whose estates have been so converted by their testator or intestate; for remedy whereof: Be it enacted, that all executors and administrators of any executor in his own wrong, and all executors or administrators of any executor or administrator of right, who shall waste or convert to his own use, goods, &c. of his testator or intestate, shall, from henceforth, be liable and chargeable, in the

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*Note by JUDGE CARR. When these remarks were written, I had not seen the revival of 1733. My brother CABELL has since turned my attention to it, and I find it containing such complete evidence of the repeal of the Act of 1661-2, by that of 1711, as would have saved me the trouble of the above remarks, had it been known to me. This revival is contained in a single volume, entitled thus: "A collection of all the Acts of Assembly now in force in the Colony of Virginia. (with the titles of such as are expired or repealed, and notes in the margin, how and at what time, they were repealed.) examined with the record by a committee appointed for that purpose, who have added many useful marginal notes and references, and an exact table. Published pursuant to an order of the General Assembly held in Williamsburg, in 1727." In this volume, we have the title of the Act of 1661-2, to wit: "Administrations, to whom to be granted;" followed by the word "Repealed;" and in the margin the following words: "Repealed, chap. 2d. 1711;" the very law, which I have contended above did repeal it. If stronger evidence could be necessary, than the Acts themselves afford, it is thus furnished.

64 same manner as his testator or intestate should or might have "been."

Here we see the mischief clearly expressed, and the remedy as plainly applied; a mischief, which could not have existed, and a remedy worse than useless, because tending to create confusion, if the statute of 1661-2 had been in force.

Several other Acts were mentioned in the argument, those of 1785 and 1814, particularly; but really it seems so clear to me that they were intended to meet the particular mischief stated in them, and have no influence on the question before us, that I do not think it worth while to add to this opinion, (already too long,) by a further notice of them.

It will be observed, that I have not compared the conveniences and inconveniences of the two constructions contended for. In doubtful questions, this may be very well; but where the law is clear, (as it seems to me in this case,) the Court have nothing to do (I think) with these considerations. That the law is so, is enough for us. If it be inconvenient, or operate injustice, the Legislature must interfere.

I shall only add, that in the revival of 1819, 1 R. C. 390, sec. 66, the law as stated above, taken from the Act of 1730, is re-enacted, whereby the administrator of an administrator who has wasted the assets, is made liable and chargeable, in the same manner as his intestate was; in other words, liable to the creditors, and not to the administrator *de bonis non*.

I am therefore of opinion, that the administrator *de bonis non* cannot maintain a bill in equity, calling the administrator of the administrator to account, for any waste or conversion of his intestate.

JUDGE GREEN.

It was determined in *Dykes v. Woodhouse*, 3 Rand. 287, that an administrator *de bonis non*, was entitled to a *scire facias* to revive a judgment in favor of a deceased executor or administrator, for a debt due to the testator or intestate; because such judgment did not, as was admitted in the English Courts, convert the property of the debt, or amount to an administration. The administrator *de bonis non* is bound by, and entitled to, the benefit of such judgment; and for the same reason, he is entitled to appeal, or to prosecute an appeal from any decree or judgment against the former executor or administrator, or administrator *de bonis non*, binding or affecting any subject belonging to the testator or intestate; the right to which, but for such decree or judgment, would have devolved on the administrator *de bonis non*. The party aggrieved, or any one standing, by operation of law, in his place, is entitled to prosecute such appeal.

The original plaintiff in the Court below, could not, in his character of administrator *de bonis non* of Wernick (in which character only he sued,) reach the fund in the hands of M'Murdo, unless he was entitled, in that character, to call the representative of the former administrator to account, and to be substituted to the rights of Wernick's creditors and distributees, and of the sureties of the first administrator, in respect

to the fund deposited with Douglas, by the first administrator, for the indemnity of his sureties.

The question, whether an administrator *de bonis non* can call the representative of a deceased executor or administrator to account in a Court of Equity, for the assets of the testator or intestate, wasted or converted to his own use by such executor or administrator, deserves a full examination; since it has never yet, as far as I am informed, occurred in this Court, except in the case of *Spotswood v. Dandridge*, decided in a Special Court; and in that case, the question does not appear to have been discussed, but to have passed sub silentio.

At the common law, an administrator was the mere bailiff of the ordinary, responsible only to him. The next of kin had no legal or equitable claim to distribution; but *the ordinary distributed the assets in pious usus, at his pleasure. 11 Vin. Abr. 52, pl. 1, n.; *Palmer v. Alcock*, 3 Mod. 56; *Skinner*, 219, S. C. It has been even doubted, whether the ordinary was responsible to creditors; a doubt removed by the statute of Westm. 2, which required the ordinary to pay the debts. 18 H. 6, 23, b; 5 Rep. 83, *Snelling's Case*. Nor could the ordinary or administrator sue for the debts due to the intestate. 8 Rep. 135, *Sir John Needham's Case*. The statute of 31st Edw. 3, ch. 11, made it the duty of the ordinary to commit the administration to the next and most loyal friends of the intestate, who might sue for the debts due to the intestate, and be answerable as executor. 11 Vin. Abr. 91, pl. 1; and the statute of 21 H. 8, ch. 5, sect. 3, directed that in case of intestacy, or the executor's refusing, administration should be committed to the widow or next of kin, or both, at the discretion of the ordinary; and if divers persons were in equality of kindred, he might accept one or more. *Ibid.* pl. 2. These statutes deprived the ordinary of the power of displacing administrators at pleasure, which he had at the common law. 11 Vin. Abr. 52, pl. 1, n; 70, pl. 7; 115, pl. 15. But, he still took bonds from the administrators, and compelled them to make distribution at his pleasure, *Sadler v. Daniel*, 10 Mod. 21; until about the 12th of James 1st, when it was determined upon the construction of the statute of H. 8, that an administrator was not bound to make any distribution of the surplus, even although the intestate had children under age, or beyond sea, and administration was granted to a stranger; and prohibitions issued to prevent the ordinary from compelling such distribution. 11 Vin. Abr. 52, pl. 1, n; 183, pl. 1; 357, pl. 2; *Hughes v. Hughes*, Lev. 233.

Before the Statute of Distributions of the 22d and 23d of Charles 2, (1670,) an executor was not compellable in any case, to make distribution of any surplus of the assets remaining after the payment of debts and legacies; so that an executor and administrator had precisely the same
67 interest *in the testator's goods; not an absolute interest, as they held in autre droit, but such an interest as that no other except creditors, in case of intestacy, or creditors and legatees, in case of a

will and executor, could claim any thing against them, in respect to the assets of the testator or intestate, which came to their hands. The nature of this interest was such, that although the executor or administrator was entitled to the goods, chattels and credits of the testator or intestate, so that no one, (except creditors and legatees as aforesaid,) could claim against them during their lives; yet, upon their deaths, testate or intestate, all the testator's or intestate's goods, chattels and credits, remaining in kind, still belong to the estate of the testator or intestate; that is, (in the language of the letters testamentary, or commission of administration,) they were "the goods, chattels and credits of the testator or intestate at the time of his death." Neither the executor or administrator could dispose of such by his will. 11 Vin. Abr. 109, pl. 3; 421, pl. 6; 267, pl. 6. They remained, as at the death of the testator or intestate, without a proprietor, and it devolved on the ordinary to give them an owner, by appointing an administrator "*de bonis non administratis*" by the former executor or administrator, or by granting probate of the will of the first executor to his executor; the effect of which was, to make the second executor the immediate executor of the first testator, as if he was appointed executor by his will. 11 Vin. Abr. 421, pl. 6; 267, pl. 6. But, the executor or administrator had the power, and if it did not injure creditors or legatees, the right also to make the goods, chattels and credits of the testator or intestate, their own, by converting them to their own use, by destroying their identity and changing their character; and whatever was so converted, no longer remained any part of "the goods, chattels and credits, which were of the testator or intestate, at the time of his death."

In this state of things, it was necessary, and within the original reason of granting
68 administrations, to grant an administration "of the goods and chattels remaining in kind. But, there was no reason to grant to another a power to call upon the executor or administrator of the deceased executor or administrator, for an account and payment of any balance of the assets converted to his own use. The payment of legacies was compelled in the Ecclesiastical Court exclusively, (11 Vin. Abr. 358, pl. 7, note;) until Lord Nottingham first assumed the jurisdiction in Chancery, upon the ground that the executor was a trustee for the legatees; and before the Statute of Distributions, and whilst the ordinary exercised the power to compel distribution at his pleasure, that jurisdiction was also exercised exclusively in the Ecclesiastical Courts. Toll. Law of Executors, 489. But, creditors never had remedy in the Ecclesiastical Court and only had it in Courts of common law. As to creditors, after the death of an executor or administrator, they had no remedy against his representative for a devastavit, at common law, it being a tort, which died with the person. 11 Vin. Abr. 309, pl. 1; 310, pl. 7, 8. Nor were they ever held to have a remedy in Chancery, until three years before the statute of 30 Ch. 2, chap. 7, sec. 2,

(which gave a remedy at law against the executor or administrator of an executor de son tort;) when it was said that such a remedy might be had against such an executor in equity; and two years after, and one year before the statute, it was held that the same remedy might be had in equity against an executor of a rightful executor. 11 Vin. Abr. 310, pl. 9; pl. 3, sec. 6; pl. 10. The bond given by the administrator could be used against the executor or administrator of the deceased administrator only for the purposes of enforcing that which was within the proper jurisdiction of the ordinary to enforce, the returning of an account, and a distribution at his pleasure; not to enforce the payment of debts, as was afterwards determined, when the Courts of law adjudged that the bond was void, so far as it bound the administrator to distribute, but good, so far as it bound him to render an account; the latter subject

69 *being within, and the former without, the jurisdiction of the Ecclesiastical Court. 11 Vin. Abr. 183, pl. 1; 358, pl. 7, note. It was therefore more convenient, (as no one was interested in the recovery to be had against the executor or administrator of the administrator, but those designated by the ordinary as distributees,) that the remedy should be had immediately for their benefit, and in their names, and paid to them at once, than that it should go into the hands of the succeeding administrator (although he might be one of the designated distributees) to be afterwards distributed, perhaps after a suit against him. But after it was determined, that the ordinary had no power to compel any distribution, it would have been absurd to hold that the executor of a deceased administrator was liable to account to the administrator de bonis non for the assets converted by the first administrator; for, then the fund would have devolved from administrator de bonis non to administrator de bonis non forever, and could have been of no use to any one. So, in respect to executors dying intestate, creditors had no remedy in respect to the assets converted to his own use or wasted; and the ordinary never had power to compel any distribution whatever, in the case of an executor. Such effect had the appointment of an executor, that before the statute of 21 Hen. 8, (which directed administration to be committed to the wife or the next of kin in case of intestacy,) that if an executor died intestate, the ordinary might, and ought to commit the administration de bonis non of the executor and of the first testator, to the same person. Br. Abr. "Administrator," pl. 45, cites 32 H. 6; 2 Lib. Int. 145; 21 Edw. 4, 24; 11 Vin. Abr. 88, pl. 1. The statute of 31 Edw. 3, having directed the administration to be committed to the next and most loyal friend, the executor was considered as designated by the testator as such; and the unadministered assets should therefore go quasi his, to the next and most loyal friend of the executor.

This doctrine was held as late as the 70 30th Char. 2, 11 Vin. *Abr. 90, 11.

But it was otherwise held, both before and after this last case, and particularly after the Statute of Distributions, and that

administration de bonis non should be granted to the next of kin of the testator, under the Statute of 21 H. 8, the testator being dead intestate as to all the assets not administered by the executor; that is, not converted. 11 Vin. Abr. 89, pl. 8; 87, pl. 23, (1721;) 111, pl. 20, 21, (1723, 1725;) 11 Vin. Abr. 88, pl. 1. The same doctrine, founded upon the Statute of 21 H. 8, was suggested by Brooke, in his abridgment.

It was for these reasons, that no rights were given to the administrator de bonis non against the former executor or administrator, and his commission was so framed as to shew accurately the extent of his rights, by committing to him the administration de bonis non administratis by the former executor or administrator; which entitled him to no more than the goods, chattels and credits, remaining in specie, or although changed, yet capable of being identified as the proceeds of the goods, chattels or credits of the testator or intestate, not intended to be converted by the executor or administrator; as money collected and kept separate by the executor or administrator; lands extended in a suit by the executor or administrator, in satisfaction of a debt due to the testator. 3 Bac. Abr. 19, 20; Wankford v. Wankford, 1 Salk. 306; 11 Vin. Abr. 108, pl. 2; 112, pl. 4. In equity, money might be recovered by the administrator of an executor, upon a judgment recovered by the executor for goods of the testator taken from the executor; Yate v. Gough, Yelv. 33; or if the executor should, for the benefit of the estate, invest part of it in the funds, or transfer it from one particular stock to another, this was not a conversion or appropriation, but it might still be followed as assets, for the nature of the case required it. Waite v. Whorewood, 2 Atk. 159. In these cases, the fund can be identified, like money kept separate; and there was no intention on the part of the executor, to convert it to his own use, and therefore the fund in

71 these cases, as in *the case of a judgment unsatisfied, in favor of an executor, for a debt originally due to the testator, remains assets of the testator not administered by the executor. After the determination that an administrator could not be compelled to make distribution, the rights of an executor and administrator were precisely the same. Neither was accountable for assets wasted or converted to his own use, except to creditors, and (in the case of a will) to legatees, in their life-time; and to legatees only, after their deaths. Their representatives had no interest in the assets unadministered; but, these went to the administrator de bonis non, or the executor of the executor, who held them as the assets of the testator or intestate, chargeable, in respect to such assets, as the executor or administrator was chargeable whilst he held them, and no further. Upon their deaths, the same consequences followed, as upon the deaths of the executor or administrator, and no other.

It was argued, that after the Statute of Distributions, the administrator, in all cases, and the executor, in some cases, being compellable to make distribution of the

surplus of the assets which came to their hands to be administered; and as their representatives were exempted from responsibility to the administrator de bonis non for goods converted by the executor or administrator, in the life-time of the executor or administrator, in respect to the beneficial power over the assets, which the executor and administrator had before that statute; and as, since the statute, the representative of the executor or administrator is responsible, for the goods so converted, to some one; that responsibility should be to the administrator de bonis non, as trustee for the distributees; and that the reason of the former rule having failed, the rule also failed.

Before the Statute of Distributions, and whilst the ordinary compelled distribution, the same reason existed for holding the representative of a deceased administrator liable to the administrator de bonis non, for the goods converted, "as exists since the statute; yet such liability never existed, and would not have been convenient to any purpose, for the reasons before stated. The administrator de bonis non, after the statute, was a trustee for distributees, and a representative of the testator or intestate, only to the extent of the goods, chattels and credits, unadministered. Such was the effect of the commission to the administrator de bonis non, both before and after the statute. No alteration was made in the form of the commission, in consequence of the statute; nor was the statute ever held, in England, to have varied or enlarged the rights of the administrator de bonis non. No case has never occurred in England, in which an administrator de bonis non has ever asserted a claim against the representative of a deceased executor or administrator, at law or in equity, for an account of the assets wasted or converted to his own use, by the executor or administrator; and consequently, no adjudged case is to be found expressly denying or affirming the propriety of such a claim. Nor do I find any direct dictum to the point, one way or the other. This is only to be accounted for, by the supposition that it never occurred to any one there, that there was any foundation in law or equity, for such a claim; otherwise, cases must have occurred, in which it would have been necessary to decide that point; and, if such a right existed, it is impossible that there should not be found many instances of its having been asserted, in the reports of the decisions of the English Courts. The various questions which must have arisen in the prosecution of such claims, could not have escaped the attention of all the reporters and elementary writers. There is, however, abundant evidence in the adjudged cases, found in the English books, to shew that no such right existed, either before or after the Statute of Distributions.

I have already noticed the cases at law and in equity, in which the question has been between the executor or administrator of an executor or administrator, and the administrator de bonis non, as to their respective rights to particular subjects; many of which were sub-

sequent to the Statute of Distributions, and in which the right of the administrator de bonis non to the particular subject, has been sustained, upon the ground that it was not converted, nor the property altered, or if altered at law, not altered in the contemplation of a Court of Equity; because the executor or administrator did not intend, by such alteration, to convert it to his own use. Other cases have occurred, where the same question has arisen in the Courts of Law and Equity, and has been determined in favour of the representative of the deceased executor or administrator, upon the ground that the subject of controversy had been administered or converted, and the property changed at law; and even when not changed at law, yet altered in the contemplation of a Court of Equity, by the act of the executor or administrator, with intent to convert it. Thus, an administrator, possessed of a term of his intestate, makes a lease for years of a part of it, reserving a rent, and makes his executor and dies; the executor of the administrator is entitled to the rent, and not the administrator de bonis non of the intestate. *Dunn v. Baylie*, Freeman's Rep. 392; Vent. 295; 2 Lev. 100; *Noel v. Robinson*, Vern. 94. The cases in equity of *Butler v. Baker*, Ch. Cas. 224, (1673,) and an anonymous case in 2 Vent. 362, (1683,) strongly illustrate these doctrines. The first of those cases was thus: "Administrator mortgages a term of the intestate's and makes A. his executor, and dies. B. takes administration de bonis non of the first intestate, and claims the residuary interest and trust in the term, and prays redemption. But, redemption was decreed to A., the executor of the first administrator, who had aliened the whole estate in law, of the term, and was not possessed in autre droit, nor of any part of the interest thereof, but in his own right; and so it shall go to his executor, and not to B. the administrator de bonis non."

The other case was thus: Administrator of the donee of a statute, had agreed with the consor to assign, in consideration of a sum of money, which, upon agreement, the consor had covenanted to pay to him, his executors or administrators. Administrator died. Decreed the money to be paid to the executor of the administrator, and not to the administrator de bonis non; although, before the extent, it could not be assigned at law, no debts of the first intestate appearing.

These cases were after the Statute of Distributions. In the last case, the legal title to the statute, belonged to the administrator de bonis non; and if debts of the first intestate had appeared, it is intimated that the equitable title of the executor of the administrator would not have prevailed against this legal title. Yet, the subject was liable to be brought into distribution, with any assets converted by the administrator.

If the representative of a deceased executor or administrator was liable administrator de bonis non, for the assets converted, upon what principle could the equity of redemption, in the first case, be decreed to the executor of the administra-

tor? That he might receive the money, merely to account for it to the administrator de bonis non, a party in the very cause in which that decree was made? And upon what principle could the equitable right of the executor of the administrator, in the last case, prevail, against the legal title of the administrator de bonis non, if the money paid to the first was to be accounted for to the last?

It was suggested in the argument, that the first administrator may have been a creditor of the intestate, and therefore entitled to the fund to satisfy his claim. If so, he must have asserted that ground of claim, or the Court could not have presumed it; or if, on the other hand, he was a debtor to the estate, that fact would have been alleged to support the claim of the administrator de bonis non. But, no enquiry was made as to the fact, whether the deceased executor or administrator was a creditor or debtor of the estate, in any case; a proof, I think, that the fact had no influence, in any way, upon the rights of the parties.

75 *Again: If an administrator de bonis non had such a right as is now claimed, upon the best settled principles of a Court of Equity, legatees and distributees could not proceed in equity against the executor or administrator of a deceased executor or administrator, without making the administrator de bonis non a party; for, if he had the right claimed, he would be entitled to the assets converted, for the payment of debts, before the legatees and distributees could be entitled to anything. In that case, if there was no administrator de bonis non, the Court should not proceed in the suit, until one was appointed, and was brought before the Court. As, in the case of an executor de son tort, it is said, "There is no precedent in a Court of Equity of a decree against him, without setting up an administrator; for, if there should be an administrator, and the defendant pay the money, he would be again liable to the administrator." *Edlows v. Deane*, Bunb. 36. Yet, in the numerous cases cited in the argument, in which the legatees and distributees prosecuted suits against the representatives of deceased executors or administrators, for the assets converted, the administrator de bonis non was not a party, nor was the necessity that he should be a party suggested. 11 Vin. Abr. 420, pl. 4; 427, pl. 11; 423, pl. 18; *Orr v. Mann*, 2 Ves. 194. The rule is accurately laid down by Lord Chancellor King, in *Swann v. Hooker*, 2 Wms. Rep. 340, (1725.) "If an executor dies intestate, all the personal estate, the property whereof is not altered, shall go to the administrator de bonis non, and not to the next of kin of the executor; and this is true; for, from the time the executor dies intestate, the first testator dies intestate also; and it was the executor's own fault, that he did not, as he might, alter the property."

There are other considerations, arising out of well settled principles of law, which lead irresistibly to the conclusion that an administrator de bonis non had not a right in equity, either before or after the Statute of Distributions, to claim satisfac-

tion from the representative of an executor or administrator, for assets wasted or converted to his use. Creditors, at common law, had no action against the executor or administrator of an executor or administrator, who had wasted or converted the assets to his own use; and in equity, a remedy was not allowed in such cases, until after the Statute of Distributions, and a little before the English Statutes gave a remedy in that case, at law. Now, such a remedy at law or in equity, would have been utterly superfluous, and the want of it could never have been felt, if the representative of a deceased executor or administrator was accountable to the administrator de bonis non, for the assets wasted or converted. The fund would have passed into his hands; and then, as assets in his hands to be administered, would have been liable to creditors. If he failed to coerce the payment, it would be a devastavit, like the failure to collect any other debt, and he would be liable for the amount to creditors, as if it had been actually received.

It has been seen, that an executor of an executor has precisely the same rights in respect to the assets of the first testator, which an administrator de bonis non has; that is, to all the goods, chattels and credits, not administered by the first executor; and an executor or administrator, who represents both the debtor and creditor, may retain the assets, which he has as executor or administrator of the debtor, for the satisfaction of the debt due to him, as executor or administrator of the creditor. 11 Vin. Abr. 261, pl. 3; *Burdett v. Pin*, 2 Brownl. 50. If then, the administrator de bonis non, who was also executor or administrator of the deceased executor or administrator, or the executor of an executor, were entitled to claim against the estate of the first executor or administrator, for the assets of the first testator or intestate, converted to their use or wasted, it would be their duty to retain out of the assets of the executor or administrator in their hands, the whole amount due to them for such conversion or waste, as administrator de bonis non or executor of the first testator

77 *or intestate; and the claim would be extinguished by operation of law, the instant the right and obligation concurred in the same persons. In such case, there never could have been any necessity for a Court of Equity to give relief to creditors against the representative of a deceased executor or administrator, upon the ground that they had no remedy at law; nor any occasion for the statute which gave them a remedy at law. It would have been absurd to allow to legatees and distributees a remedy in equity, against the representatives of the deceased executor; for, the debt of the deceased executor would be in the hands of the executor of the executor, as executor of the first testator, liable to creditors and legatees, and that before any suit could possibly be brought.

Again: An executor, before the Statute of Distributions, was entitled to the surplus of the assets, after the payment of debts and legacies, and since the statute, unless from the terms of the will it appears that the tes-

tator intended to exlude him from the surplus; and then he is a trustee for the next of kin. 11 Vin. Abr. 408, pl. 6, and note. He was not entitled as legatee, but as executor; so that the assets unadministered went to his executor, as immediate executor of the first testator, with precisely the same rights which the first executor had. The executor could not devise the assets unadministered; and if the executor died intestate, then was the testator intestate as to the assets not converted by the executor, and they went to the next of kin of the testator, and not of the executor. 11 Vin. Abr. 111, pl. 19-20. Thus, the right of the executor to the surplus, was virtually limited to the surplus of the assets, the property of which had been altered by his act in his life-time. If the estate of the first executor was responsible to the executor of the executor, as executor of the testator, for the assets so converted, this right to the surplus would be utterly frustrated, not only as to the first executor, but every succeeding executor ad infinitum; and after the payment of the debts and legacies of the testator, the residue

78 *of the assets of the testator would be transmitted ad infinitum from executor to executor, each succeeding as to such assets as the executor of the testator, and the fund would never be liable for any debts of the intermediate executors. If a creditor sued the executor of the executor for the debt of the executor, the executor of the executor would say, "my testator, the executor, was indebted for goods wasted and converted, to me as executor of the first testator, in a large sum which I have retained out of the assets of my immediate testator, and no more came to my hands, than was sufficient to pay that debt;" and so every succeeding executor ad infinitum. The right of an executor to the surplus, stands, in Virginia, precisely on the same footing that it does in England. This was certainly the case, until January 1, 1787, as was decided in *Shelton v. Shelton*, 1 Wash. 53, in this Court. In that case, a doubt is thrown out, whether, since the time when the act of 1785 took effect, the executor is not, by that act, deprived in all cases of the surplus. That act provides that "when any person shall die intestate as to his goods and chattels, or any part thereof, the surplus shall be distributed." The expression, or any part thereof, was adverted to in *Shelton v. Shelton*, as referring to all that was not actually bequeathed. I cannot think that the expression had that import. A testator might die testate as to part, and intestate as to other part of his estate. 11 Vin. Abr. 79, pl. 3. As, if he appointed an executor of all his goods in Virginia, leaving goods in Maryland, he would be intestate as to all the goods in Maryland; or, was to appoint an executor of a specified part of his goods, saying nothing of the residue, he would die intestate as to the residue; or, if his general executor died without administering or converting all his goods and chattels, the testator would be intestate as to all unadministered or unconverted, according to the cases before referred to. But, whenever a general executor was appointed, the testator was not in-

testate as to any part of his estate, unless the executor died without converting the whole; in which case, he would be intestate as to the part not converted, and it was to these cases of partial intestacy that the expression of the statute referred. All statutes should be construed, with reference to the principles of the common law; and the expression, "if intestate as to a part of the estate," means intestate according to the signification of that term as used in the common law. It was not intended by the statute, to give it an entirely new signification.

If the administrator de bonis non had the right now contended for, the statutes giving a remedy to creditors against the representatives of the deceased executor or administrator, for the waste or conversion of the assets, would not only have been useless for the reasons before stated, but the remedies of the creditors and of the administrator de bonis non, in relation to the same subject, would have been inconsistent in their effects. As respects the assets of such executor or administrator, the claim of all creditors (no matter what was their original dignity, in respect to the assets of the testator or intestate) were of equal dignity, and all ranked as simple contract debts only; and the first judgment was to be first satisfied. But, if the fund was to go into the hands of the administrator de bonis non, then the claims of creditors would rank upon the fund according to the original dignity of the debts. As against the executor or administrator of the executor or administrator, a simple contract creditor might get, by greater diligence, a preference over a bond creditor; which could not be done, as against the administrator de bonis non. If the administrator de bonis non had a right to claim the fund, the Legislature surely would not give to creditors a concurrent right to claim the same fund; the effect of which would be so totally different as to the ultimate rights of the different creditors; and that too, without any necessity.

It was argued that the Statutes of 30th Ch. 2, and 4th and 5th of Will. & Mary, did not give a remedy against an executor or administrator of an executor or administrator, "who had wasted or converted the assets, to any creditor, but such as had obtained a judgment against the executor or administrator in his life-time; and that, therefore, in order to provide for creditors who had not obtained judgment in the life-time of the executor or administrator, the fund should go into the hands of the administrator de bonis non, so that the creditors who had not obtained judgments might be satisfied. If this proposition were true, there was the same necessity before as since the statutes, to give the fund to the administrator de bonis non; and if that had been the law, the statute would have been unnecessary. But it seems to me, that the statute gives a right to all creditors, whether they had obtained judgments against the executor or administrator in his life-time or not, to sue the representative of the executor or administrator, and to allege in his declaration, the existence

of the debt, that assets sufficient to pay it had come to the hands of the executor or administrator, and that he had wasted or converted them. This construction is necessary to give effect to the statutes. The declaration that the executor or administrator was liable, relates to the substance of the liability, and not to the mode of enforcing it. In an original suit against an executor or administrator, a devastavit cannot be put in issue, nor any thing, but whether the debt be due, and whether assets sufficient to satisfy it, in a due course of administration, have come to the hands of the executor or administrator. 11 Vin. Abr. 312, pl. 7. If the devastavit could be enquired of, then a personal judgment would be the consequence, whilst it might happen, that although the executor had committed a devastavit by paying debts of an inferior dignity, or by releasing a debt improperly, or by converting the goods to his own use; yet, there might be assets sufficient remaining to satisfy the creditor, upon execution; in which case, none of those things would be an injury or devastavit, as to that creditor. It only becomes an injury to him, when, by a return of nulla bona, it appears that such acts had

81 prevented the *recovery of his debt.

It would, therefore, be premature to enquire into a devastavit, before it appeared that such devastavit had injured the creditor. But, after the death of the executor or administrator, none of the assets of the testator or intestate, can remain in the hands of his representative, answerable to the claim of the creditor; and in a suit against such representative, an enquiry into the devastavit becomes pertinent and proper; for that is the only foundation of the plaintiff's claim. The gist of the action by a creditor of the testator, against the executor for a devastavit, is not the debt of the testator, but the tort of the executor in wasting the assets, which ought to have been applied to the payment of the debt. The action is therefore against the executor in the debt and detinet, for the recovery of compensation against him individually, for his tort; and the debt of the testator, ascertained by the judgment against the executor, is introduced collaterally, as an inducement to the action, and as furnishing the measure of compensation. *Wheatley v. Lane*, 1 Saund. 216. So the gist of an action against the administrator of an executor, for the devastavit of the executor, would be the personal wrong of the executor, which, by the common law, died with the person, but for which the administrator of the executor is responsible, in his character of administrator, by the statute. The action is not for the recovery of the debt *eo nomine*, as the debt of the testator, but for compensation for the injury done by the executor; and the debt is matter of inducement, and the measure of the recovery. It is not at all uncommon, that the question whether a debt, and to what amount, is due to the plaintiff by a stranger to the defendant, is necessarily put in issue; as in the case of an escape, the creditor, in a suit against the sheriff, may recover the amount of the debt which he can prove to be due to him

from the prisoner who escaped; and if he cannot prove that any debt was due, he can recover nothing. *Alexander v. McCauley*, 4 Term Rep. 611; *Ravenscroft v. Eyles*, 2 Wils. 294; 4 Vin. Sup. 96, 82 pl. 2. And if an *attorney or agent were sued for failing to collect a debt, he would not be liable to any recovery, unless it were proved that the debt was due. It is a maxim of law, that there is no right without a remedy; and especially, when a statute gives a right and does not prescribe the remedy, the Courts are bound to devise the proper remedy, which, in general, is an action on the case founded on the statute. To give effect to this maxim, general rules of law, introduced for the sake of convenience, yield to cases of necessity, in which injustice would be done by adhering to the general rule. Thus, in an action of trespass *quare clausum fregit*, as a general rule the plaintiff can only recover damages for the first entry and eviction, and not for the detention of the possession, unless he has regained the possession by entry or action. But, if the estate of the plaintiff is expired, so that he cannot regain the possession, he may recover the profits accrued from the time of eviction till his title expired, without regaining the possession, notwithstanding the general rule. The rule that an executor could not be sued for a devastavit, until there was a judgment for the debt against him as executor, was a rule of convenience, and to avoid mischiefs which would arise, when the suit for a devastavit was against him, and which do not exist in the case of a suit against his executor or administrator. If, however, there was any inconvenience in allowing a suit for the devastavit of the executor against his representative, without a previous judgment for the debt against the executor, that must be submitted to, rather than that the right given by the statute should be unavailing. But, I can see no inconvenience in this remedy, although the fact that no debt was due, or that the executor had not wasted, or that the administrator of the executor has no assets of his testator, would each have been a complete defence for the representative of the executor, and before the statutes allowing double pleading, he could only put his defence on one of those points. This was an inconvenience common to all cases, in which a party

83 might *have several good pleas, but was confined to one; as, an executor, although a plea that no debt was due, or that he had no assets, would have been a bar to the action, could plead but one of those pleas. The statute allowing double pleading has remedied this inconvenience; and the representative of an administrator, sued for his intestate's devastavit, may plead that no debt was due, and that his intestate did not waste or convert the assets, and that he has no assets of his intestate. Although I have found no case of an action against the administrator of an executor for the devastavit of the executor, without a previous judgment against the executor, yet such suits have been common against executors of executors. The opinion which I have suggested on this point,

is supported by that of Sergeant Williams, 1 Saund. 219, e; and by the doctrine of the Court in 4 Vin. Supp. 196, pl. 2, Rivett v. Jeffries, &c.

If I am wrong in this opinion, then the creditor, who would have no remedy at law under the statute, would be remitted to his remedy in equity, as before the statute, against the executor or administrator of the executor or administrator; and it would not follow, that the administrator *de bonis non* was entitled to any remedy.

It is, however, argued, that a creditor who has not obtained a judgment against the executor or administrator, establishing his demand, cannot, on general principles of law, maintain an action for that purpose, against any but the proper representative of the testator or intestate, because no other can have the means of ascertaining whether the demand be proper or not. But the cases are quite common, in which such suits may be maintained against one not representing the testator or intestate, as against an executor *de son tort*; and when a wrongful administration has been revoked, a creditor may sue the displaced administrator, and he can only defend himself by shewing that he has legally administered all the assets, except those delivered over to the succeeding administrator or executor;

and if any remain in his hands, not so delivered over, or, *if he has committed a devastavit, by paying debts of inferior, before those of superior dignity, the creditor will recover. 6 Rep. 18, b, Packman's Case; 11 Vin. Abr. 119, pl. 5.

The cases of temporary administrators, who are responsible to the executor or administrator who succeeds them, have been relied upon; and it is said, that for the same reason that they are responsible to their successors, the representative of a deceased executor or administrator should be responsible to the administrator *de bonis non*. But the cases are wholly different. The commission of the latter gives him only the goods not administered; whilst in cases of an infant executor or administrator, or where one entitled to administration, or as executor, is absent, or is obstructed by a pending suit; whenever the impediment is removed, a general probate or administration is granted to him for the whole estate, and the administration is granted in the mean time to the administrator *durante minoritate*, or *durante absentia*, or *pendente lite*, for the use of the executor or administrator, to whom a general probate or administration may be afterwards committed. They are only the bailiffs of such general executor or administrator, and therefore responsible to them. So, if administration is granted to an improper person, or by an improper Court, and afterwards revoked, the administrator to whom administration is afterwards properly granted, has, in such cases, a general commission of administration, and is thereby entitled to call the displaced administrator to account. 11 Vin. Abr. 117, pl. 4. The latter is, indeed, as to the former, an executor *de son tort*.

I am satisfied upon the whole, that in England an administrator *de bonis non*

never had any such right as is claimed for him in this suit; and our law is to the same effect unless changed by statute.

The Act of 1661-2, chap. 45, provides that if an administrator die before he hath given an account of the estate and obtained his *quietus*, the Court should have power

85 to *grant the administration of the estate not so accounted for, to some other person, who may, by virtue thereof, call the heirs, executors or administrators of the former administrator to an account, who shall pay out of the deceased administrator's estate all such debts as shall be found due to the estate he administered upon, in the first place. This statute also directed distribution to the wife and children, and only applied to the case of a deceased administrator not having accounted; and in that single case, authorised a commission to the succeeding administrator, for the estate not accounted for, and to call for an account; instead of an administration *de bonis non*, which gave no right to an account of the goods wasted and converted; and the only object of that provision in the law, was, to enlarge the rights of the succeeding administrator, in that single case only, beyond the rule of the common law, and to make the debt due from the administrator in that case only, of the first dignity. The reason why the same rights were not given to an administrator succeeding an executor, was, that it would have defeated the executor's right to the surplus of the assets administered by him. The effect of this statute was, to enable creditors to recover their debts, after the estate not accounted for came to the hands of the succeeding administrator, out of that fund which they could not reach before; but this only in the case of an administration after an administration, and not in the case of an administrator *de bonis non*, after an executor; and in effect, placed the rights of the distributees against the estate of the first administrator, in that single case, upon the footing of a debt of the highest dignity.

The Act of 1705, chap. 33, sec. 13, provided, that when any person shall be chargeable as executor or administrator, or otherwise, with the estate of any person deceased, or with any orphan's estate, and shall die so chargeable, the estate of such person so dying, shall be liable to pay and satisfy such other deceased person's or orphan's estate, before any other debt whatever. This Act, in connection

86 *with that of 1661-2, made, in effect, a legacy due from an executor, and the claim of the second administrator after another administrator, claims of the first dignity; but made no provision for creditors, in the case of an executor dying testate or intestate, nor in the case of an administrator, except incidentally as aforesaid.

The Act of 1711, chap. 2, sec. 3, provided that, "if it should so happen, that any executor shall die intestate, not having fully performed his executorship, or any administrator shall depart this life, not having fully administered the goods of the intestate, it shall and may be lawful for the Court that granted the certificate for

obtaining such probate, or commission of administration, to hear and determine the right of administration, and to grant certificate for obtaining letters of administration of the goods not administered, to such person as by this Act shall have a right thereto." This was the precise form of the administration de bonis non at the common law; and this Act, which repeals all Acts concerning any matter or thing coming within the purview of that Act, repeals the Act of 1661-2, which directed an administration of the goods not accounted for by the first administrator.

In 1730, an Act passed, which has been re-enacted into our last Code, subjecting executors and administrators of executors and administrators, who had wasted or converted the assets, to the same liability, as the executor or administrator was subjected to. I have already observed how this liability directly to the creditors, conflicted what a supposed liability to the administrator de bonis non. Creditors, to whom a remedy was given by this Act, were entitled to claim against the assets of the executor or administrator, as for debts of the highest dignity, by virtue of the Act of 1705. But, the dignity of all the debts was equal in that respect, and a simple contract creditor, recovering first, would have the preference over a specialty creditor; whereas, if the fund went into the hands of an administrator de bonis non,

and was not sufficient to pay all the debts, *it would be paid to the creditors, according to the original dignity of their debts. This would be a palpable inconsistency. The Act of 1785, which was re-enacted at the last revision, modified that of 1705, so far as to make the estate of the deceased executor or administrator liable, as for a debt of the first dignity, to legatees and distributees only. But, it is, in effect, the same; since the legatees would be responsible to creditors, to the amount recovered by them. The Act of 1661-2, if not repealed by that of 1711, is clearly repealed by the Act of 1819, repealing all Acts not re-published in the Revised Code.

The only other statutes, which can be supposed to affect this question, are those which provide for the indemnity of the sureties of an executor or administrator, and the safety of creditors, legatees and distributees. The Act of 1785, (now repealed,) only extended to the indemnity of the sureties, and was, I think, only intended to enable the Court, if the executor or administrator failed to give counter security, if required, to give the same relief to sureties, which creditors, legatees and distributees already had in equity, to compel the executor or administrator to pay the money in his hands into Court, or to a receiver, and to deliver the assets remaining unconverted, to a receiver. 12 Ves. 4. And this, under the statute, might be done in a summary way, by compelling the executor or administrator to settle, pay and deliver, by attachment.

The only remaining Act is that of 1814, re-enacted at the revision. If this Act really introduced a new description of administrators, (an administrator of the goods not

administered, who was entitled to claim those which were converted,) it would only apply to the particular cases provided for by the Act; but I do not think that the statute has this effect. Taken altogether, I think the fair construction of it is, that the administrator de bonis non was intended by the Act, to have only the goods not converted, and not the proceeds of those converted. It provides, that at the instance of the sureties, the Court

88 may revoke *the authority of the executor or administrator, in whole or in part, and appoint an administrator de bonis non, as if the executor or administrator were dead; or to put the unadministered estate into the hands of the surety or other curator; or make any other order essential to the protection of the surety, having due regard to the interests of creditors, legatees or distributees. If, under this Act, an administrator de bonis non were appointed, he would have the same rights as, and no more than, an administrator de bonis non had at common law; for, he is described to be appointed as if the executor or administrator were dead; and the statute defines, in effect, the unadministered estate as something which might be taken from one, and put into the hands of another; a definition perfectly appropriate to assets remaining in kind, but not to an unliquidated debt due from the executor or administrator. If the administrator de bonis non, or surety, or curator, appointed under this Act, had a right to claim of the executor or administrator, an account of the converted assets, and to have them put into their hands by a summary proceeding of the court, then there would have been little or no use for the additional authority given to the Court, to make any other order upon the subject. That provision I consider as having the same effect, as the Act of 1785 upon the same subject; to enable the Court to secure the fund, by compelling the payment of it into Court, or into the hands of a receiver, by summary process. Upon this construction of the Act, a due regard would be had to the interests of creditors, legatees and distributees. They might still proceed against the executor or administrator, and reach the fund so secured, as if his authority had not been revoked; for, the provision that the suits depending might be continued against the executor, or the name of the administrator de bonis non, or curator, substituted for him, at the election of the creditor, was intended to enable the creditor, if he pleased, to pursue the administrator de bonis non or curator,

without losing the benefit of his suit; 89 and *does not preclude the other creditors who had not sued, from proceeding against the displaced executor or administrator for the goods wasted or converted; as a creditor had a right at common law, to proceed against an administrator whose authority was revoked, and who could only defend himself effectually by pleading and proving that he had duly administered all the assets which came to his hands, except what he had delivered over to the succeeding administrator; whilst the construction that such adminis-

trator de bonis non, surety or curator, had a right to claim the assets converted, would impair the rights of creditors, legatees and distributees in various ways; some of which only will be alluded to. A double commission would be chargeable upon so much of the estate as was converted. The creditors, legatees and distributees, at least the two latter, would be delayed, until after a frequently tedious litigation, the administrator de bonis non, or surety, or curator, had recovered the fund, and until they could, by another tedious suit, recover it from him, and the surety, who was liable to account for the waste of the executor or administrator, would frequently be the person charged with the duty of calling his principal to account. He would be called upon to assert the interests of persons, whose interests were the very reverse of his. The manner in which this duty would frequently be performed, is easily conjectured; and if the executor or administrator died, the remedy given by statute to creditors against his representative, would either be frustrated, or materially varied, as to their effect, as has been before observed. I do not think that this statute has any influence upon the question under consideration.

It was said in the argument, that the proceeds of the testator's or intestate's perishable goods, directed by statute to be sold, ought not to be considered as assets converted; since the executor or administrator, in this respect, acts by direction of the law, and cannot be supposed to have intended by such sale, to convert the goods to his own use. *If that be so, it would not affect the question under consideration; for, if the administrator de bonis non were entitled to claim the proceeds, it would be upon the ground that the sale was not in such case a conversion, not being the merely voluntary act of the executor or administrator, and not intended by him as a conversion. I am inclined to think that such a sale, although a conversion at law, would not be considered as a conversion in equity, so long as the debts remained uncollected; so that if the executor or administrator died before the debts were collected, the bonds uncollected at the time of his death, and which, by the statute, might be assigned to the legatees or distributees, or the money recovered upon them by the administrator of the executor or administrator, might be claimed in equity by the administrator de bonis non; upon the ground above stated, on which the cases of a judgment by the executor for the testator's goods, not enforced by the executor in his life-time, and the stocks changed by the executor for the benefit of the estate, were held to be unadministered assets in equity. If, however, the executor had collected such debts in his life-time, and failed to keep the money separate as the money of the testator, so that it might be identified, and had applied it to his own use, this would, both at law and in equity, amount to a complete conversion.

It was also said in the argument, that the general impression in the Commonwealth had long been, that an administra-

tor de bonis non was entitled to call the representative of a deceased executor or administrator to account; and that it was common, if not a matter of course, for such representatives to account for, and pay over, to the administrator de bonis non, all the assets converted by the executor or administrator; and that the Acts of the Legislature already referred to, shew that such has been the impression of the Legislature.

The review already taken of the statutes, shews, I think, that nothing is to be found in any Act since that of 1711, 91 *indicating any thing as to the Legislative understanding on this subject, and that Act, compared with the Act of 1661-2, shews that the Legislature then had distinctly in view, the difference between a commission of administration of the estate not accounted for, and one of the estate not administered; and that clause of the Act of 1711 was unnecessary for any purpose whatever, but to repeal the Act of 1661-2, and put all administrations de bonis non upon the same footing, as well those granted after the death of an executor, as after the death of an administrator. A general power to grant administrations would have embraced administrations de bonis non, to be granted in all cases, as at the common law; but, such a general grant would have left the Act of 1661-2, in force, and applicable to the case of an administration after an administration. The clause was therefore necessary in that Act, to repeal the Act of 1661-2, and for no other purpose; and accordingly, it has never been thought necessary, in the various revisals of the law, to re-enact that clause.

That the general impression of the country has been such as is stated, is, I think, very probable; and the origin of that impression is easily traced. Commissions of administration were originally granted by the Governor and Council forming the General Court, and signed by the Governor, upon the certificate of the County Courts, that the party was entitled, and had given proper security; and finally, they were made out by the Clerk of the County Court, and signed by a justice of the peace, upon a similar certificate of the County Court. The practice of actually making out the commission in form, has been, for a great length of time, discontinued; the certificate of the Court, upon which the commission might issue, being sufficient for all practical purposes. No defendant can claim the production of the commission, at law or in equity. Indeed, I have never seen a commission of administration given in Virginia. The form of a commission of administration de bonis non is almost

92 forgotten; and added to this, all attention to pleading *having for a long time been discontinued in practice, except in the use of short sentences, as "nil debet," "non assumpsit," "fully administered," &c. the idea was naturally adopted, that since upon the plea of "fully administered," an executor or administrator could not defend himself against the claim of a creditor, by shewing that he had converted the assets to his own use; therefore, such a conversion was not an administration; and consequently, the as-

sets so converted, must go to the administrator *de bonis non* administratis. The reason why evidence of a conversion does not support the plea of fully administered, is not because such conversion is not an administration, but because it is, as to the creditor, not a legal administration. As to him, it is a wrong, but not as to any other. The question of *devastavit* is not put in issue upon that plea; but the replication puts in issue the amount of assets which came to the hands of the executor or administrator, and their application to the payment of debts of equal or superior dignity, in a legal course of administration, and nothing more. The jury can only find against the defendant the amount of assets in his hands, liable to the creditor's demand. 11 Vin. Abr. 312, pl. 7. They do not find that he has not fully administered, but that he has not legally administered, so as to bar the creditor.

It was said in the argument of the cause, that if the administrator *de bonis non* cannot claim an account of the assets converted by an executor or administrator, against his representatives, then in all cases where the representatives of deceased executors and administrators have accounted with administrators *de bonis non* for, and paid over to them, such assets, the estates of such executors or administrators will be still liable to creditors, legatees or distributees, as if no such payment had been made. It is not proper to decide this question, before it shall be presented in a shape to enable the Court, upon full consideration, to decide it conclusively. If such would be the consequence, it would afford no reason for

93 deciding otherwise *than according to our convictions of what the law is.

If any loss should fall upon a party, by acting under a mistake of the law, this Court has not the power of relieving him. I think it however, not amiss, to state now, that I am strongly under the impression, that the estate of an executor or administrator would not be liable to creditors, legatees or distributees, for the assets so paid over, unless they had, before payment, asserted their claim against his estate, by suit; upon the ground, that such payment was an admission by the executor or administrator of the executor or administrator, that the assets had not been converted; as in the case of the money kept separate by the executor or administrator, as the property of his testator or intestate, and the other cases in equity before referred to. But, if the executor or administrator had been guilty of a *devastavit* by paying debts of inferior, before those of superior dignity, or had otherwise committed waste, for which his representative had not so accounted; in the first case, the estate of the executor or administrator would still be liable, to the extent of such *devastavit*, to creditors, and for the other waste, to creditors, legatees and distributees. *Packman's Case*, 6 Rep. 18, b; 11 Vin. Abr. 119, pl. 5.

If the practice of the country has been contrary to these views, I do not find that it has ever been deliberately sanctioned by this Court; nor do I consider it as a question of practice liable to be varied

and moulded, according to the discretion of the Court; but, as a question of legal right, depending upon the commission of administration, which alone gives any right to the administrator *de bonis non*, and which gives him a right only to "the goods, chattels, rights and credits, which were of the testator or intestate, at the time of his death not administered by the former executor or administrator;" which, in terms, does not embrace the value or proceeds of goods converted by the executor or administrator; such proceeds not being any part of the goods and chattels, rights and credits, which were of the testator or intestate at the time of his death.

94 This *construction and effect of the terms of the commission, is perfectly settled by the common law, and by all the legislation which has any bearing upon the question, here or in England, and which is in conflict with any other construction. The statute giving a remedy to creditors against the executor or administrator of an executor or administrator, for assets of the first testator or intestate, wasted or converted to his own use, by the first executor or administrator, gives to all creditors an equal right to claim under the statute, whether that be in respect to the assets of the executor or administrator, as for a simple contract debt only, or as for a claim of the first dignity; so that the creditor getting the first judgment, would have the prior right to satisfaction, without regard to the original dignity of the debt, and that, whether his claim was asserted in a Court of Law or Equity; which equality of right amongst the creditors, given by the statute, would be utterly frustrated, by allowing the administrator *de bonis non* to recover the funds; since the debts would, in that case, be payable by him, out of the funds, according to their original legal priorities.

If the administrator *de bonis non* has not this right, the creditors have an immediate remedy against the executor or administrator of the first executor or administrator; in which it is only necessary to prove a waste or conversion to an amount sufficient to satisfy the plaintiff's demand, and not to settle accurately the accounts of the administration of the executor or administrator; and without the intervention of the administrator *de bonis non*, all creditors, to the extent of the fund in question, would be secured by bonds given by the legatees to the executor or administrator of the executor or administrator, to indemnify him against debts of the first testator, which may appear and be recovered against him. He alone being responsible to the creditors for the fund for which his testator or intestate was responsible, he is the proper, and only proper person, to whom those bonds should be given; whereas, if the administrator *de*

95 *bonis non* has a right to recover this fund, *it will be burthened with two commissions instead of one; which would be paid in the other case, or even more than two, if there were several successive administrators *de bonis non*. The creditors would be delayed, until after a tedious litigation, the accounts of the

first executor or administrator were finally settled in the suit of the administrator de bonis non, and he had been enabled to coerce the payment of the money, and their rights would be varied as aforesaid. They might further be delayed by the necessity of a suit against the administrator de bonis non; and so the legatees and distributees would also be delayed, not only by the first suit by the administrator de bonis non, but by their suit against him for a settlement of his accounts; and the hazard of loss to creditors, legatees and distributees, would be doubled, trebled or quadrupled, according as there were one or more successive administrators de bonis non, from the possible, and indeed common, insolvency of executors and administrators and their sureties. The hazard of the insolvency of the first administrator is unavoidable; but the funds would be lost by the insolvency of any of the administrators de bonis non, if they received them, even although the estate of the first executor or administrator were good. Many mischiefs, in respect to delay, expense and hazard, would arise from giving to the administrator de bonis non, the right to call the representative of the deceased executor or administrator to account, without one solitary advantage to any party concerned, which they would not have upon the contrary doctrine; and if this was a question, not of legal right, (as to which we are bound to administer the law,) as it is, but a mere question of practice, and we had authority to control it at pleasure, I should not hesitate to say, that every consideration of convenience and justice should induce us to adopt the principles, which I have supposed to be the settled principles of law on this subject.

This case is a good commentary upon the question, whether an administrator de

bonis non has a right to call
96 *the representative of a deceased administrator to account. Wernick died intestate, and Marks administered on his estate in 1782, and gave an administration bond, with Coleman as his surety. The latter being anxious to get an indemnity, Marks deposited in the hands of Douglas \$1500, (which was not equal to the amount of the assets,) to be held by him for the indemnity of Coleman. Marks dying, Coleman took administration de bonis non on Wernick's estate, and sued the representative of Marks, and the executor of Douglas, in order to recover the \$1500, in his character of administrator de bonis non. Douglas's executor answers, that the advances made by his testator to Marks, after the deposit of the \$1500, exceeded that sum. There is no intimation in the proceedings, that there is any creditor or distributee of Wernick, who claims any thing against Wernick's representative; and if the administrator de bonis non has the right contended for, such an allegation is not necessary to entitle him to recover. Coleman died pending this suit; and the plaintiff took administration de bonis non of Wernick's estate. Upwards of forty years having elapsed since the death of Wernick, and no creditor or distributee now claiming, there is the strong-

est reason to believe that none will ever claim. This at least is possible; and if so, and the present plaintiff could recover the \$1500; then, after his death, the next administrator de bonis non could claim it with interest, from his representative; and so it would devolve from administrator de bonis non, to administrator de bonis non, forever, to the exclusion of all other creditors of the deceased administrators de bonis non; the claim of each administrator de bonis non, upon the estate of the preceding administrator de bonis non, being preferred in dignity to any other debt; a more perfect perpetuity than was ever before devised.

The scire facias to revive the appeal should be quashed, as improvidently awarded.

97 *JUDGE COALTER.

This case brings, for the first time, before this Court, the propriety of a practice, which, it seems to be admitted, has heretofore prevailed without objection, of an administrator de bonis non calling to account the executor or administrator of the first administrator, in relation to the goods wasted or converted by that administrator. The practice, which also seems to have existed, of the administrator de bonis non with the will annexed, calling the administrator or executor of the executor to account for such goods, has also been incidentally debated, as one standing on the same grounds.

The British doctrines and authorities have been brought fully to the view of the Court, and will be first examined, in regard to the practice there; and if such a course would not be permitted there, I will then enquire whether there is anything in our laws, which would make it inexpedient, if not unlawful, to change the practice here.

It is said, that in that country executors were entitled to the surplus, where there was no residuary clause in favor of some one else, or something else in the will, shewing that the executor was not entitled to it; and that, except as to creditors, every thing which had been converted by the first executor, belonged to his estate when he was entitled to the surplus; and though he would stand as trustee for creditors, and his estate be responsible to them, they only had a right to charge the fund in the hands of his representatives; *for, if the administrator de bonis non got it, whether necessary for creditors or not, that which might belong to the estate of the executor would thus be taken from it; and that therefore, the commission of the administrator de bonis non with the will annexed, only authorised him to take possession of the goods of the testator remaining in kind, or unconverted: that as to the administrator, inasmuch as before the Statute of Distributions, he was entitled always to the surplus, the like injustice

98 *would follow, if his executor or administrator should be liable to account, except as to creditors, for the assets converted, and that consequently, the commission to the administrator de bonis non only gave him a right to the assets remaining in kind, or unconverted.

Whether the Statute of Distributions it-

self ought to make any change in relation to the powers of the administrator *de bonis non*, under his commission, and especially in the case of intestacy, may be worthy of enquiry. One thing, however, I suppose must be admitted: that if any positive statute, or one or more, which could not be fully carried into effect, without enlarging his rights under his commission, so as to extend them to such a subject, had been enacted, either directly extending the power thereto, or, by necessary implication, doing so, the commission, though issued in the usual form, would extend to, and enable them to claim, the fund, as fully as if, from the beginning, such fund had been considered unadministered assets. If it is declared by statute, to be unadministered assets, the administrator's right to it, under the commission, would necessarily be extended to it.

Before the Statute of Distributions, I believe it was admitted, that where there was no residuary clause in favor of some one else, the executor of course took the surplus; but, after that statute, as the law provided a successor to an undisposed of surplus, if it appeared not to be the intention of the testator to give it to the executor, but to leave it undisposed of, the executor was held a trustee of that surplus, for the next of kin, according to the statute; and so, in like manner, was the administrator, in all cases. Whenever the executor or administrator then converted the goods or any part of them, and died leaving a surplus in their hands, not administered, in payment of debts, and the executor was not entitled to the surplus, they were considered as trustees of that fund, as well for creditors as next of kin, and their estates answerable therefor. This fund, before the statutes which gave a suit to creditors

99 *against the representatives of executors or administrators, was a mere trust to be enforced in equity in favor of creditors and next of kin, &c.; and it would seem to me, ought regularly to pass into the hands of the administrator *de bonis non*, for their benefit; and that his commission ought to be held to extend to it, as it sometimes does to subjects, which are not considered in equity as having been converted. It seems, however, to have been the practice in England, either for the creditor or next of kin to go into equity, and there reach the fund, and have it applied as by law it ought. Whether this can be done in all cases, without calling into Court the administrator *de bonis non*, I am not well advised. I incline to think it has been done in many cases without doing so. As to creditor suing, without making him a party, it may be that they could do so, in cases where they had established the debt against his predecessor; but where that was not the case; and unless it appeared that there was no dispute or difficulty as to that matter, I presume he must make the administrator *de bonis non* a party; for neither he, nor the distributees, would be bound by a decree charging the estate with a debt, in a suit to which they were no parties. There may be some peculiar cases, such as actions for escapes, on mesne process, before a debt

has been established, in which the debt must be proved, in order to shew the injury that has been done; but if there are such, it proceeds from the necessity of the case, and because the party who has done the wrong, is not, in this way, to shield himself from the consequences of his own acts; but it will be, to me at least, a new doctrine, if a decree or judgment can be recovered, so as to charge an estate with a debt, without a representative of the estate being before the Court. If such decree would not charge the estate, so as to end the matter, it would be for want of the necessary parties; and if it did not end the matter, such decree would be wrong.

When the next of kin come, I presume they must all come, and they of course being entitled to the administration, 100 *would be entitled to the fund, subordinate always to creditors, who can pursue the fund in their hands, and to secure whom a Court of Equity in England will require bond to refund, whenever it is deemed necessary. But, if some of them only have been appointed administrators *de bonis non*, or it has been granted to a stranger, then if the suit is by the next of kin, the administrators themselves would be parties plaintiff, with others. But whether, in the case of the stranger, they can proceed without making the administrator *de bonis non* a party, may be a question; for he represents creditors, may have paid debts himself, and this fund may be necessary to reimburse him, &c.; and there being such a representation of the estate, of which this fund is a part, it may be and probably is necessary, that he should be a party.

Be this as it may, there are certainly many cases in England, in which the next of kin have recovered against the executor himself such fund, when he was not entitled to the surplus, but claimed to hold it.

In the case of *Corden v. Noden*, Prec. in Ch. 12; Ibid. 92, the testator gave legacies to his relations, amounting to nearly the whole of his estate, and also gave legacies to his executors, and lived several years, during which he increased his estate considerably. In a suit by the next of kin against them, they were decreed to distribute it.

So in *Farrington v. Knightly*, Ibid. 566, there was a similar decree, and it was there said, that since the Statute of Distributions, the succession to a personal estate is as much established, as to real before the statute; and that the executors should claim to have the surplus to their own use, because they are made executors, would be to construe the will by a rule which probably the testator did not understand; for, he might be ignorant of the import of the word executors, or never intended, by making them such, to give them his personal estate; and that here it would be more unreasonable, because they had legacies given them. So that executors, says the

101 Judge, are but trustees, and *are to have nothing more to their own use, than what the testator plainly intended them as legatees or devisees, and not the whole residuum by virtue of the executorship. The Lord Chancellor then puts this

case: If A. and B. severally make their wills, and make C. executor; and A. gives him the surplus, but B. does not, and then C. dies intestate; in this case, the personal estate of A. and B. shall go several ways. For, the administrator of C. is admitted to the administration of the personal estate of A. but the next of kin are to have administration to him; which proves that C. as to that, was but a trustee. Now, although the next of kin of B. might come into equity, according to the British practice, without taking out administration de bonis non to B. and get this surplus, or the administrator of C. might retain the surplus of A's estate, without taking administration de bonis non to A. (that being considered there the shortest way, as creditors could still pursue the fund,) yet they might take the administration de bonis non, and it is their right to do so; which gives them the right to claim immediately, and without this form.

This doctrine is exemplified also by the case of *Rachfield v. Careless*, 2 P. Wms. 158, where a legacy of 5l. was given to the executor for his care in fulfilling the will. He notwithstanding claimed to hold the surplus, and the next of kin sue for it. It was there declared, that the bequest of 5l. amounted to a declaration of the trust, especially considering that it is a fundamental rule in a Court of Equity, that an executor is but a trustee; and, on his dying intestate, so much of the testator's personal estate as remains unadministered, must go to the testator's next of kin, to wit, to the administrator de bonis non, and not to the administrator of the executor. I will here remark, that in both these cases, the Judges, when speaking of the right to the thing, speak of it as belonging to the administrator de bonis non, as distinguished from the administrator of the executor.

102 As to the jurisdiction of *equity to give it immediately to one who may ultimately be entitled to receive it from the one having the right to receive it in the first instance, it is another question.

I take it that the Judge in this last case, could not have intended to say, that the unconverted assets went to the administrator de bonis non. No one could doubt that; for, no one else could get them. The next of kin, unless they administered, could not. They remained without an owner, until administration; when the legal, not the equitable right to them, would vest in the administrator de bonis non. This was not a suit to recover such unadministered assets, or no such decree could have been given; and it cannot be supposed, I presume, that if the next of kin had taken administration, they could not have recovered this subject, not administered in payment of debts, in that character; but must sue merely as next of kin. It is because they would be entitled to it in that character, and because it is an equitable subject in the hands of a trustee, that they may come at once into equity, where substance alone is regarded, and call the trustee to account, without the form of taking administration.

So, too, before the statute of Charles, creditors were also relieved in equity,

and indeed in one case in the Exchequer, they were sustained at law before that statute, on the principles of the civil law. 3 Keb. 517. But that case seems not to have been approved of, or followed up.

Thus, in *Chamberlayne v. Chamberlayne*, 1 Ch. Cas. 257, a few years before the statute of Charles, it was ruled, that if an executor make devastavit and die, his executor is liable to make it good to the creditors, if he has assets from the executor.

So, in *Vanacre's Case*, Ib. 303, the same was ruled, and the creditors directed to come to account, and have satisfaction proportionably; and it is there said, that an executor, in case of devastavit, is to be considered in the nature of a trustee of an estate.

103 *So, in *Price v. Herbert*, 2 Ch. Cas. 217, the Lord Chancellor said, "Although, by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here; and the common law will come to it at last;" and it was decreed that the executor should answer for the waste, as far as he has assets.

These cases would seem to be founded on the waste by the executor, which happens when judgment has been recovered against him, and nulla bona returned. I have seen no case, nor have I searched sufficiently to say that there are none, where a debt has, in the first instance, been set up in a suit charging such waste in a bill in equity; but, I am content for the present to say, that it may, if proper parties are before the Court.

But, as was predicted by the Judge, the common law did, in a short time thereafter, come to it to a certain extent, by the statute of 30th Char. 2, explained and extended by that of William & Mary. Those statutes in substance provided, as ours has since done, that all and every the executors and administrators of any person or persons, who, as executor in his own wrong, and the executor or administrator of an executor or administrator of right, who shall waste or convert to his own use, goods, chattels or estate, of his testator or intestate, shall be liable and chargeable in the same manner, as his testator or intestate might have been.

It is contended, that this statute gives a right to the creditor to sue the executor or administrator of an executor, or the executor or administrator of an administrator, when the executor or administrator has wasted, not only in the case where the creditor has recovered a judgment against the executor or administrator, and had a return of nulla bona, so as to fix the devastavit on him; but to sue on a bond or other chose in action; and not only to set up that debt at law against the estate, but to suggest and prove a devastavit in the executor or administrator. I doubt

104 this; *and if this is not the case, but if he can only sue under this statute for a devastavit, when he could bring such suit against the executor, then a large class of creditors could not sue under this statute.

It becomes necessary, therefore, in the

first place, to enquire, under what circumstances the executor himself was liable to an action for a devastavit, and see the reason why he was so liable; and then see how far those reasons and others will bear me out in supposing, that his executor or administrator ought not to be liable in any other manner, or in any other case.

The case of *Wheatley v. Lane*, 1 Saund. 216, is, perhaps, the first case but one, which clearly decided this question. There the creditor had obtained a judgment against the executor, who, he alleges, had wasted the assets, &c.; and the action is in the debt, suggesting this waste, &c. It was tried on a demurrer to the declaration, and many objections were made; amongst others, that it was an action of debt for a tort, which dies with the person; and if debt will lie, it may be brought against his executor; and that for the same reason that this action is brought on a judgment against him, it might be brought on a judgment against the testator, or on a bond entered into by him, &c.; that in case the action would survive, it would be doubtful whether it would be debt on a judgment or simple contract, &c. But, the action was sustained.

It will be found, however, that though attempts were made to carry it further, this action of debt for a devastavit against the executor himself, has never been sustained, except where a judgment has been first obtained against him, in which assets have been admitted, or found to be in his hands, and where, on a return of nulla bona, it appeared that he had wasted them. It was held, too, that it did not survive against his executor or administrator; and therefore, the statutes giving the suit against them, were enacted. It was also held that this action for a waste by the executor, did not lie against him on a
105 judgment against, or *on a bond executed by, his testator, notwithstanding the privity between them, because of the difficulty of pleading and making a proper defence, &c.; and because it was with difficulty the action was introduced, and the Courts would not carry it further.

All the reasons why it should not be sustained, in such case, against the executor himself, apply, if possible, with ten-fold force, to shew that it ought not to lie against his executor or administrator; and hence it no doubt has followed, that we see no case in which this action has been sustained, since the statute, against the executor or administrator of an executor or administrator, except on a judgment against the executor or administrator, establishing the debt, and fixing a devastavit on him. It is founded on the tort, and though there is also a judgment, it nevertheless ranks only as a simple contract claim; and notwithstanding Sergeant Williams, in his note on the above case in Saunders, seems to intimate that it may be sustained against the executor or administrator of the executor or administrator, without a previous judgment establishing a devastavit, yet he cites no case to support his position; and I therefore take it for granted, that none such had then occurred. I feel confident that he had not

examined the matter with reference to the pleadings, or he never could have come to that conclusion.

How an administrator of an executor can be privy to the first testator, so as to defend himself against a suit brought on a bond executed by the testator, I cannot perceive. The only case which looks at all that way, is that of *Trivett v. Jeffries*, given to us in 4 Vin. Supp. 192, pl. 2; and which was a suit against the executors of an administrator, on the bond of the intestate, and was prosecuted on this ground, as I understand the case. The administrator, at his death, had goods of the intestate, not converted or wasted, enough to pay the debt. These came to his executors, and were in their hands at the institution
106 *of the suit. There was no waste by the executor, charged. There was no administrator de bonis non; and the question was, whether these goods could be charged in the hands of the executor of the administrator, as they might have been in his hands. It was held that the action could not be sustained, though there was a verdict finding that there were assets, as alleged; for, there was no privity between the executor and intestate.

It was said that it could not be maintained at common law for that reason; that it could not be under the statutes of Ch. 2, and Wm. & Mary, for there was no devastavit in the executor charged; and hence it has been supposed that this was impliedly saying, that such devastavit might have been charged in that case, so as to bring it within the statute. But I do not think so. What was meant was this; that a devastavit must be charged to bring the case within the statute; but here it was not only not charged, but it was not a case in which such charge could be made; for, it is on a bond of the intestate, not on a judgment against the administrator.

It surely could not have escaped the Court in that case, that a charge of a devastavit would not have created any privity between the executors and the intestate, so as to have enabled them to defend that suit; to plead that it was not the act and deed of the intestate, obtained from him by duress, or that he had paid it in his life-time, &c. How could such debt, in the first instance, be set up against them, so as to charge the estate of the intestate in their hands? Did the statute mean to alter the common law, which requires that the suit which is to establish the debt, shall be brought against him who is privy to, and represents as well the person, as the estate, of the intestate? It never has been so held, and never can be. It has only been held to continue the action which once accrued against the executor or administrator for a devastavit, and which, if not given against his executor or administrator, would die with him.

107 *In addition to the above cases on this subject, I refer to the cases of *Berwick v. Andrews*, reported in 1 Salk. 314, and 2 Ld. Raym. 971; to an anonymous case in 1 Vent. 292; to *Ent v. Withers*, *Ibid.* 321, which will be found also more fully stated in 3 Keb. 797, and 825; to

Bathurst's Case, 2 Vent. 40; and to Brown v. Collins, 3 Keb. 462.

But, the administrator of an executor is sued on a bond of the testator, charging a devastavit in the executor, and he pleads that the executor fully administered, and it turns out that he did pay away, in discharge of debts, the whole of the assets which he had converted, but they are debts of inferior dignity to the bond. Still, I maintain that this is not necessarily and per se a devastavit; for, he may have left assets enough in kind to pay the debt, and which have gone over to the administrator de bonis non, and which would have been rendered in execution, had judgment been recovered against the executor. Surely this would be a good defence; otherwise, however large the estate, no executor ought to pay debts of inferior dignity, without first converting the whole of the assets; for, if he does, and dies, and the unconverted assets go to the administrator de bonis non, who wastes them, the estate of the executor will be answerable. Any course of decision, leading to such injustice, can never have my support. He has a right to make the defence, or he has not; and if he has, how is it to be tried in this suit at law on the bond? Assets enough, or some assets, may have gone to the administrator de bonis non. He may have wasted or paid debts of inferior dignity; and if he has, who is to sustain the loss? And how is this to be established in a suit to which he is no party?

Again, in England, this claim, as before said, is but in nature of a simple contract; and there, if the executor or administrator of the executor or administrator, pays out debts of any dignity, he stands safe; but here, the claim, if sued for by the administrator de bonis non, if he can sue for it, or by the legatees or
108 next of kin, is a debt of *the first dignity. But if, in a suit at law by the creditor, it would only rank as in England, there will be difficulties and dangers here on all sides, which would not beset the road to justice in England. I incline to think that would be its rank at law. It is founded on the tort, according to the very terms of the statute giving the suit; and which leaves it at law, as in England. How a Court of Equity would consider it, on principles of substitution, and permitting the creditor to stand, as it were, in the shoes of the next of kin, &c. is another matter.

Restrain the cases, then, to those in which a debt has been established in a suit against the executor or administrator, and the devastavit fixed, and all those difficulties vanish. This fixes a debt against the executor, and there is no plea of fully administered, except as to his estate.

Thus far, then, I am willing to admit that in England, the practice has been for the creditor to sue under these statutes, where a devastavit had previously been fixed by judgment as aforesaid; and when that was not done, they went into equity, either against the executor or administrator of the executor or administrator, or the legatees or distributees, &c. as the case might be; inasmuch as the Courts of

Equity were open to them, as well before as since the statutes. But, our practice has been different. Here the administrator has gone for the fund, as has been first stated.

This practice will be found to have originated, in the first instance, in positive statute, passed upwards of a century and a half ago; and even if that statute has been repealed, or its policy changed by a subsequent statute, (which I will hereafter deny,) still it will be found that our laws on the subject of executors and administrators, and of the estates of testators and intestates, have, from time to time, during that whole period, undergone so many changes and alterations from those of England, all concurring to shew the propriety of our practice, and enacted under a full knowledge
109 of its existence, and many of which laws, it seems to me, cannot *well stand or be executed under the proposed change of practice; that I think that practice, if not now sanctioned by positive law, has an equally legal and sure foundation. Hence it has followed, that there being no necessity for creditors to resort to their remedy at law under the statute, even where they had judgments, or to equity where they had not, inasmuch as the administrator de bonis non got in the fund, we hear of no suits either of the one kind or the other by creditors.

As to legatees or distributees coming into Court directly, and where there is no administrator de bonis non, or where there is, without bringing him in as a party, in order to reach such fund and distribute it, the principles of our decisions, as I understand them, are opposed to such pretension. Here, it is considered, as I understand, that every fund that is subject to debts, must go into the hands of one who can be sued at law for the debt, who gives bond and security, can be ruled to counter-security or displaced, and the fund taken from him; and it is not enough that the party may be entitled, after debts are paid. *Hays v. Hays*, 5 Munf. 418. We have, it is true, made some exceptions to this; as where a suit has been long pending, no debts appearing, &c. on the party giving bond and security. But, bond from such a party is not like that of an administrator. He can be displaced in a summary way, &c. but the legatee cannot. The structure of our laws, then, arising from the situation of our country, is different in this respect, as in many others, from those in England; and hence the propriety, and indeed the necessity, of a different practice.

But, suppose that in England, (as I incline to think it is here, at least since the Act of 1785,) there was no such thing as an executor having the surplus, except by express residuary bequest; and let us go further, and suppose that no such thing had ever existed there, either as to executors or administrators; can it be supposed, that it ever would have been doubted that the administrator de bonis non was entitled
110 to get into his hands every thing to which creditors *and next of kin were entitled? The reason for the contrary opinion and practice never would have existed, and we cannot presume the practice would. But, our early laws expressly gave

the right to the administrator de bonis non, to call in this fund.

The Act of 1661, 2 Hen. Stat. at Large, 92, provides, that where an administrator dies before he has given an account of the estate and obtained his quietus, the Court may grant the administration of that estate, so not accounted for, to some other person, who may, by virtue thereof, call the heirs, executors or administrators of the former administrator to an account, who shall pay out of the deceased administrator's estate, all such debts as shall be found due to the estate he administered on, in the first place.

Again. By the Act of 1705, 3 Hen. Stat. 371, sec. 13, it is provided, that where any person is chargeable as executor or administrator, or otherwise, with the estate of any person deceased, and shall die so chargeable, the estate of such person shall be liable to pay and satisfy such other deceased person's or orphan's estate, before any other debt, &c. Thus, the provisions of the other Act, are extended to executors as well as administrators, not only as to the dignity of such debt, but as to the accountability to the administrator de bonis non; for, in no other way can it come to the estate; and it was not until long after this, (viz. in 1730,) that we had a statute, 4 Hen. Stat. 285, similar to those of Char. 2, and Wm. & Mary, empowering creditors to sue. Mark the phraseology of this law. The estate of the trustee shall be answerable. How? Not by suit against the heir, legatee, &c.; but the representatives of the personal estate most certainly. To whom answerable? To the deceased person's estate; not to the heir, distributee, &c., but to him who has a right to the personal estate, to wit, the administrator de bonis non. Our Courts of Equity, then, as early as 1661, had jurisdiction at the suit of the administrator de bonis non, to call

111 *the representatives of the first administrator to account; and since 1705, to call the executor or administrator of an executor to account; and it has been constantly the practice to do so.

Shall an after statute, then, giving a right to creditors to sue in a particular case, be considered as operating more than to give a remedy cumulative, as it were, to creditors in such cases; or shall it be considered as abrogating a practice, which that great feature in the law, in relation to the priority of such claims, seems to me to require a continuance of, merely because subsequent Acts may not repeat and continue, in the precise terms of the Act of 1661, the liability to the administrator de bonis non? And this, under the idea of a legal right in the creditor to be protected from the effects of a statute, passed twenty-five years before the Act, under which he claims this right. This statute, then, cannot repeal or alter that of 1705.

Our Courts are full of cases of suits by the administrator de bonis non claiming such a fund. This is one of them, in which no one thought of the objection until it came here. On the other hand, where are the cases of suits by creditors against the representatives of executors or administrators, either at law or in equity? How have

they been prosecuted? Have they set up the debt in such suit, or have they first sued the administrator de bonis non for that purpose?

But, suppose the administrator de bonis non says to the creditor, "I have no assets; go against the representative of my predecessor; he wasted assets enough to pay your debt." But, the creditor says, "True, I have found that out; but your predecessor left no estate beyond enough to pay his own bond debts. My claim is in the nature of a simple contract, and of inferior dignity. Your's would stand higher; you must go;" or "I cannot go, because I have no judgment establishing a devastavit." What could the administrator de bonis non say to this? If he failed, would or would it not be a devastavit?

112 *All these inconveniences may be avoided by adhering to the present practice; for, if the administrator de bonis non has a right to call for all the assets not administered, that is, not paid away in debts, by the executor or first administrator, and the creditor establishes his debt against him, and he has properly administered all the effects which have come to his hands; and this creditor cannot be paid, and if the executor or first administrator has paid debts of inferior dignity, not leaving enough to pay this debt; then, the way is open and plain for him to go into equity against the estate of that party who has done him this injury.

Whether the executor, in this State, has been entitled to the surplus, since the Act of 1785, has never been brought before this Court, and ought not to be decided incidentally: but as some reasons have been given to shew that he may, I will merely observe, that as before shewn. Courts of Equity, ever since the Statute of Distributions, have treated them, whenever they could, as trustees. Our early statutes, before cited, clearly treated them as such, and gave the surplus to the administrator de bonis non. All our laws, in short, requiring them to give bond, holding them to counter security, &c. have placed them more in that character, than they stood in England. It is just too, that in all cases they should be so. And it was on a view of those ancient statutes, that I said in *Dykes v. Woodhouse*, 3 Rand. 312, that if this question was *res nova*, I would have serious doubts about it, even before the Act of 1785.

When the Act of 1785 was about to provide for the succession to intestate's estates, and provides that when any one shall die intestate as to his goods and chattels, or any part thereof, what did the Legislature mean by the words or any part thereof? If they intended a partial intestacy as it regarded an executor, by making an executor only of a part, it was unnecessary to use those words; for, the general law, as it before stood, distributed in such cases. So too,

of a total intestacy, as it regarded the appointment *or qualification of an executor, either because no executor is named, or because the executor refuses. In these cases, although there is a will bequeathing the whole or greater part of the estate, there is a technical intestacy; inasmuch, that an administration with the will

or testament annexed, is to be granted. But, in all these cases, the surplus would be distributed under the law as it before stood. To confine the words, then, to those, or like cases, might seem to impute to the Legislature a work of supererogation. The matter in hand was to provide how estates shall go by law, if the owner has not declared his wish on the subject. If he has, that wish must stand, although he has not appointed an executor, and in legal phase, is intestate. It did not mean, then, that kind of intestacy; for, it does not dispose of the estate in that case. But at present, it seems to me, that it intended to provide, that when the owner gave no other destination to his property by will, with or without an executor, he was to be considered as intestate in that sense of the word, as to such property, and that it should be distributed. This gives an operation and meaning to the words, and would introduce something new, or settle what might have been before doubtful; and in this way, we can account for their introduction.

If my impressions are right as to this matter, it is surely an additional reason why we should adhere to the present practice, as one reason for not giving the fund to the administrator de bonis non no longer exists.

But it is said, that the Act of 1711, repealing all Acts within its purview, not having re-enacted the provisions above noticed in former laws, as to the right of administrators de bonis non to call for the account as above mentioned, repealed those Acts; at least, that it repealed the Act of 1661. But, there are many other important provisions in former Acts, in relation to estates of testators and intestates, which are not embodied in this Act, such as that declaring the right of the Common-

114 wealth to the surplus, in *case there be no next of kin; the exemption of an executor or administrator from a personal judgment, until a devastavit is proved; 1 Hen. Stat. 446; the liability of the justices for failing to take bonds; the priority given to claims against the estates of executors or administrators above mentioned, and which is in the same clause; provisions for counter security; the right to demand a refunding bond, &c. Must it, in short, be considered a repeal of every provision thereafter existing on the subject of deceased persons' estates, not again provided for in that Act? It would seem to me, that this would be giving an unreasonable latitude to this repealing clause.

The former laws had confined the probate of wills and granting administrations, &c. to the County Courts. This Act extends it, in certain cases, to the General Court, and subjects them, in case of neglect in taking bonds. Could it be supposed that they were to be subjected, and the County Courts not? The evident object of this Act was more clearly to define the manner of granting probates, letters of administration, and of administrations de bonis non, and how to be authenticated, &c., prescribing the forms of the bonds to be given, oaths to be taken, &c.; and as it regards this particular question, it would

be strange to suppose that it was intended to take away the right of the administrator de bonis non, to call for the accounts in question, when the same Act, in the 4th and 9th sections, (speaking of the effect of probates and administration prescribed by that Act, and which includes of course those of administrators de bonis non,) declares that it shall empower and enable them to sue for, recover and receive, by all lawful ways and means whatsoever, all and singular the goods and chattels, real and personal, and all and every, the estate or estates, as any executor or administrator might lawfully do, by any ways or means whatsoever. Now, in what way, and how far, could executors and administrators, and administrators de bonis non then recover? They could then recover the very fund now in question.

115 *But, it is contended, that the terms on which the commission as administrator de bonis non is to issue, confines him to what is technically and at common law unadministered assets. Those terms are, "And if it shall so happen that any executor shall die intestate, not having fully performed his executorship, or any administrator shall depart this life, not having fully administered the goods of the intestate, it shall be lawful, &c. to grant certificate for obtaining letters of administration of the goods not administered." Then follows the clause declaring the effect of probates and administrations, as above mentioned. It is said, that these terms bring the case within what is technically an administration de bonis non in England, and the clause was intended to repeal, and did repeal the Act of 1661; so that thenceforth the administrator de bonis non should not call for the accounts, as by that Act directed, and as had been done for fifty years.

In the first place, I am not clear that it is brought within the technical language of the commission of an administrator de bonis non.* But, if the policy of the 116 Act of *1661, so far it provided for the accountability now under consideration, was extended to executors, as well as administrators, by the Act of 1705, then it will not follow that the Act of 1711 repealed or altered that policy, unless it also repealed the Act of 1705; and I supposed that this would also be contended for, but it has not.

Let us see how the law stood in 1710. An administrator de bonis non, we will

*Note by JUDGE COALTER. It is not clear to me, that if an executor had converted every thing to his own use, and had paid neither debt nor legacy, and dies, that he has performed his executorship; or that an administrator, if he has in like manner converted and died, without paying debts or making distribution, that he has fully administered the goods of his intestate; though it may be that he has technically administered them. There are no words confining the grant of administration to this technical administration: as, that it shall be granted of the goods which were of the intestate, and which remains unadministered. No. The object was, that the administrator de bonis non should, as theretofore, possess himself of the means to perform the will, as the executor ought to have done, and to administer fully, not technically, the estate of the intestate. This was conformable to the spirit of the law of 1661, and of 1706, which then had been long in force and practised under, and the policy of which is thus impliedly sanctioned, not repealed.

suppose, sues the executor of an executor, to recover the fund in question, under the Act of 1785, in order to pay debts; but, it is alleged by the executor of the executor, that the Act does not authorise such suit. I think it would have been answered by the Court in such case, "Here is the Act of 1661, under which, for fifty years, the administrator de bonis non has recovered a similar fund from the executor or administrator of the administrator. It was the intention of the Legislature to extend the policy of that law, not only to the case of an executor as well as that of an administrator, but to other cases of persons having orphans' estates. This Act was not intended to repeal that of 1661, except so far as re-enacting its policy, and extending it, as aforesaid, repeals it. They must, therefore, be considered as Acts in *pari materia*, and as having the same object; and, therefore, the action will lie. It ought to lie for another reason. If an executor wastes and dies, it is a wrong which dies with him, and creditors may be injured; and as the Legislature has not provided that this action shall survive, we will consider that they have made this provision, so as in that way to secure creditors; and we will not presume the contrary; especially as the case of the administrator is combined in the same clause with that of the executor, and the words themselves cannot bear any reasonable interpretation but this. For, how is this fund to go back to the estate of the deceased; except it goes to him who has a right to that estate, to wit, the administrator de bonis non?"

Suppose that there was such a decision of the Courts of that day reported, or found in their records; could we say it was a bad decision, or a wrong construction of these Acts; and that this fund ought to stand out, until the Legislature might thereafter make some provision to enable creditors to sue for it, or until legatees and distributees came of age and recovered it, and against whom creditors could go? I would say, that it was a most correct decision, a most fair and just interpretation of the laws, and an advancement of justice, not only for the reasons which may thus be supposed to have influenced such Court, but for this further reason. Not only the law of 1661, but that of 1705, makes this claim against the estate of the executor or administrator,

But, if a mere technical common law commission was intended to be issued, still I do not think that would necessarily be a repeal of that branch of this section, which relates to the priority of the claim, or the accountability of the representative of the administrator, even if neither of them had been incorporated in the Act of 1705. To bring that subject within the purview, it must appear that there is something in the body of the Act opposed to the policy of the previous law, that it was intended by the Act to operate on this matter. That is attempted, by insisting that a technical common law commission is opposed to it; but that is not so. If the law had theretofore declared that goods wasted should no more be considered as administered, than goods remaining in kind, the common law commission would as well enable the administrator de bonis non to go into equity for these, as for assets that have been converted at law, though not in equity. But this was in fact the law, as it then stood, and which, I think this very clause recognizes as the law. The repeal, then, only went to that branch of the law, which imperfectly gave administration de bonis non, and which was there more fully and completely provided for.

one of the first dignity; and if it is to remain unsettled, whether the estate of such executor or administrator is or is not chargeable, on account of the trusteeship, until children of tender years shall be able to assert their claims, (for creditors, if there be any, and if they could, are not obliged, to resort to that fund,) no debts due from that estate can be paid with safety. The executor of the executor must come in by bill of conformity, bring in the creditors, the administrator de bonis non, the infants by their guardians, &c. in order to ascertain what is the sum so due, and to be first paid.

Suppose he does, and that sum is ascertained, to whom will it be decreed? To the guardian of the distributees, when the administrator de bonis non wants it to pay debts, to reimburse his own advancements for the estate, &c.? Or to him, for these purposes, and afterwards for distribution? Surely, I think, it would be decreed to him.

118 *If this was the law in 1710; if the executor or administrator of an executor, could then be called to account by the administrator de bonis non; then nothing is gained to the present question, by proving that the Act of 1661 is repealed by that of 1711. That must also repeal the Act of 1705, or the accountability still continued.

It is true there is no reported decision, as early as 1710, on this subject; nor have I examined the records of the Courts to see that such has been the practice. But this, I can say, I believe with confidence; that from 1661 until 1705, (44 years) if any administrator died in Virginia, not having obtained his quietus, and there was a second administration granted, that administrator called the executors and administrators of the first administrator to account for any assets converted, and not paid away in debts: that as creditors had not then, nor for many years thereafter, any remedy at law reaching such fund, it was a just and salutary law and practice; and I believe I may also with like confidence say, that from 1705 until 1825, (a space of 120 years more,) it has been the constant practice for the administrator de bonis non to call, as well the executor or administrator of an executor, as the executor or administrator of an administrator to account; and that such right never has been disputed, until the argument of this cause; and I think that these facts must be equal to a reported case, under the Act of 1705, of such decision as I have above supposed.

For these reasons, then, the Act of 1711 did not repeal or alter that feature of the Act of 1661, now under consideration; and of course, could not repeal the same feature as re-enacted in 1705.

But the Act of 1711 is not to be construed, at this day, as repealing those Acts, for another reason. The compilation of 1733, made under the sanction of the Legislature, (as the title page shews,) contains in it as well the Act of 1705 as that of 1711, as subsisting laws. It is true, the Act of 1661 is noted by its title, and said to be repealed, "and by the Act of 1711. But, this note is not to

be considered as a statute repealing it because of its improper policy; otherwise, its policy in declaring the dignity of the demand in question, would be repealed. It is no more a repeal or alteration of the policy in this respect, than a similar note in the compilation of 1752, opposite the Act of 1711 above mentioned, repealed its policy. That statute is there marked "Rep'd." and by the Act of 1748, which also has a repealing clause, and may be said to have repealed the Act of 1711; but it is repealed merely on the ground, that this latter statute embraced its provisions as to granting probates and administrations; and in this same way, that of 1711 may be supposed to have repealed that of 1661, as to administrations de bonis non, but no further. All laws which may thus be considered as virtually repealed, are always taken into construction as in *pari materia*, in case of any doubt. Suppose the Act of 1705 had not contained in it a provision in relation to the priority of these claims, and that had stood on the Act of 1661. Would the statute of 1711 have repealed that provision? Certainly not; for, it would not have been within the purview of the Act. That Act merely intended to point out "the manner of granting probates," &c., not to prescribe the remedies of executors or administrators. This matter of priority of claim, as well as of accountability, regards their remedies, and would not have been repealed, or the Act of 1705, which continues the same matter in this respect, ought also to have been considered as repealed.

That branch, then, of the Act of 1661, was either re-enacted or repealed by the Act of 1705, not by the Act of 1711; though the other branch of the Act, and which fell within the purview, was repealed, or rather its policy re-enacted and enlarged by that Act. This, I think, is the only sound construction that can be put on those statutes.

It is a little remarkable, that even the power to grant a commission of administration de bonis non seems not expressly to be given since the Act of 1748, 120 though it is occasionally *incidentally spoken of. But the constant practice has been, and is, to grant them. Could it be said, at this day, that this power in the Courts does not exist?

So in 1748, (to be found in the compilation of 1752, p. 229,) a similar statute to that of 1705, is passed, extending its provisions to the case of a guardian, who had not been named before. So, also, in the compilation of 1769, this same law of 1705, and the one last mentioned, are both inserted as subsisting laws; and so the matter stood until 1785.

If I am correct, then, in my understanding and interpretation of the Act of 1705, as well the executor or administrator of an executor, as the executor or administrator of an administrator, was accountable to the administrator de bonis non, from 1705 until 1785, (a space of 80 years,) as the latter had been for 40 years before, and were so constantly sued and brought to account. This, I understand, to be admitted to have been the practice; whilst, at the same time,

though there may be a case, yet I can find no trace of any, where a creditor has taken his remedy under the statute in his favor.

In the Act of 1748, chap. 5, sec. 22, which impliedly repealed that of 1711, as before mentioned, it is declared that all commissions, probates, &c. issued, &c. and signed by the Governor, &c. shall empower and enable executors or administrators to possess themselves of the estates of their testators or intestates, by any lawful ways or means whatever. If the amount due from a former executor or administrator, is a part of the estate of the deceased, as understood in our laws, and subject to pay debts, legacies, and for distribution, the payment and performance of all which belong to the duties of the administrator de bonis non, (as appears by the Statute of Distributions, which directs that after debts, funeral, and just expenses, &c. the surplus of all and singular the goods and personal estate shall be distributed, &c.) how can it be said that such commission cannot extend to it? I confess I am utterly unable to say that it shall not.

121 *Although the Act of 1785, chap. 61, which extends the principle so as to embrace not only executors, administrators and guardians, but committees of idiots and lunatics, makes a change in the phraseology, by declaring that the executor or administrator of the person so chargeable, shall pay so much as shall be due to the ward, idiot or lunatic, or to the legatee or person entitled to distribution, before any proper debt, &c.; it cannot be supposed that the object was to change what had theretofore been considered the settled law and practice. I say so, because no such change is indicated, except by a slight change in phraseology. It was not intended, surely, to cut out creditors; and if that law was intended to take away the surplus from executors, and thus to remove one reason why the administrator de bonis non should not have the action, it can hardly be supposed to intend any change in the practice on this subject, as to him. I say so the more confidently, for this further reason, that so far from any grievance under the former practice existing, which that Act may be said to remedy, that same practice has gone on yet forty years more, since that Act, without mischief or complaint, that we have heard of: successive Legislatures, after distant periods, re-enacting and extending the principle, without any declared intention to alter a practice, which must have been so well known and understood.

This Act of 1785, also introduces a feature into our laws, which has been, from time to time, much extended, and which seems to me to have a strong bearing on the other branch of the enquiry; as it seems to me to cut up almost every suit at law, which might have been brought by creditors under the statute aforesaid. It declares that no surety of an executor or administrator shall be answerable for any omission or mistake in pleading, &c.; and the Act of 1806 provides, that the executor or administrator himself shall not be liable for false pleading, non-pleading, mispleading, &c. in any action then pending or there-

after to be brought, &c.; provided that judgment may be given, so far as
122 assets *may be found in his hands.

This provision is not only in the Act of 1819, but it further provides a remedy, which surely is better than that given before, if that was restricted to a suit on a judgment as I have before contended, by enabling a creditor, after obtaining a judgment against an executor or administrator, to bring suit on the official bond against the executor or administrator, and his sureties, or either of them, or the executors or administrators of either of them, &c.

If an executor of an executor is not liable to be sued, except when a devastavit has been established by a judgment fixing such devastavit, (as I hold to be undoubted law;) and as there will be few cases indeed, in which such devastavit will hereafter be established by the first judgment; this last Act, giving a remedy on the official bond, will, I think, forever put an end to any use, which the creditors might wish to make of the statute, and which, even without this alternate remedy, has remained, I believe, a dead letter in our statute book, for upwards of a century.

Thus, at a period of our legislation, when every reason for a change of practice has, from time to time, been more and more taken from under us, and when the remedy of the creditor under our former statute always doubtful and surrounded by difficulties, has become entirely useless and unnecessary, (a better one being given to him) we are to interpose on some supposed legal right that he has to our interposition, so as to uphold his claim under a statute never to be resorted to, and change a practice of 150 years standing, which, to say the least of it, has some plausible ground of law to stand on.

But say that an executor may, notwithstanding the Act of 1785, be still entitled to the surplus, and that he also is entitled to our protection. If so, and the administrator de bonis non calls on his representative for the fund in question, and which he would necessarily do by a suit in Chancery; might not that Court only, and
123 from time to time, *decree what was necessary for the payment of debts?

If a creditor sues for it at law, he will recover the fund, although there may be enough in the hands of the administrator de bonis non to satisfy him. It would therefore be more just, even on this score, that the administrator de bonis non, and not the creditor, should get the fund.

On the whole. I can see no reason for changing our practice; and it seems to me, it is one of those cases, in which it may be better to do too little than too much. In *Dykes v. Woodhouse*, we did not go according to what may be the British practice; but looking to our own statutes, and the reason and nature of the case, gave the *scire facias*, or action of debt, to the administrator de bonis non.

I think, therefore, the process was properly issued, and ought not to be quashed.
JUDGE CABELL.

This case was elaborately and ably argued by the counsel, and has been fully discussed by the Judges who have preceded

me. I also have considered with very great attention, the arguments and authorities adduced; but, I must acknowledge that I have not experienced any difficulty on the subject; which appears to me to depend on a few plain and obvious principles.

The powers of an administrator de bonis non, must depend on his commission. That commission, in England, is confined to the goods not administered by his predecessor. *Bac. Abr.* vol. 3, p. 19, 20. Now, although, in some cases, a question may be raised as to what shall, or what shall not amount to an administration, yet it never has been doubted in England, that when an administrator wastes the goods of his intestate, or converts them to his own use, that is an administration. Being an administrator of the goods by the former administrator, it is without the commission of the administrator de bonis non. And, accordingly,

it is admitted on all hands, that the
124 practice *in England, (founded no doubt on this principle,) has invariably been for the creditor and distributee of the first intestate, and not the administrator de bonis non, to prosecute the representatives of the first administrator for any waste or misapplication of the assets by that administrator.

Such being the law and the practice in England, let us see whether our Legislature has adopted the same or a different system. It is true, that at a very early period of our history, (in the year 1661,) when our Code afforded nothing like a matured system of legislation on the subjects of the probate of wills, and grants of administration, there was a law, 2 Hen. Stat. 92, which provides, that if an administrator died before he had given an account of the estate, and obtained his *quietus*, the Court should be "empowered to grant the administration of that estate so not accounted for, to some other person, who may, by virtue thereof, call the heirs, executors, or administrators of the former administrator to an account, who shall pay out of the said deceased administrator's estate, all such debts as shall be found due to the estate he administered upon, in the first place."

If this law were now in force, there could be no doubt that the administrator would have the power contended for. But, that law was repealed more than a century ago, and has never been re-enacted.

In the year 1711, the Legislature matured and adopted a complete system upon the subject of the grant of administrations, and instead of the provision in the Act of 1661, above referred to, adopted the following: (See 4 Hen. Stat. 14,) "And if it shall so happen that any executor shall die intestate, not having fully performed his executorship, or any administrator shall depart this life, not having fully administered the goods of the intestate; in every such case, it shall and may be lawful for the Court that granted the certificate for obtaining such probate or commission of administration, to hear and determine the right of administration, and to grant certificate for obtaining letters of ad-
125 ministration *of the goods not administered, to such person as by

this Act shall have right thereto." That it was intended, by this law, to repeal the Act of 1661, is a subject on which I cannot doubt. In the first place, the two Acts (relating to the power of the administrator de bonis non,) are inconsistent with each other; and in the second place, all former laws "coming within the purview of this Act," are expressly repealed. In fact, there could have been no other object for introducing this provision in the Act of 1711, but to repeal the Act of 1661; for, the power to grant administrations de bonis non, would necessarily result from the general power to grant letters of administration. And accordingly, we find, that in the edition of the laws published under the authority of the Legislature, about twenty years afterwards, viz: in 1733, the Act of 1661, is given by its title only, as one that was repealed by the Act of 1711.

It is very worthy of remark, that our Legislature, in repealing the Act of 1661, and in providing for the appointment of a second administrator, have adopted the very terms used in England, as descriptive of the administrator de bonis non. This was not an accidental circumstance. It was the effect of a design to make our laws conform to those of England, the policy of which has been tested by long and approved experience. By this law, the commission of an administrator de bonis non is, in this country, precisely the same that it is in England. It is this commission that must determine his rights and powers; and looking at this commission, I cannot see how it is possible to claim for him greater rights and powers, than have been assigned to him by the decision of the English Courts. Those decisions have my entire approbation.

It is said, however, that a different practice has always prevailed in this country. This may be so, or it may not be so; for, the evidence on the subject does not enable me to pronounce any positive opinion upon it. It is true, that in the case of *Spotswood v. Dandridge*, the Special Court 126 *of Appeals said that an administrator de bonis non had the powers now claimed for him. But I well remember that the point was not considered by the Court. This is the first time that the propriety of any practice on the subject, has been brought to the deliberate consideration of the Court; and I cannot sanction any practice that is against the law, however long it may have been pursued.

I am clearly of opinion, that an administrator de bonis non has no right to call to account the representative of a deceased administrator, for a waste or misapplication of the assets; and consequently, that the *scire facias* heretofore awarded in this case should be quashed, as having been improvidently awarded, and that the appeal should be abated.

Hunter v. Fulcher.

March, 1827.

Depositions—Notice of Taking—Sufficiency of.—A notice to take depositions is insufficient, if it omits

***Depositions—Notice of Taking—Sufficiency of.**—See on this subject monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74.

The principal case is cited with approval in *Har-*

the place where the depositions are to be taken; nor, if the Magistrates meet on the day appointed, can they resume the taking of depositions at any future day, without an adjournment to such day. **Law of Sister State—Authentication—Sufficiency of.**—

A law of another State is sufficiently authenticated under the Act of Congress, if it has the Seal of the State affixed thereto; and the particular officer entitled to affix the Seal, depends upon the regulations of the several States, respectively. **Evidence—Law of Another State—Whole Law Unnecessary.**—Where a party in a suit in Virginia, relies on the law of another State, to support his claim, he may produce an authenticated copy of the section only on which he relies, without a copy of the whole law.

Hunter, a man of colour, brought an action of assault and battery against Fulcher, in the Court of Hustings of the City of Richmond, to recover his freedom. An issue being made upon the plea of not guilty, the jury found a verdict for the plaintiff.

At the trial, the plaintiff offered in evidence, a paper purporting to be the first section of an Act of Assembly of 127 *Maryland, entitled, "An Act relating to negroes, and to repeal the Acts of Assembly therein mentioned." This paper was authenticated by Thomas Harris, Clerk of the Court of Appeals for the Western Shore of the said State, who affixed the seal of the said Court of Appeals. Then followed a certificate by John Buchanan, "Chief Judge of the State of Maryland, for the Court of Appeals," that "Thomas Harris is Clerk of the said Court of Appeals for the Western Shore, and that the annexed attestation by him is in due form and by the proper officer." After this, there is a certificate by "Thomas Culbreth, Clerk of the Council of the State of Maryland," that John Buchanan aforesaid was, at the time of signing the foregoing certificate, Chief Judge of the said State for the Court of Appeals, &c. Ramsay Waters, Register of the Court of Chancery, certifies, that Thomas Culbreth is Clerk of the Executive Council of the State of Maryland; and he affixes the great seal of the State aforesaid. To the introduction of these certificates, the defendant objected, because they were not proved and certified according to law, and because the first of them, or that part of it which purported to be an Act of the Legislature of the State of Maryland, was not a full exemplification or copy of that Act. But, the Court refused to exclude the said papers from the jury, and permitted them to be read in evidence; to which opinion, the defendant excepted.

The plaintiff also offered in evidence the commission to two justices of the peace of the county of Washington in the District of Columbia, to take the depositions of sundry witnesses; and a statement by the said justices, that they met and sat at the office of the Mayor of Georgetown, on Saturday, the 8th day of October, and thereafter on Friday and Saturday, the 14th and 15th days of the said month, and thence by adjournment from day to day till Tuesday, the 18th day of the said month, for the examination of the witnesses mentioned

ris v. Harris, 89 Va. 765, 17 S. E. Rep. 871; *Richardson v. Donehoo*, 16 W. Va. 710; *Bennett v. Bennett*, 37 W. Va. 408, 18 S. E. Rep. 642.

***Evidence—Laws of Sister State—Whole Law Unnecessary.**—See principal case cited in *Union Central Life Ins. Co. v. Pollard*, 94 Va. 154, 26 S. E. Rep. 421; *foot-note* to *Wilson v. Lazier*, 11 Gratt. 477.

See further, monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

in the commission, and the said Fulcher, the defendant, did not appear before 128 them, either in *person or by attorney. He also introduced a witness, who swore that on Tuesday evening previous to the 8th day of October, 1825, he delivered to the defendant Fulcher, a notice to take the depositions of the said witnesses: that he did not recollect on what day the notice stated that the depositions would be taken; but that upon reference to the said depositions, and to the minutes of the Court, the fact is brought distinctly to his mind, that the day fixed in the notice for taking the said depositions, was on the Saturday previous to the October term of the Hustings Court, which was on the 8th day of October, 1825; but, that the notice itself had been mislaid or lost, &c. The Court permitted the said evidence to go to the jury, and the defendant excepted.

The Court gave judgment for the plaintiff, and the defendant appealed to the Superior Court of Henrico. That Court reversed the judgment of the Court of Hustings, because the Act of the Legislature of the State of Maryland aforesaid, ought not to have been permitted to go to the jury, as it was not proved or certified according to law.

From this judgment, the plaintiff appealed to this Court.

French and Southgate, for the appellant. Daniel, for the appellee.

It was contended for the appellant, that the Maryland Act was duly authenticated, according to the Act of Congress. L. U. S. 1 vol. 115, chap. 11. In the case of the U. States v. Johns, 4 Dall. 416, it is decided, that no particular officer of a State is required to attest a copy of a law; but that it is sufficient, if the great seal is affixed. This doctrine is confirmed by the case of Ferguson v. Harwood, 7 Cranch. 412. Foreign laws may be proved by exemplification under the great seal, and by the laws printed by the public printer. Norris's Peake, 109, 110; U. States v. Palmer, 3

129 Wheat. 624. As to the objection that *part of the law only was certified, that rule only applies to judicial proceedings. But, with regard to laws, every section is a distinct fact. If the opposite party thinks that there is something in another part of the law, which operates in his favor, it is incumbent on him to produce it. Dive v. Manningham, 1 Plowd. 60; Neues & ux. v. Lark and Hunt, Ibid. 408.

For the appellee, it was said, that this law was not authenticated, either according to the common law or the Act of Congress. By the common law, foreign laws must be proved by a witness on oath. Talbot v. Seaman, 1 Cranch, 1; Church v. Hubbard, 2 Cranch. 237. The Act of Congress has not been complied with; for, the great seal is not affixed to the law, but to the certificate that "Thomas Culbreth is clerk of the Executive Council."

But the whole Act is not certified, which was necessary according to all the principles which govern evidence. 1 Phill. Evid. 289. Statutes should be taken all together. 4 Bac. Abr. I. tit. Statutes. The cases

from Plowden relate to pleading, and not to evidence.

The notice for taking depositions was too short, and no place was appointed for taking them. They were taken, too, without a regular adjournment from day to day.

March 22. JUDGE CARR delivered his opinion.

In this case it seems, that a written notice of the place of taking the depositions, was given to Fulcher; but, that being lost, the person who gave it is introduced to prove the notice. He swears, that on the Tuesday before the Saturday on which the Justices first met, he gave Fulcher a notice to take the depositions, but he no where states in his affidavit a notice of the place of taking them. It is not unlikely that this was stated in his evidence before the Court, but omitted in taking down that evidence. We, however, must go by the record, and this seems

130 to be a *defect. But this is not the worst. In the certificate of the magistrates, they state that they had met at the Mayor's Office of Georgetown on Saturday the 8th day of October, 1825, and "thereafter, on Friday and Saturday, 14th and 15th of same month, and thence by adjournment, till Tuesday, 18th, for the examination of the witnesses," &c. and "that no person appeared for Yeatman or Fulcher." The 8th of October was the day on which Fulcher had notice to attend. On that day, it seems, there was a mere meeting. How long it lasted, we are not told; nor did the magistrates adjourn to any further day. How then could Fulcher know that they would meet again on that business? Or, what power had they to do so, without adjournment? The meeting on the 14th and 15th, was quite a distinct thing, and required a notice as much as the first meeting. I consider the depositions, therefore, as taken wholly without notice, and improperly admitted.

As to the Maryland law, it is objected, first, that it is not properly authenticated. I think it is. The Act of Congress says, that the Acts of the several Legislatures shall be authenticated, by having the seal of their State affixed thereto. This is the whole that is required. Here the seal is certainly affixed, and to this law, and with the sole view of authenticating the law. The mode seems somewhat roundabout; several officers attesting the authenticity of the Acts of each other. But, this is the mode which the State authorities have settled, and to them the Act meant to leave the matter. In the U. States v. Johns, 4 Dall. 412, the Court, composed of Judges Washington and Peters, say, "The Act of Congress does not require the attestation of any public officer in this case; although in all the other cases provided for, such an attestation is required. There is good reason for the distinction. The seal is in itself the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy as to the officer entitled to affix the seal, which is a regulation very different in the different

131 States." Here we have the great "seal of the State affixed; and all controversy as to the proper officer to affix it be-

ing precluded, we must take it that it is properly affixed.

The next objection, to wit, that this evidence ought not to be admitted, because it is one section only of the Act, has a greater show of reason in it, but yet is not sound, as I incline to think. The objection rests on this ground; that the whole law is one entire record, and that no part of a record can be used as evidence, without exhibiting the whole. This is true of judicial records, and for the best reason; that the whole record is one, and without the whole, you cannot tell what is the effect of it. But, with Legislative Acts, it is different. We know well, that some of our Acts occupy many pages, and treat of many different parts of an extensive subject, and sometimes of different subjects, wholly unconnected with each other. We are told in *Plowd.* 65, that a statute often contains many branches, and "that these branches, though contained in one chapter, are several Acts of Parliament, and concern several matters; and then, where one branch only serves a man's purpose, it is sufficient for him to recite that only; for the recital of that only is the recital of an entire and several Act of Parliament;" and if this rule hold in the strictness of pleading, I cannot see why it should not as to evidence. The section of the law of Maryland is perfect as to sense and purpose. It enacts that it shall not be lawful to bring a slave into the State, either for sale or residence there; and that any slave brought in, contrary to the Act, shall immediately be free. Now, we cannot suppose that in this same Act, there can be any clause contradicting this; and if there should be one narrowing or modifying it; saying (for instance,) that where a citizen of Maryland acquires a slave by descent or marriage, he may bring him in, provided that within such a time he has him registered; would not the claimant have to bring himself, by proof, within the proviso? And if you would hold him to that, would it be any additional burthen to 132 say he should produce the "law which authorised such proof? The law (if it exist) he may easily produce. The proof may be much more difficult. But, if no such proviso exist, will you require the pauper to prove this negative? My present impression then is, that the law is well authenticated; and that the section produced is admissible evidence; but, that the depositions were improperly admitted, there being no notice.

The judgments of both Courts should be reversed, and the cause sent back.

The other Judges concurred.

Stribbling v. The Bank of the Valley.*

May, 1827.

Judicial Notice—Public Laws.—The laws establishing Banks in Virginia, are public laws, and may be noticed by the Courts *ex officio*.

Banks—Usury Laws—Application.—The law of usury

*For sequel of principal case, see *Bank of the Valley v. Stribbling*, 7 Leigh 28.

Judicial Notice—Public Laws—Laws Establishing Bank.—To the point that the acts of the general assembly incorporating banks are public acts of which the court will judicially take notice, the principal case is cited in *Farmers' Bank v. Willis*, 7 W. Va. 42; *Mason v. Farmers' Bank*, 12 Leigh 87;

applies to the Banks, subject to the modifications produced by their charters.

Notes—Interest in Advance.—Taking interest in advance upon the whole amount of a note discounted at Bank, is lawful.

Usury—Facts Agreed—Province of Court.—Where the facts are agreed or found by the jury, it is the province of the Court, to say whether they amount to usury or not.

Usury—What Constitutes.—**Case at Bar.**—When a proposition is made for a loan of money, and the lender will only consent to lend a part of the money wanted, on condition that the borrower shall receive stock at a price much above the market value, to make up the deficiency, and the bargain is made on these terms, such contract is usurious.

Notes—Interest in Advance.—A loan on accommodation paper, and a discount on real paper, stand on the same footing, as to the right of a Bank to deduct the interest in advance on the whole amount of the note.

This was an appeal from the Superior Court of Law for Frederick county, where a suit was brought by the Bank of the Valley against Erasmus Stribbling, on a promissory note for \$8,810, made payable to Francis Stribbling, endorsed by him to Francis Stribbling, jun'r., endorsed by him to A. S. Tidball, administrator of Sigismond Stribbling, deceased, endorsed by him to John Jolliffe, *endorsed by him to John Mackey, endorsed by him to George W. Kiger, who, at the foot of the note, ordered the drawer to be credited for the amount of the proceeds of the said note. The declaration alleges, that this note was afterwards discounted at the Bank of the Valley, and the full amount thereof paid to Erasmus Stribbling, deducting therefrom the lawful discount or interest, &c.

All the subsequent proceedings are so fully detailed in the opinions which follow, that it would be needless repetition to insert them here.

The case was argued in this Court, by Jones and Johnson, for the appellant; and Stanard and Leigh, for the appellee.

On the part of the appellant, it was contended: 1. That this transaction was a loan, and not a discount of paper already in circulation. Paper of this sort is not entitled to the privilege of having the interest deducted in advance, on the whole amount of the note. *Jones v. Hake*, 2 Johns. Cas. 60; *Wilkie v. Rosevelt*, 3 Do. 66; *Dunham v. Day*, 13 Johns. Rep. 40; *Dunham v. Goode*, 16 Do. 367; *Powell v. Waters*, 17 Do. 176; *Chitt. on Bills*, 77, cites *Rex v. Ridge*, 4 Price's Rep. 66; *N.*

Hays v. Northwestern Bank of Virginia, 9 Gratt. 180; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 349, 351, 354.

See further, monographic note on "Evidence" appended to *Lee v. Tapscott*, 3 Wash. 276.

Notes—Interest in Advance—Usury.—It is settled in Virginia that the taking of interest in advance, upon discounting a note at banks not usurious. To this point, the principal case is cited in *Grigsby v. Weaver*, 5 Leigh 213; *Crump v. Trytyle*, 5 Leigh 261, 260, 263, 264, 267; *State Bank v. Cowan*, 8 Leigh 264.

See further, monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

Same—Facts Agreed—Province of Court.—See, on this point, principal case cited in *Whitworth v. Adams*, 5 Rand. 364, 406, 408; *Brockenbrough v. Spindle*, 17 Gratt. 43.

Same—What Constitutes.—See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698. The principal case was cited on the subject in *Seibry v. Morgan*, 8 Leigh 586; *Bank of the Valley v. Stribbling*, 7 Leigh 55.

Same—Statute—Person—Corporation.—To the point that the word "person" used in the law against usury embraces corporations, the principal case is cited in *Bank of United States v. Merchants' Bank of Baltimore*, 1 Rob. 589, 590; *Crafford v. Supervisors of Warwick County*, 87 Va. 115, 12 S. E. Rep. 147.

York Fire Ins. Company v. Ely, 2 Cow. Rep. 678. These cases fix the character of this transaction as a loan; and on the doctrine of taking interest in advance, Comyn on Usury, 81, and the cases there cited, and Marsh v. Martindale, 3 Bos. & Pull. 154, support the other branch of the proposition. There is an additional objection to this discount, because it was for eighteen months, when the charter allowed only one hundred and twenty days; as to the effect of which, Comyn on Usury, 81, 2 Cow. Rep. 678, above cited, and the same book, page 736, are conclusive.

2. The transaction was usurious. The sale of stock was connected with the loan, and inseparable from it. The stock was sold above the market price. The sale of stock was a mere sift to cover the usury, which will not avail.

134 *Davis v. Hardacre, 2 Camp. 375; Jones v. Davidson, Holt, 256; Douglass v. M'Cheaney, 2 Rand. 109.

For the appellee it was contended: 1. That the Statute of Usury does not extend to a corporation. The expression in the law is "no person," &c. This term does not apply to a corporation. 2 East's Cr. Law, 927. The second section inflicts a penalty to be paid, one half to the Commonwealth, the other to the informer; which can only apply to a natural person. An artificial person can never be liable to indictment or penalty. The terms of all the Bank charters use words of restriction, not of grant, in imposing limits on the rate of interest which they are allowed to take. This plainly implies, that without that restriction, the Banks might take any rate of interest that they pleased, and therefore were not subject to the usury laws. Besides, the charters allow the Banks to take one half of one per cent. for thirty days, which exceeds the rate of six per cent. per annum. There was no necessity for applying the Statute of Usury to Banks. They were subject to a greater penalty, viz: the forfeiture of their charter. Fleckner v. U. S. Bank, 8 Wheat. 354.

2. As to the length of time the note had to run, the law only makes the directors liable to a penalty, and so far from exonerating the borrower, it declares that whoever shall borrow for more than one hundred and twenty days, shall be liable to pay the note at the expiration of that time, as if it were made payable then. 2 Rev. Code, 102, sec. 18. There was no stipulation here, to let the note run for eighteen months at all events. Stribbling had his option to renew it or not, and might have discharged himself by paying it at the end of sixty days.

3. A discount applies as well to accommodation paper, as to paper given for a real consideration. Beawes' Lex Merc. 410. The N. York cases all support this idea. This was the English law, where there is no express provision authorising discounts at all.

135 *4. The burthen of proving the value of stock lies upon the borrower, not the lender. 2 Camp. Rep. 553. The price of the stock was fixed by Stribbling himself. The loan of \$2,500 was not connected with the sale of Bank stock.

5. The jury, and not the Court, were the proper tribunal to decide whether the sale was a disguise for usury, and they have decided that question for the appellee. 3 Com. Law Rep. 97; 4 Mau. & Selw. 194, Castairs v. Steane; Doe ex dem. Metcalfe v. Brown, 3 Com. Law Rep. 109; 3 Barnew. & Ald. 664; 5 Com. Law Rep. 417, S. C. But, if the Court ought to have decided the question, they ought not to have decided it in the way asked by the appellant. It is absolutely necessary to have a communication for a loan, to render the sale of property connected with a loan usurious. The Bank, by its charter, was bound to sell its stock whenever par could be obtained. This ought to have great weight in ascertaining the intent of the Bank in making this contract.

In reply, it was said, that it did not appear judicially to the Court, that the Bank of the Valley was a corporation, and therefore, it could derive no benefit from the argument that the term "persons" did not apply to corporations. The charter of this Bank is a private law, which must be pleaded or given in evidence. 5 Com. Dig. 322, 323, (New Edition,) tit. "Parliament," R. 6, 7. Legrand v. Hampden Sidney College, 5 Munf. 324. Our law, 1 Rev. Code, 510, chap. 123, sec. 92, merely declares that private Acts may be given in evidence without being specially pleaded; but, they must be given in evidence, and the Court cannot take notice of them judicially. That this law is a private Act, appears from the case of Kirk v. Nowell, 1 Term Rep. 125; Holland's Case, 4 Co. Rep. 76; The Prince's Case, 8 Co. Rep. 28.

136 *May 25. The Judges delivered their opinions.*

JUDGE CARR.

This is a most important case, both for the amount of money, and the principles of law, involved in it; and it was argued with all the zeal, ability and research, which its importance merited. It is a suit by the Bank against Stribbling, on a promissory note for \$8,800, payable at sixty days to Fr. Stribbling, or order, negotiable and payable at the Bank. There are six endorsers; and the last directs that the note be credited to the drawer. It was discounted at the Bank; protested for non-payment; and the maker sued. The declaration sets out the particulars of the case. The defendant, 1st, demurred generally to the declaration, and on argument the demurrer was overruled. 2d. He filed a special plea of usury, to which there was a replication and issue. 3d. He pleaded Nil Debet, and issue. 4th. Another special plea of usury, to which there was a demurrer. The Court thought the plea bad; but gave leave to amend, by adding the scienter. Thus amended, the Court received the plea. The plaintiff excepted to the opinion of the Court giving leave to amend, and took issue on the plea. The defendant filed another special plea of usury to the following effect: that before the making of the note, to wit, on the 14th day of February, 1821, at &c. it was corruptly, and against the form of the Acts

*The PRESIDENT absent.

of Assembly, &c. agreed between the Bank and the said Stribbling, that the Bank would discount for him two notes, one for \$10,000, the other for \$2,500, and would continue the said discount for eighteen months, provided Stribbling (and several others named) should be made drawers, and the notes should be endorsed by Sigismond Stribbling; the notes to be renewed every sixty days, and the discount to be paid thereon, to wit, interest in advance
 137 at the rate of one *half of one per cent. for every thirty days; and provided that the said Stribbling would take in payment of the said discount, one hundred shares of stock of the Bank at \$10,000, and the rest in money. The plea then states the giving and discounting the notes, with their various renewals; the receipt of the shares at par, &c.; all in execution and continuation of the corrupt agreement; and concludes with an averment, that at the original discounting, and at each renewal of the notes, there was uniformly paid in advance by Stribbling to the Bank, in execution of the said corrupt and unlawful agreement, a discount upon the notes, at the rate of one half of one per cent. for every thirty days; and he avers that the discount and interest contracted to be paid, and actually paid, by him to the Bank, at the renewal of the said notes, every sixty days, exceeds the rate of \$6 for the forbearance and giving day of payment of \$100 for one year; contrary to the Act of the General Assembly in that case made and provided; by means whereof, and by force of the said Acts of the General Assembly, the said last mentioned promissory note was, and is, void in law, and this, &c. To this plea there was a general demurrer, which the Court sustained.

The issues of fact were then tried by a jury, and all found for the plaintiffs; on which verdict, the Court rendered judgment.

In the progress of the trial, three exceptions to the opinion of the Court were taken; which will be further noticed hereafter, as also an exception to the opinion of the Court overruling a motion for a new trial. The demurrers to the declaration, and the last plea, were placed by the counsel for the defendant on the same ground, to wit, that the case disclosed by each was a case of pure loan, and therefore that the interest taken in advance was usurious. Before, however, deciding this question, it may be best to discuss some preliminary points raised at the bar.

It was contended by the plaintiff's counsel; First, That no corporations are embraced by the statute of usury.

138 *Secondly, That if it extend to other corporations, it does not to this Bank, it being, by the law of its creation, set above the general law of usury. To meet, or rather to forestall these enquiries, it is insisted on the other side, that the law creating the Bank, is a private statute, and not being set out in the pleadings, cannot be noticed by the Court, in deciding these demurrers. This last point must be first disposed of. The distinction between public and private Acts, is unquestionably

a doctrine of the common law; but, as I must say that it seems to me to be founded much more in technical and artificial reasoning than in good sense, I do not feel inclined to carry it beyond the strict letter. Most of the old books abound with cases turning on this doctrine. Many illustrations of the distinction between public and private acts, are given in Holland's Case, 4 Co. Rep. 76. But, I have seen the subject nowhere treated with more clearness and precision, than in the note to 6 Bac. Abr. 374, tit. Statute, F. said to be from the pen of Mr. Abbott. "Acts are deemed to be public and general Acts, which the Judges will take notice of without pleading, to wit, Acts concerning the King, the Queen, and the Prince; those concerning all prelates, nobles, and great officers; those concerning the whole spirituality; and those which concern all officers in general, such as all sheriffs, &c.; Acts concerning trade in general, or any specific trade; Acts concerning all persons generally, though it be a special or particular thing, such as a statute concerning assizes, or woods in forests, chases, &c. &c. Com. Dig. tit. Parliament, (R. 6.) 2d. Private Acts are those, which concern only a particular species, thing or person; of which the Judges will not take notice, without pleading them, viz. Acts relating to the bishops only, Acts for toleration of dissenters, Acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to colleges only in the universities. Com. Dig. tit. Parliament, (R. 7.) 3d. In a general Act, there may be a private clause,

139 (Ibid.) and a *private Act, if recognized by a public Act, must afterwards be noticed by the Courts as such." (2 Term Rep. 567.) To this last point, there are many authorities. Buller, in his Nisi Prius, 224, says, that though it be regularly true, that a private law shall not be taken notice of unless it be shewn; yet it will be otherwise, in case such private law be recognized by a public one. In Samuel v. Evans, 2 Term Rep. 574, Ashurst, Justice, speaking of the statute of 23d Hen. 6, empowering sheriffs to take bail bonds, says, "on the reason of the thing, the statute is a general law; for, though it relates to officers of a certain description, yet all the King's subjects are included in it; for it gives to all of them a liberty of being bailed. But, whatever doubt there might have been before the passing of the statute of Ann, it is now removed by that statute, which unquestionably makes it a public law." Buller, J. in the same case, speaking of the 23d Hen. 6, says, "But the point is not now open to consideration; for, whatever might have been the law before the statute of Ann, the case of Saxby v. Kirby, removes all doubt. The Court there said, that though the 23d Hen. 6, were a private law, yet the statute of Ann having enabled the Sheriff to assign such bond, the Court must take notice of the law that enables him to take such bond." Whether our laws creating Banks are intrinsically private Acts, is matter of great doubt with me. They, to be sure, may be said in some respects to

concern the particular stockholders who compose the corporation; but, in other respects, all the citizens are interested in them. The Commonwealth has a large interest in them, and by her power of appointing officers, has, in a great degree, the control of them. The cashier is by the law directed semi-annually to furnish to the Executive, statements on oath, shewing the whole situation of the Bank, which it is made the duty of the Executive to communicate to the Legislature. He is also empowered to send an agent to inspect the books of the Bank, and count the specie. Our laws also make it felony

140 to counterfeit *their notes. All these things give them rather the aspect of great public institutions, than private companies. In *Young v. The Bank of Alexandria*, 4 Cranch, 388, counsel, who were discussing the question whether the law of Virginia establishing the Bank of Alexandria, was a public Act, were stopped by the Court. Chase, J. said, "The Act makes it felony to counterfeit the notes of this Bank. Does not that make it a public Act?" Marshall, C. J. said, "that the opinion of the Court was very strong that this was a public Act; and that if it were not, it being printed by the public printer, by order of the Legislature, agreeably to a general Act of Assembly for that purpose, it must be considered sufficiently authenticated." From all this, I rather incline to think, that these Bank laws are of themselves public laws; but if not, I am well satisfied that they have been made so, by the recognition frequently given them by public laws. All our revisals (since Banks were among us,) direct the publication of the laws creating them, as public laws; the revisal of 1819, especially. It gives a list of the general laws to be published; and the Bank laws are among these; then it directs that all private, local, and temporary Acts, shall have their titles only published. I am of opinion, that the Court are bound to notice this law, though not set out in the pleadings.

We come now to the question, are corporations included within the Statute of Usury? Can they take usury ad libitum? It is contended, 1st. that they are not within the words of the law; 2nd, that they are not within the mischief.

The first objection that occurs to this point, is its novelty. I have never heard, nor have I been able to find in any book, a question of this kind raised; and yet the case must have occurred frequently. We see many decisions in the New York, and Massachusetts cases, where the contracts of Banks have been pronounced usurious. These cases called forth the very best talents of the State, and were, some of them, most ably argued; and yet, this 141 objection *never occurred. In the Federal Court, cases have been decided between the U. S. Bank and its debtors, in which the question of usury has arisen; but it was never contended, that a corporation could not commit usury. I refer particularly to the case of *Fleckner v. U. S. Bank*, 8 Wheat. 338. I mention this merely as a prima facie objection to the point. It is certain, that although

never made till now, it may be sound; and the professional standing of the counsel who made it, as well as the ability with which it was supported, require that it should be seriously weighed.

The first section of the law directs, that no person shall, upon any contract, take directly or indirectly, for loan of any money, &c. more than six per cent. for a year, &c. The second section says, "If any person shall, by any way or means, &c. take more than six per cent. every person so offending shall forfeit double," &c. These sections, it is said, shew that none but persons can commit usury, and that a corporation is not a person. That a corporation is not a natural person, is most clear. Whether they may not sometimes be comprehended in law, by that term, I have not formed an opinion. Some pretty strong cases to that effect were cited at the bar; and if this were an attempt to inflict the penalties of the statute, we should have to decide that point. But the question is, whether a contract made by a corporation, contrary to the statute, is not void; and this, I think, is clearly decided by the last clause of the first section, which enacts, that "all bonds, contracts, covenants, conveyances or assurances, to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void." These words seem to me to include every contract that can be made. The words of the law, therefore, take in the case.

But it is said, that corporations are not within the mischief of the law, or its meaning. The mischief of the law, was taking usury. Cannot corporations 142 make usurious *contracts? Unquestionably. The power of buying and selling, granting and taking, &c. is generally given expressly by their charters, and if it were not, would result as an incident to their creation. 10 Rep. 29, 30. My Lord Coke says, "When a corporation is duly created, all other incidents are tacite annexed;" among which he mentions the power to sue and be sued, implead and be impleaded, grant and purchase, and many others.

But it is said, that Banks are the depositories of the property of the subscribers, for whom the officers are mere trustees: that the rights of widows, orphans and infants are committed to them; and the law could never intend, that these interests should be sacrificed by their mismanagement or dishonesty. I cannot agree to this position. In the very nature of things, all who commit their interests to the keeping and management of others, must depend, for gain or loss, on the skill and fidelity of the fiduciary. Suppose the officers lose money by bad debts. Suppose they embezzle it. Must not the stockholders suffer? And why not, if they make a contract violating the usury law, and thereby create a bad debt? This is no greater loss than if the same money were lent to an insolvent man. The doctrine would extend to all trustees of every description, (a thing never thought of,) or you must say that this is a privilege peculiar to Banks.

But, it is said, secondly, that this Bank is placed above the law of usury by its own law, which permits it to take one half of one per cent. for every 30 days. The words of the law are, "neither shall the said corporation take more than the rate of one half of one per centum for 30 days, for or on account of its loans or discounts." It is contended, that this is a total repeal of the usury law, so far as relates to the Bank; and that though they take 20 per cent. a month, no consequence can result from it, but the loss of their charter under their own law. I take it very differently. The power given to the Bank to take one

143 half of one per cent. for 30 days, I consider a particular *privilege, which, while they keep within it, protects them from the action of the usury law, but no longer. The moment they exceed the privilege, the shield is gone, and the general law operates. I can have no idea that a total repeal of the usury law was intended. Surely, if it had, there would have been something in the Bank law more clearly expressing it. There is certainly no express repeal. "Implied repeals, we know, are not favoured in law. There must be absolute repugnancy to effect it. If the laws can be made to stand together; especially if there be different functions for the laws, the one a general, the other a particular purpose; the latter will never be construed to repeal the former. For this doctrine, many cases might be cited. I shall only refer to *Warder v. Arrell*, 2 Wash. 282." I believe the only intention of the Act, was to make that law, which was known to be the practice. In Banking operations, it is much the most convenient and ready to take the year to consist of 360 days; and this had become a general practice in all Banks, (attended with very mischievous consequences to many of them, as we see by the New York cases.) Our Legislature meant to give this Bank the benefit of this practice, without subjecting it to the charge of usury.

I am clear, therefore, that corporations, generally, are within the usury law; and that this Bank is not, by its charter exempted, further than the privilege of taking one half of one per cent. for 30 days, extends.

Let us now consider the demurrers and plea; and as they are both placed on the same ground, it will only be necessary to consider one. We will take the plea. The contract stated by it, is an agreement to discount the notes for eighteen months, renewable for every sixty days, deducting in advance the discount of one half per cent. for 30 days, at every renewal, and paying in part discount 100 shares at \$10,000; and it is averred that the discount and interest contracted to be paid, and actually paid, at the renewals, exceeded six per cent.

144 contrary to the Act of Assembly, *&c. The whole charge here is, that the taking interest in advance amounted to more than six per cent. and constituted usury.

Upon two grounds, I think this plea bad, and the demurrer properly sustained. 1st. It is perfectly settled by the cases, that in commercial and banking transac-

tions, it is not usury to take interest in advance on discounts or loans. This is very clearly laid down in *Fleckner v. United States' Bank*, 8 Wheat. 338. The Judge says, "The next point in the record, is, whether the discount taken in this case was usurious. It is not pretended that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of 6 per cent. on the sum due by the note. The sole objection is the deduction of the interest from the amount of the note, at the time it was discounted; and this, it is said, gives the Bank at the rate of more than 6 per cent. upon the sum actually carried to the credit of the P. Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to Bank discounts generally; for, the practice is believed to be universal; and probably few, if any charters, contain an express provision authorising, in terms, the deduction of the interest in advance, upon making loans or discounts. It has always been supposed, that an authority to discount, or make discounts, did from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among commercial and professional men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where so statute authorises bankers to make discounts, it has been solemnly adjudged, that the taking of interest in advance by bankers, upon loans in the ordinary course of business, is not usurious." It is useless to make further quotations or remarks on this subject. It is a settled point.

145 *In the second place, the plea concludes, that the taking the interest in advance, amounts to more than 6 per cent. contrary to the Act, &c., meaning the general usury law. Now we know that by the charter, the Bank has a right to take more than 6 per cent. per annum, to wit, one half of one per cent. for thirty days.

Upon these grounds, I think that the demurrer to the declaration was properly overruled, and that to the plea properly sustained.

We come now, to the exceptions taken in the course of the trial, to the opinions of the Court. The first need not be examined. It was an exception taken by the plaintiff, in whose favor the final judgment was.

The second was a motion by the defendant, setting out the whole evidence, and moving the Court to instruct the jury, that if they believed certain facts, they must find for the defendant. The Court refused the instruction, either on the ground that the question, whether the facts amounted to usury, belonged exclusively to the jury; or that the facts, as stated, did not amount to usury, and therefore did not justify a verdict for the defendant. Upon either hypothesis, I think the Court was wrong. As to the first, many cases may be cited to prove, that the facts being agreed or found, it is for the Court to decide whether in law, they amount to usury. If this were not so, no special verdict would be suffi-

cient, unless it found the usury expressly. But, in *Gibson v. Fristoe*, 1 Call, 54, it is decided, that though the corrupt agreement be not expressed in the verdict, yet if it is apparent to the Court that the matter is usury, it is not necessary for the jury to shew that it was corruptly made; and *Tremaine v. Roberts*, Cro. Jac. 508, is cited, where it is said *res ipsa loquitur*.

In *Marsh v. Martindale*, 3 Bos. & Pull. 158, a special case was found, in which, after stating the facts, the jury find expressly that Marsh did not think he was acting contrary to law. In delivering the opinion of the Court, Lord Alvanley says,

"We must consider what was the real transaction *between the parties. I told the jury that if a man agree to take more than 5 per cent. for the forbearance of money, the law declares that such agreement is corrupt, within the statute of Ann, whether the party thought, at the time, that he was acting contrary to the statute, or not. And though the jury have found that Marsh did not think he was acting contrary to law, there is nothing in that finding to prevent us from examining the transaction, and declaring it to be corrupt, if it appear to us to be so in point of law, without sending the case back to a jury to find the corruption." It is every day's practice for the Court, upon a hypothetical statement of the facts, to tell the jury that the contract was usurious. Thus in *Pratt v. Willey*, 1 Esp. Rep. 40, the Court, assuming the fact, pronounce the law. In *Rich v. Topping*, 1 Esp. Rep. 176, the doubt was about the fact; the law was pronounced. In *Doe v. Bernard*, 1 Esp. 11, Lord Kenyon said, it was clearly usury, and non-suited the plaintiff. In *Boldero v. Jackson*, 11 East, 612, the Court held the contract usurious upon the facts. In *Davis v. Hardacre*, 2 Camp. 375, where a picture was taken in part, Lord Ellenborough held this *prima facie* evidence of usury, and held the plaintiff to prove the value, and on failure non-suited him. In *Jones v. Davidson*, 3 Common Law Reports, 92, Gibbs pronounced the law upon the facts.

Suppose the facts (upon the hypothesis of the truth of which, the motion was made) had been found here by a special verdict; would not the Court have had to pronounce upon them? And if upon such finding, they would have considered them to amount in law to usury, they ought, on the motion of the defendant, to have told the jury that if they believed those facts, it amounted to usury.

But did the facts amount to usury? I think so clearly. Disguise it as you will, Stribbling's was, in effect, an application for a loan. His object was to raise money, and that clearly disclosed to the Bank. He wanted \$10,000, and his proposition says so expressly. "I offer my brothers

147 *for \$2,000, &c., which, together with the stock, is to make the \$10,000 I am to receive." How did the Bank understand it? The Cashier says, "I am instructed by the Board to inform you, that they will discount for you two notes, one for \$10,000, the other for \$2,500, &c. In payment for which discount, you will receive one hundred shares of stock of the

Bank, &c., at \$10,000. The balance in money." Now it is in clear proof, that the current market price of stock was \$80; and the Bank, knowing this, knew that by letting Stribbling have the one hundred shares and \$2,000 in money, he could not raise the sum he wanted, because the Banks would not receive the stock in deposit at its full price. They therefore offer him a loan in money of \$2,500; which, depositing the stock at \$75, would exactly make the sum he wanted. Nothing can be clearer to my mind, than that the sale of the stock and the loan are indissolubly linked together, making one transaction; and the object being to raise money, and the stock passed above its market price, that it was an usurious contract, and that the Court ought so to have told the jury.

I think also, that the Court erred in refusing to grant a new trial. It was a verdict against law and evidence.

My opinion is, that the judgment be reversed, and the cause sent back for a new trial, with directions to the Court, that if the same evidence be introduced, and the same instruction asked which was asked in the first part of the second bill of exceptions, that the Court shall give it.

JUDGE GREEN.

The defence to this action is usury, and the appellees insist that no corporation comes within the terms or spirit of the Act against usury; and especially that a banking corporation does not. To this the appellant's counsel replies, that so far as the case depends upon the demurrers to the declaration and the 4th plea, the Act

148 of Assembly "incorporating the Bank, although given in evidence upon the trial of the issues, and made part of the record by an exception, not being set forth in the declaration or 4th plea, cannot be noticed by the Court, it being a private Act and not a general statute; and that therefore it does not appear upon the record; nor can the Court know judicially that the "Bank of the Valley in Virginia" is a corporation. If it were admitted that the Act incorporating the Bank of the Valley in Virginia, so far as it relates to the details of its organization, its privileges, and the restrictions imposed upon it, is a private Act, which the Court cannot take notice of *ex officio*; yet, there is a provision in it, which is general, and which the Court is bound to take notice of *ex officio*, since it affects the whole community; that provision which declares that all notes or bills negotiable at this Bank, shall be put upon the footing of foreign bills of exchange; and this suit is brought upon such a note. We therefore know judicially, that the "Bank of the Valley in Virginia," is a corporation; and the right to contract and to sue, subject to the general laws affecting the contracts of individuals, is incident to a corporation, unless those rights are in any way modified by the charter of incorporation.

It is said, that the Statute of Usury does not apply to any corporation, because it is a penal statute, and cannot properly be extended, by any equitable construction, beyond its letter; and that a corporation not being a person, does not come within the

literal terms of the statute. The terms of the statute are, "No person shall, upon any contract, take directly or indirectly, for loan of any money, wares or merchandise, or other commodity, above the value of six dollars, for the forbearance of \$100 for a year, and after that rate for a greater or lesser sum, or for a longer or shorter time. And all bonds, contracts, covenants, conveyances or assurances, to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is

reserved or taken than is hereby allowed, *shall be utterly void." The second section imposes a penalty upon any person's taking usurious interest, if it be corruptly taken, but not otherwise. If there had been nothing in the statute but the first clause of the first section, and the second section, the consequence would have been, that if any person had contracted for usurious interest, and had not received it, the borrower could have resisted the payment of the excess of interest above the legal rate, but not of the principal and legal interest, and if the lender had received the usurious interest, whether corruptly or not. The borrower could have recovered back the excess, beyond the principal and legal interest, in an action for money had and received. If it had been received corruptly, then the lender would have been moreover liable to the penalty imposed by the second section. But, if the usurious interest was received ignorantly and innocently, (as might happen,) the party would not be liable to the penalty; as, if an agent should make an usurious contract in the name of his principal, and the latter were to receive the usurious interest, without knowing that the contract was usurious. Whether a corporation would come within the term person, used in the first clause of the first section, and in the second section, it is unnecessary to decide; since the contract, if usurious, is avoided by the second clause of the first section, which extends to all contracts, no matter by whom made, upon which more than legal interest is reserved or taken.

It is argued, that if corporations come within the letter of the statute, they are not within the reason or policy of the laws against usury; since widows, orphans, foreigners and others, who have no agency in the management of their transactions, have their funds invested in corporations; the forfeiture of which by usury, practised by the directors, would inflict upon innocent persons a loss, which the policy of the law inflicts as a punishment for an offence; and that this reasoning applies particularly to banking corporations, especially those in which the public have an interest.

150 *The chief, if not sole object of the institution of Banks, was, to increase the prosperity of the community, by facilitating the borrowing of money at the rate of interest fixed by the charters; and to affect this, and to induce those who had money to lend it, through the agency of the Banks, these corporations were allowed the privilege of lending their notes instead of money, to a much larger amount than that of the money invested in the stock,

besides many other privileges which individuals have not. The forfeiture, by the Statute of Usury, of the money lent, is not imposed upon the lender, as a punishment of an offence, so much as for the purpose of protecting the necessitous from oppression. This was the only real object of that provision of the law; and the loss to the lender, only the incidental effect of that policy. To allow a Bank, therefore, to take usurious interest, would not only frustrate the policy of the law against usury, but the objects of their own institution, and tend to the utter ruin, instead of promoting the interests, of the community. If this argument were well founded, it would apply with equal propriety to the exemption of all trustees acting for others, from the operation of the law against usury. The interest of the State as a stockholder, can have no influence upon this question, especially as to this Bank. The stock reserved to the State as a bonus, may be disposed of at her pleasure, by the express provisions of the statute; and in that case, her right to appoint a portion of the directors would cease. Corporations are, in their nature, bound as individuals are, by the general laws regulating contracts, except so far as they may be exempted from their operation by specific statutory provisions.

This exemption from the operation of the statute against usury, is accordingly claimed on behalf of the Bank of the Valley, by force of that provision of the charter, which provides, "neither shall the said corporation take more than the rate of one half of one per cent. for thirty days,

for or on account of its loans or 151 counts;" a provision *which, it was admitted on the other side, allows them impliedly to take at that rate, which exceeds the legal interest of six per centum per annum; and it is argued, that this permission to take more than legal interest, exempts the contracts of the Bank from the operation of the statute against usury, even if they take more interest or discount than is allowed by their charter.

This privilege to take more than legal interest, is not unlimited, but is restricted to a given rate of discount or interest. But for this, a contract reserving to the Bank more than six per cent. interest, would be void for usury, the statute applying to all possible contracts. The charter of the Bank does not repeal the statute against usury expressly, and the repeal of statutes by implication is not favoured. If, by any reasonable construction, both statutes can have effect, such construction is given to them; and where they are inconsistent with each other, in some degree, the latter repeals the former, to the extent of such inconsistency, and no further. This is the rule laid down in the strongest terms, in many cases cited in 19 Vin. Abr. tit. Statutes, 520, pl. 84, 85, 86; 1b. page 525, pl. 131, 132; 11 Co. Rep. 64, Foster's Case; 10 Mod. 118; and this rule of construction has been approved by this Court in *Warder v. Arrell*, 2 Wash. 282. When, therefore, the Statute of Usury avoids all contracts, upon which an interest higher than the rate of six per cent. per annum is reserved, and

another statute allows, in a particular case, one half of one per cent. for every thirty days, to be reserved, the latter repeals the former only in cases in which no more than one half of one per cent. for every thirty days is reserved. A reservation of interest at a greater rate than this, is not sanctioned by the latter statute, and brings the case within the former. The Bank no longer acts within its privilege, and the contract must be tested by the general laws.

It is contended that the contract stated in the declaration is, upon its face, usurious; since it is a contract of 152 *loan, and not a discount of negotiable paper; and that to retain the interest or discount in advance in such a case, is usury. I do not think this question arises upon the declaration. It is not stated, at what rate the discount or interest retained, was estimated; and the fair meaning of the declaration is, that so much only was retained as they had a legal right to retain.

The fourth plea presents a serious question, whether that part of the charter of the Bank, which prohibits their taking more than at the rate of one half of one per cent. for 30 days, is a general law, which the Court are bound to take notice of, or not. If not, then as the Court cannot take notice of this privilege, the contract reserving the discounts or interest at the rate of one half of one per cent. for 30 days, was clearly usurious upon its face.

The cases cited in the argument shew, that a statute may be general as to some of its provisions, and private as to others. This privilege to the Bank, to take more within a certain limit than the interest prescribed by the general laws, is particular and private in its nature, made for the benefit of that particular corporation, and which does not concern the public generally, or any class of the community. If the whole of the residue of the Act was a general law, (as many parts of it are,) this particular provision would, from its nature, be private, and could not be noticed ex officio by the Court. This seems to me to be the common law doctrine. The Statute of 3 Jac. 1, concerning Popish recusants, is, in all its provisions but one, a general law. It disables them to present to any benefice or ecclesiastical living, &c., although they would, but for the disability imposed by the statute, be entitled to present; and the statute gave the right to present in such cases, to the Chancellor, Masters and Scholars, of the University of Oxford; and this donative clause was held to be a private law, which the Court could not notice ex officio. 10 Co. Rep. 57; The case of the Chancellor of Oxford, Hob. 227; Bull. N. P. 223.

153 *This case falls clearly within the distinctions laid down in Holland's Case, 4 Co. Rep. 76, 77. The clause in question is therefore private, unless any statutory provisions shall have either made it a general law, or given it the same effect. There are two statutes which may be supposed to have that effect. The Act of March 12, 1819, providing for the re-publication of the laws, directs the Act incorpo-

rating this Bank, with very many others particularly specified, (most of which are undoubtedly general laws,) to be published in the edition of the laws directed by that Act, without designating any of them as general or private Acts. It directs also, all Acts of a general nature passed at the then present and last sessions of the Assembly, and all Acts of a general nature then in force, not noticed in the report of the revisors, and the titles and dates of all private, local and temporary Acts, passed between particular periods, to be published in that edition; and provides, that the laws published in that edition, "shall be received in evidence, in the same manner as the originals." Do these provisions of the Act of 1819, make those Acts published in that edition of the laws, which would otherwise have been private Acts, general or public Acts? I think not. The only purpose of this Act, in relation to the private Acts directed to be published, was, to authorise the printed copy to be given in evidence, without the necessity of producing the originals, or exemplified or sworn copies; and to these private Acts only, is the direction applicable, that they shall be received in evidence as the originals. As to the general laws, no such provision was necessary; nor, as to them, can it have any effect. There are many Acts published in this edition of the laws, by express directions of the Act of 1819, which, although the greater part of their provisions are general, yet some of them are most emphatically private; as chap. 260, the Act concerning the trustees of all the unincorporated towns in Virginia, in which there is a special provision for a new survey and plat of the town of Suffolk, for ad- 154 justing *the boundaries of the streets and lots, the original being lost by fire. The publication of a private Act with the general laws, cannot charge its nature or effect. If it could, then certainly a clause in a public Act published entire must be considered as public or general also; and in that case, the clause of the statute of 3 Jac. 1, giving presentations forfeited by Popish recusants to the University of Oxford, ought to have been noticed by the Court ex officio; it being published with the residue of the statute, which was general. Even at common law, the copy of private statute which concerns a whole country, as the Bedford Levels, printed with the general statutes, might be given in evidence, without comparing it with the record. Bull. N. P. 225. But, this gave it no new character as a general or private law, but only varied the proof necessary to establish its authenticity. And it was for the purpose of allowing the private Acts published in our last Code, to be given in evidence without producing the originals, that the Legislature directed them to be so published, instead of leaving it to the Courts to say in each case, whether the printed copies should be admitted in evidence, in lieu of the originals; and not for the purpose of converting Acts in their nature particular and private, into general and public Acts.

The other statute which may be supposed to affect this question, is that which pro-

vides that "Private Acts of Assembly may be given in evidence, without pleading them specially." At the common law, private Acts of Parliament must have been pleaded, or might have been given in evidence, according to the circumstances of the case, precisely as any other muniment of title. Buller's Nisi Prius, page 222. The necessity of pleading such an Act in particular cases, proceeded, not from its character as a private Act only, but from that combined with the nature of the right claimed under it, and of the pleadings of the other party. I cannot think that this

provision was intended to change entirely the nature of a private "Act of Assembly, and make it the duty of the Court to notice it, whether given in evidence or not; and to change the laws of pleading, in favor of persons claiming under private Acts, by dispensing with the pleadings which the nature of the case requires. This provision of our statute, seems to be merely declaratory of the common law; and that seems to have been the opinion of this Court in *Legrand v. Hampden Sidney College*, 5 Munf. 324. The charter of the Bank was properly given in evidence upon the trial of the issues of fact, and is properly in the record for the purpose of deciding the questions which arose upon the trial of those issues. But the matter of, and proceedings upon, one plea, cannot be called in aid of the matter of, and proceedings upon, another plea; and we must decide upon the demurrer to the 4th plea, as if there was nothing in the record, but the declaration, that plea, and the demurrer to it. That demurrer should have been overruled.

Upon the trial of the issues, the Court, upon the motion of the defendant, instructed the jury that if they believed from the evidence, that the Bank of the Valley in Virginia on or about the 14th of February, 1821, loaned to E. Stribbling \$2,500, or thereabouts, for eighteen months, but made it a condition precedent to the granting of the said loan, that he should buy of the Bank one hundred shares of its stock, at the price of \$10,000, giving his note negotiable, with other sufficient drawers and endorsers for that sum, the note to be renewed for eighteen months, and the said Erasmus complied with the conditions; and that the price of \$10,000 thus demanded and agreed to be given for the one hundred shares of stock, on the terms of payment prescribed and agreed to, was palpably and obviously an over price for the said stock, having reference to the then selling price in the market; and that the defendant was influenced in agreeing to give the over price demanded, by the offer of the said loan of \$2,500 or thereabouts; and that the purchase at such over price operated
156 "as an inducement to the Bank to make the accommodation discount which it did make, and that the negotiable note in the declaration mentioned, was given in consideration of the said transaction; then, they ought to find for the defendant.

The Court further instructed the jury, that if they should be of opinion that it was not made a condition of the loan of

\$2,500 or thereabouts, that the said defendant should buy the said one hundred shares of stock at such over price, or that the said loan was independent of the said purchase of stock, or that the purchase of the said stock was the principal object of the defendant, and that being accomplished, the Bank afterwards agreed to lend the said \$2,500, or thereabouts; then such loan was not usury. To the first part of this instruction, the plaintiff excepted.

The defendant also moved the Court to instruct the jury, that if they believed that he had written and sent to the President of the Bank his letter of the 12th of February, 1821, on or about that day, and had submitted to the President and Directors of the Bank his written propositions of February 13th, 1821, and that the Cashier had given to those propositions the answer aforesaid, acting under the instructions of the said Board of Directors, and that this was the only answer by the plaintiffs to his propositions communicated to him; and that a contract was made between the plaintiffs and defendant, just before or on the 14th of February, 1821, in conformity with the terms of the Cashier's letter, and that the account exhibited was regularly entered in the books of the Bank; and that of the sum of \$12,377 08 cents, entered in the said account as cash paid to him, \$10,000 consisted of one hundred shares of the stock of the Bank, at par; and that the contract was executed, continued and extended, as stated in the first special plea; and that the one hundred shares of stock, on the 14th day of February, 1821, were worth, at the market price in cash, not more than \$9,000, and that fact known to the directors; and that the note sued
157 on was "given in consideration of the original note of \$10,000; then they ought to find for the defendant; which the Court refused to give, and the defendant excepted.

The defendant also moved the Court to instruct the jury, that if the sale of the one hundred shares of stock was unconnected with the loan of \$2,500; yet, being a sale on eighteen months credit, the reservation of interest or discounts at the rate of one half of one per cent. for thirty days, as had been agreed to be done and actually done, was usurious; which instruction the Court also refused to give, and the defendant excepted.

The defendant also moved for a new trial, which the Court refused; and he excepted to that also.

The counsel for the appellees objects to the form of the instruction, as moved by the defendant, because he alleges that it excluded from the consideration of the jury, the order entered on the minutes of the Board of Directors on the 13th of February, 1821. I do not think it had that effect. The motion was founded upon the condition, that if the jury should believe from the evidence, that the contract was concluded in conformity with the letter of the Cashier; and in considering that question of fact, nothing in the motion to instruct prevented the jury from considering the effect of the order of the Directors upon that question.

It is also objected, that the motion confined the enquiry as to the market value of the stock, to the 14th day of February, 1821; whereas the contract was probably made on the 13th day of February; and this is well founded. The motion ought to have confined the enquiry as to the value of the stock, to the time of the contract; leaving it to the jury to ascertain that time; and if, in other respects, the instruction asked for was proper, it should have been given with that modification.

If the facts, upon the supposition of the truth of which (to be determined by the jury) as recapitulated by the defendant, were really as supposed; then it was
158 clear beyond *a doubt, that the contract for the sale of the stock and the loan of money, was one entire contract, indissolubly connected, and that the inducement to the Bank to lend the money was the advantage of a sale of the stock at greatly more than its real value; and the inducement to Stribbling to give an exorbitant price for the stock, was the loan of the money; and that the contract was a shift to evade the Statute of Usury.

It is obvious, from comparing the opinions of the Court upon the first and second motion to instruct, that it was of opinion, that however manifest the intent of the parties in making this contract, and the motives which influenced them mutually to make it, might be in fact; yet that that intent, and those motives, were an inference of fact from the other facts of the transaction, and that the jury alone were competent to make it. And the real question upon the second exception is, whether the intent and motive of the parties to the contract is a question of law or of fact.

The intent, the *quo animo*, to be deduced from the acts of the party, is, in many cases, an inference and question of law, and not of fact; and this in criminal, as well as in civil cases. Although an inference of law, yet when it is involved in an issue of fact to be tried by a jury, the jury must of necessity judge of, and decide upon it; and in criminal cases, their decision is conclusive, and cannot be controlled, since in such a case no new trial can be awarded on the ground that the verdict has been contrary to the evidence or to the law. But, in civil cases, the error of the jury, as to the inference of law from the facts, may be corrected by awarding a new trial. If the intent of the party, to be inferred from the facts of the transaction, was a question of fact, it could only be decided by the jury; and it would not be competent to the Court to instruct them that the inference ought or ought not to be made. There is nothing better settled with us, than that the Court cannot properly influence the judgment of the jury as to any matter of fact, by giving their opinion upon it; and
159 that to do *so, is erroneous. Yet in criminal, as well as in civil cases, the Court is at liberty to instruct the jury as to the intent, legally to be inferred from the facts alleged, in case the jury should be of opinion, that the facts are proved. Again; if the intent to be inferred from the facts, was a question of fact, and not of law,

then, upon a special verdict finding the facts, no judgment could be given, in cases where the decision of the cause depended upon the intent, unless that intent was expressly found by the jury. For, it is an inflexible rule, that the Court, upon a special verdict, cannot infer other facts from those found. Yet, in criminal and civil cases, when the intent is important to the decision of the case, the Court infer it from the facts found in a special verdict, although the intent be not found. Cases, however, may and do frequently occur, in which the question of intent depends upon the weight of conflicting circumstances, which it is proper to leave to the decision of the jury. Again; if intent was an inference of fact, and not of law, no case of usury could occur, in which it could be decided upon a demurrer to the pleadings, that a contract under the form of a contract of hazard or sale, was a shift to evade the Statute of Usury. If, to a plea of usury, in the case of a contract upon its face one of hazard, there be a demurrer, it has never been suggested that the demurrer admitted the truth of the allegation in the plea, that the contract was a corrupt loan. If the demurrer was an admission of the truth of that allegation, then all such cases, without exception, must have been decided against the demurrer, upon that ground only, without looking further. If the demurrer is not an admission of the corrupt intent alleged in the plea, and that was an inference of fact from the facts alleged in the plea; then, as the Court can make no inference of facts from facts found or admitted, the demurrer in all such cases should be overruled. Yet demurrers in such cases have been sustained and overruled, according to the legal inference of intent made by the Court, from the facts admitted by the pleadings.

160 *In all criminal cases, it is the intent, and not the act, which constitutes the crime. *Actus non facit reum, nisi mens sit rea*. This criminal intent is an inference of law, upon which the Court may instruct the jury, as upon any other question of law, or may decide upon a special verdict not finding the intent. Thus, in *The King v. —*, 2 *Ld. Raym.* 1494, it is laid down, that "on the trial the Judge directs the jury thus; if you believe such and such witnesses, who have sworn to such and such facts, the killing of the deceased appears to be with malice pre-pense; but, if you do not believe them, then you ought to find him guilty of manslaughter, and the jury may, if they think proper, give a general verdict of murder or manslaughter; but, if they decline giving a general verdict, and will find the facts specially, the Court is then to form their judgment from the facts found, whether the defendant be guilty or not guilty, i. e. whether the act was done with malice and deliberation or not."

In civil cases, especially on questions of usury, the intent of the parties has been held to be a question of law, by a series of unquestioned decisions. In *Reynolds v. Clayton*, 2 *And. 15*; *Mo. 397*, 560, 70; *Batton v. Dunham*, *Cro. Eliz. 642*; 2 *And. 121*; *Mason v. Abdy*, 3 *Salk. 390*; *Comb.*

125; Carthew, 67, it was held, upon general demurrers, that contracts, which, upon their face, were contracts of hazard, and in which there was a real hazard, were in truth contracts of loan and intended to evade the Statute of Usury, because of the slightness of the hazard. In the case of *Roberts v. Tremaine*, Cro. Jac. 507, the same doctrine was held upon a special verdict finding the facts of the contract only, without any finding as to the intent of the parties. And in *Chesterfield v. Jansen*, Sir John Strange approves of the doctrine of these cases, and says, that if a contract of loan is put into the shape of a contract of hazard to evade the Statute, it is usury, and may be determined by the verdict of

a jury, or by the Court's exercising 161 its judgment on *the facts; as, he says, has often been done. In the case of *Gibson v. Fristoe*, 1 Call, 62, and *Marsh v. Martindale*, the contracts purported on their faces, to be purchases, in the first case of bonds, and in the second, of an annuity. The Court, in each case, held them to be contracts for the forbearance of debts, and shifts to evade the Statute of Usury; in the first case, upon a special verdict, which did not find any thing as to the intent of the parties; and in the second, upon a case agreed, connected with a verdict of a jury, although the case agreed did not admit any thing as to the intent of the parties, and the jury declared, in their verdict, their opinion, that "the party did not think he was acting contrary to law." In *Benton's Case*, 5 Co. 69, a demurrer to a plea of a corrupt agreement against the Statute of Usury was sustained.

It is argued, that the question of usury depended, in this case, upon the questions whether the transactions in respect to the stock, was a contract for a sale, or a colour for a loan; and that this was a question of fact for the jury, and upon which it was not competent to the Court to instruct the jury; and several cases are cited to prove that proposition. I do not think that the enquiry, whether the transaction in respect to the stock was a sale or a colour for a loan, is at all material to the merits of this case. I have, however, looked into the cases cited by the counsel for the appellants, and do not think that they support the proposition for which they were cited. The note of the reporter to the case of *Davison v. Jones*, 3 Com. Law Rep. 97, in which he states that the question whether the contract is in substance a loan or any other species of contract, belongs to the decision of the jury, if he means by that, exclusively, is contradicted by the case of *Chesterfield v. Jansen*, which is the only case which he cites. In the cases of *Doe v. Brown*, 3 Com. Law Rep. 109, and *Doe v. Gooch*, 5 Com. Law Rep. 417, the only effect of the decisions, was, that a sale of land, with an agreement to repurchase at a higher price at a future time,

was not usurious on that account 162 *merely. There being other circumstances which led to a suspicion in both of these cases, that these transactions were a cover for a loan, it was left to the jury, who found in one case that it was a

sale, and in the other, a loan. If, in these cases, there had been a positive agreement to re-pay the money at all events, and a collateral security for the payment, they would have been clearly disguised loans, and so the Court would have said as a matter of law. *King v. Drury*, 2 Lev. 7; *Benton's Case*, 5 Co. Rep. 69.

The question in this case, whether the transaction in respect to the stock was a sale or a loan, was of no consequence, and was not raised. The ground of the defendant's motion for the instruction, was, that it was a sale at an advance of twenty-five per cent. connected with a loan of money; and if so, (as was the fact, if the jury believed that the contract was according to the terms of the Cashier's letter,) it was clearly usurious. For in that case, the contract being entire, both for the sale and the loan, all on the one side was the consideration of all on the other, the loan the inducement to Stribbling to buy, and the sale the inducement to the Bank to lend. I think, therefore, that the refusal to give the instruction asked for, was erroneous.

I think, also, that the Court erred in refusing a new trial. The evidence is complete, and leaves no scruple on my mind in saying, that the loan and sale were indissolubly connected, and formed one entire contract. The original proposition of Stribbling, was to purchase stock, and to borrow money: and he makes the loan an indispensable condition of the purchase; and in that he discloses plainly and unreservedly that his object was to raise \$10,000; \$8,000 by pledging the stock, and \$2,000 by a loan. To effect this, and to have the use of the \$10,000 for eighteen months, paying interest, he at once offers a premium in the price of the stock, of 25 per cent. This proposition, the Bank accepted in substance. The modifications which

they proposed, and Stribbling agreed 163 to, do not vary substantially *from his terms, and the motives for proposing them are obvious. Instead of four several notes, proposed by Stribbling as a security for the sale and loan, drawn and endorsed by him, and his different friends named by him, (which was intended, as he said, to avoid the violating a rule of the Bank, not to allow any one person to stand on their books as payer, for more than 5,000,) the effect of which would have been, to bind his friends severally for portions of the debt only; the Bank, for the sake of having all of his friends bound for the whole, proposed to discount two notes of the same persons for \$12,500; thus violating, to a great extent, one of their own rules. Instead of lending \$2,000, and discounting \$8,000, on the one hundred shares of stock, as he proposed, they being unwilling to discount on the stock to its full value, and at the same time intending to enable him to raise the \$10,000, (which was the condition on which alone he was willing to purchase the stock at such a sacrifice,) offered him a loan of \$2,500; \$500 more than he asked for. This was to make up the \$10,000, and an inducement to him to make the sacrifice in the purchase of the stock; and he accordingly, the very next day, got at another Bank a di

of \$7,500, on the pledge of the stock. This loan of \$2,500, was made for eighteen months, directly against the prohibition of one of the clauses of their charter, which interdicts their making any loan for more than one hundred and twenty days. It is impossible that any motive could have induced them so flagrantly to violate the rules and charter of the Bank, but the advantage of selling, by that means, the one hundred shares of stock, at twenty-five per cent. above its real value. The letter of the Cashier, and the order of the directors on their minutes, state, in substance, the same terms; and if the order had been delivered to Stribbling, instead of the letter, as the answer to his proposition, he must have understood it, as he could not help understanding the letter, that he could not have the loan of the money, unless he bought the stock. Considered as an

164 answer *to his proposition, it could not bear any other construction; or, if the order was made, as it imports, after the contract was concluded, then it was no evidence of the contract, and the Cashier's letter remains as the only evidence of the true contract of the parties. So that, if they really differed in their terms, the contract could not be varied by the order.

The obligation imposed upon the Bank by the charter, to sell out any stock of their own corporation, which they might have purchased, whenever they could get par, can certainly have no influence on any question in this cause. They were at liberty to sell under par, and they were bound to sell if any one had offered par simply; and they might have sold at any time, on a credit of eighteen months, with interest from the time of the sale, if the transaction was wholly unconnected with a loan. But, the charter neither imposed upon them the obligation to avail themselves of the necessities of another, and by the temptation of a loan of money connected with the sale of stock, induce him to give a price which he would not otherwise have given, and thus to practise usury; nor does it in any way sanction such a transaction. The Bank could not have been prosecuted for a violation of their charter, if they had refused to sell to Stribbling upon the terms they did. Their answer would have been conclusive. "We could not sell the stock at par, without giving a loan of \$2,500 in the bargain, and that for eighteen months, which would have been a violation of the charter, and subjected the directors themselves individually, to the payment of the whole amount at the expiration of one hundred and twenty days." Nor has the provision of the charter, obliging the borrower, upon a loan on a credit of more than one hundred and twenty days, to pay at the expiration of that time, any effect on any question in the cause. This only applies to a valid contract, which bound him when made; and was not intended to subject him to the payment of a debt, which was never due, upon a contract void in its inception.

165 *There are two other points insisted on by the counsel of the appellant; one, that as the 4th plea alleges that there was a corrupt agreement, that the Bank

should discount two notes for the defendant to the amount of \$12,500, which were to be renewed and continued for eighteen months, and the discount to be paid in advance every sixty days, at the rate of one half of one per cent. for every thirty days, and that the defendant was to take in satisfaction of \$10,000 of the loan, one hundred shares of Bank stock, the contract is usurious on its face, unless it had been shewn that the stock was worth \$10,000; upon the ground that the only motive on the part of the Bank for paying a large part of the discount in stock, was to get a higher price for it than it was worth; and the case of *Davis v. Hardacre*, is cited to support the proposition. I do not think that the proposition can be maintained as a general one. It seems to have been adopted in that case as a rule of evidence, and not as a rule of law; not upon the ground simply, that a sale of property was connected with a loan of money, but that the sale was forced upon the borrower as a condition of the loan. It does not follow from the mere fact of a sale and loan being connected, that it was not even the choice of the purchaser to buy as well as to borrow, and that the purchase was at a fair price.

The other objection is, that the transaction being a loan for eighteen months, and not a discount, it was usury to take the discount for each sixty days in advance. I do not think that this objection is well founded. This privilege to take interest in advance, is confined to commercial paper, and is an indulgence to the customs of merchants. Whatever objections there may be to this, it is too well settled to be now questioned. A discount of a bill of exchange, known to be for the accommodation of the drawer, is virtually a loan, and not the purchase of the bill; yet, to retain the legal interest in that case, is not usury, on account of the form of the security; and if the original transaction is not objectionable, the repetition of it, no matter 166 how *often, by previous agreement, is not. The transaction in this case, was a contract of loan upon the security of commercial paper, and this was an integral part of the contract. The same objection applies to the transaction, as it appeared upon the trial of the issues. The only effect of the provision in the charter, allowing the Bank to take at the rate of one half of one per cent. for thirty days, was, to vary the rate of discount and interest, leaving them to take discount and interest at that rate only, in the manner others might take discount and interest, at the rate of 6 per cent. per annum. Upon loans in the shape of discounts of negotiable paper, they could only take the interest in advance, in cases in which others might take it; and if others could not take it in advance, for 120 days or more, neither could the Bank. If the notes had been payable at the expiration of eighteen months, and the discount for the whole time had been retained, I should think clearly that it was usury.

There seems to me to be an objection to the declaration not noticed by the counsel for the appellant. It does not state that the last endorser, George W. Kigar, by his

endorsement, ordered the money to be paid to the plaintiffs, or assigned, transferred or endorsed the note to them. The fact that the legal title was transferred to them, is left to be inferred from the recital, that Kigar endorsed it with his own name and hand, with intent to procure the discounting of it at the Bank, and by a note at the foot of the negotiable note, signed by him, ordered the drawer to be credited with the amount, and that the note was offered to the President and Directors of the Bank, and the full amount, deducting discount, paid to the drawer, without saying by the Bank. Upon a general demurrer to the declaration, I do not think there is any sufficient averment, that the legal title to the note was transferred to the plaintiff.

167 *JUDGE COALTER.

The first important question to be considered in this case, arises on the pleadings, and mainly on the last plea of the statute against usury.

On the first of those pleas, an issue was joined to the country. The second was demurred to; but, on the Court intimating an opinion that it was defective, the defendant obtained leave to amend, and then offered his plea so amended, which was a virtual withdrawal of the second plea; so that no judgment was entered on the demurrer; but, the plea so amended, was received and ordered to be filed as a sufficient plea, and issue was also joined thereon to the country. The last plea, and the demurrer thereto, present the questions which have been stated by the Judges who have preceded me.

On the part of the Bank it is contended, that though one half of one per cent. for thirty days is more than the rate of six per cent. per annum, yet by the Act of Assembly incorporating the Bank, they are permitted to take interest at that rate on their discounts and loans, and had also a right to take it in advance on the discount for every sixty days; and that if this be not so, yet the statute against usury does not apply to a corporation; and if it does to a private corporation generally, it does not apply to the Bank, as well from general reasons arising out of the Act of incorporation, as because that Act authorised them to take more than the rate prescribed by the statute against usury, without any provision making the contracts void, should they even exceed the rate thus allowed.

These positions are all controverted on the other side; and first, on this ground; that the Act of incorporation is a private Act, of which the Court cannot take judicial notice, so as to bring either of those questions within their cognizance.

Whether this is a private or public Act, is then the first question for consideration. My opinion is, that it is a

168 *public Act. The common law doctrine on this subject, I understand to be this; that Acts of Parliament either relate to the kingdom in general, and are called general Acts, or only to the concerns of private persons, and are thence called private. A general Act is taken notice of by the Judges and jury, without being shewn; but a particular Act is not noticed

without being shewn, because it is said, that the Court cannot judge of particular laws which do not concern the whole kingdom, unless they be exhibited; for, they are obliged by their oaths to judge of all matters coming before them, according to the laws and constitution of England; and therefore, they cannot be obliged, ex officio, to notice a particular law, because it is not a law relating to the whole kingdom; and therefore, like all other private matters, it must be brought before them to judge thereon. Bull. N. P. 222. So it is said, of general Acts of Parliament, the printed statute book is evidence; not that the printed statutes are perfect and authentic copies of the records themselves, but every person is supposed to know the laws, and the printed statutes are allowed to be evidence, because they are hints of that which is supposed to be lodged in every man's mind already. Bull. N. P. 225. But of private Acts, the printed statute book is not evidence, though reduced into the same volume with the general statutes, but the party ought to have a copy compared with the Parliament roll; for they are not considered as already lodged in the minds of the people. However a private Act of Parliament in print, that concerns a whole country, as the Act of the Bedford Levels, for re-building Tiverton, &c., may be given in evidence, without comparing it with the record; and these things are the rather admitted, because they gain some authority from being printed by the King's printer; and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. Hence, as I understand, if a statute is of so notorious a character, that a

169 knowledge of it may be presumed to exist in the minds of the people, it is to be considered, as standing on the footing of a public statute; for, it is said to be on that ground that those statutes are to be noticed.

How far these reasons for the decisions in England apply to this country, or whether any thing exists here which would induce this Court to relax from the ancient doctrines there, will be noticed hereafter; but it may be observed, that even in England, common sense has induced those Courts to relax from the strict rules formerly held, as will be seen in the case of Samuel v. Evans, 2 Term. Rep. 569.

In England, the general doctrines are these: 1. Whatever concerns the kingdom in general, is a general law; whatever concerns a particular species of men, is a particular law. 2. So the same law may be both general and particular in different parts; as 3 Jac. 1. against recusants in general, in disabling them to present; yet the clause giving their presentations to the Universities, is particular, and must be pleaded or found. 3. A law which concerns the King, or the public revenue, is a general law, because he is the head and union of the Commonwealth. So of an Act that comprehends all trades, because it relates to traffic in general. 4. So, if the matter of a law be ever so special, yet if it relates equally to all, it is a general law. Bull. N. P. 223; 6 Bac. Abr. tit. Statute,

F. 5. And if it be of a private nature, as if it concerns a particular trade, yet if a forfeiture be thereby given to the King, it is a public statute. 6. And if a private law be recognized by a public one, it must be noticed as a public law. *Samuel v. Evans*, 2 Term. Rep. 575.

The whole of our Banking institutions are of a similar nature; and if the law establishing the Northwestern Bank, and the Bank of the Valley, is a private law, so must be the laws establishing the Virginia and Farmers' Banks, and vice versa. These institutions, it seems to me, must be considered as public corporations, and very different from such as are brought into existence at the instance of particular individuals, who have, beforehand, associated for particular purposes. They were instituted by the Legislature, on the call of the people generally, for great public and State purposes, and to put this State, in a commercial point of view, on an equality, as to Bank accommodation, with the surrounding States; to increase the circulating medium beyond the metallic capital; to keep the funds of money-holders within the State, which otherwise might have gone to fill the vaults of other banking-houses, or have been converted to purposes of usury, unless retained and properly used, by an increase of the legal rate of interest. Their notes were, moreover, receivable in all payments to the Commonwealth; so that the collection of the revenue was made more easy and certain. The vaults of two of them are the secure depositories of the public treasure. They facilitated transportation of money, and kept down exchange; and although it may be, and perhaps is, questioned by some, whether all the expected advantages have not been more than outweighed by the bad effects of those institutions; yet no one can doubt that they have been called for by the people at large; and that they were considered essential to the State for the great purposes above. Hence the laws establishing them, are little short in importance, as it seems to me, of the power of coining money itself.

But these laws, on their first enactment and publication, seem to have a public and general character. They are addressed to monied capitalists, foreign and domestic. at the same time that care is taken to avoid any monopoly of the stock; so that all who chose might participate. The State herself, too, takes a large interest in all of them, and retains over all of them an almost overwhelming power of control; with a duty and power in the Legislature, at every session, to examine into the affairs of the Bank, in the faithful exercise of which, every man in the State who possesses a Bank note is interested. The rate of discounting and lending, was a subject, too, in which all those (no small
171 *portion of the community,) who might have occasion for Bank accommodation, were interested. In addition to all this, we find penalties imposed by each of those laws, recoverable either wholly or in part for the State, on directors dealing contrary to the charter, &c.; and

finally, we find them recognized by laws confessedly public, as well in those punishing forgeries, larcenies and frauds, in officers and servants, as the laws enforcing the payment of specie for the deposit of the public monies, and in some of our execution laws, which had a temporary existence, soon after or during the last war, &c. In short, it seems to me, that almost every criterion of a public law, as distinguished from a private one, above noted, may be applied to these institutions.

If, however, there could be any doubt on this subject in England, I think there ought to be none here. The Act which permits private laws to be given in evidence without being pleaded, was surely intended to make some change or relaxation in the ancient doctrine; and, I am not prepared to say, that the counsel was wrong in supposing that the privilege thus granted was not confined to the case of giving them in evidence to the jury; but, that they could equally be shewn to the Court on an issue of law. I believe that this point was not fully if at all considered, in the case of *Legrand v. Hampden Sidney College*. The parties there agreed to receive the certificate of the Chancellor, that the Act was before him, and that he would certify it on a certiorari, if required. Here our printed statute book is as complete evidence of a private statute, I believe, as a copy compared with the Rolls; and it may be then, that this statute was intended to put public and private Acts on the same ground of authenticity and public notoriety; and if so, I see no reason why they might not equally be shewn to the Court as the jury. But, be this as it may, all these statutes are expressly directed by law, to be printed in the New Revised Code, 1 Rev. Code, 7,

together with all the undoubted public Acts of the State; *and as contradistinguished from these, the titles and dates of private and local acts are directed to be published; and it is expressly enacted, that the laws, so directed to be published, when examined and found correctly printed, &c. shall be received in evidence in the same manner as the originals; lb. 14; thus giving them the station and authenticity of public laws, if they were not so before. But, those creating the Bank of Virginia and Farmers' Bank had long before been recognized by legislative sanction as public laws.

By the Sessions Acts of 1806, chap. 14, reciting that Samuel Pleasants had prepared for publication a continuation of the Revised Code, containing a collection of all Acts of a public nature passed since 1801, a publication of them is sanctioned, to be received and considered of equal authority as the originals are, &c. The Act establishing the Virginia Bank is to be found in the second volume of this compilation. After this, viz: in 1811, the Farmers' Bank was established, and in the same Session, chap. 21, another publication is authorised, of a new edition of his Code by Samuel Pleasants, with a Supplement to the second volume, containing the public Acts since 1817, and the titles of private and local Acts. This Act also makes it the duty of the public printer to

separate, in his publications, the public from the private Acts, with separate indexes, &c.

In the Acts of this Session, that establishing the Farmers' Bank is published as a public Act; and in the edition thus authorised, the Virginia Bank law is again published as a public Act in page 60; and that of the Farmers' Bank in the Supplement, as is a law authorising both Banks to lend money to the General Government, on any terms they could agree on.

By the Act of 1813-14, chap. 31, the charter of the Virginia Bank is extended, and is published amongst the public Acts of that Session, as is the Act giving to the Farmers' Bank half the deposits of the public monies; and so

173 *is the Act of 1814, authorising both Banks to issue notes as low as \$2 and \$3, (and which authority to issue notes, I presume must be a public law;) and so also are the Acts of 1815, chap. 22, and 1816, chap. 7, as to the presumption of specie payments by these Banks, not only of a public character, I presume, but are found amongst the public laws. And finally, the Act of 1816, chap. 39, establishing the Bank in question, is published in the public Acts of that Session.

In addition to all this, the very plea before us, both in its beginning and conclusion, lays the alleged corrupt agreement to be against and void by the Acts of Assembly; thereby recognizing two Acts on the subject, to be taken cognizance of by the Court.

Having a right, then, as I conceive, to look into the Act of incorporation, the first general question is, whether a contract with a corporation is within the Statute of Usury. This, as a general question, is not without its difficulties; nor am I prepared fully to decide it. It seems to me, however, that a corporation is not a person who can be punished under the second section of the Act; and I am by no means prepared to say, that the agents of a corporation, with whom an usurious contract is made, can be punished under that section, as individuals. They may receive the usury altogether as agents, having no interest whatever; but even where interested as members of the corporation, it is an interest in common with others, and may be a very small interest in them, whilst the punishment may be very heavy. But an officer may receive, who neither had an agency in the contract nor an interest in the money. Besides, if the contract is made with the corporation, how is the officer who, as treasurer or cashier, receives the money, to be punished for receiving, unless the contract can be pleaded to, and invalidated, as one made with A. B. and C. as individuals, he being one of them? If A. lends money to B. on usury, and takes his bond and assigns it to C.

for value, or makes him his mere 174 *agent to collect, and who is informed of the usury, but is told that B. will pay, and B. does pay him; C. cannot be punished for this usury, though it would be otherwise if A. had acted as his agent, and the loan was in reality made by C. who knew of the usury. The receipt of

the usury must be by him who is the usurer, and who alone incurs the penalty inflicted by the second clause. The usurer is the party who lends the money. Thus a man gives his individual note to the Bank for a loan, and pledges his stock for the payment, on an usurious contract; can this be said to be a contract and loan to him by A. B. and C. who were the President and Directors present? Suppose it to be decided to be a case of usury, on the grounds here contended for, to wit, that the transaction was not a discount of a note of a third person, but a loan, and that interest in advance in such a case is usury. This interest is retained in the coffers of the Bank, the cashier only paying the balance after its deduction. Who are the usurers, and who has received the usury in this case? And how is this usury to be pleaded under the first section? And who is to be punished for it under the second? If the individuals who made the contract are guilty of the usury, then it must be so pleaded under the first section; and who is to be punished for it under the second? If the individuals who made the contract are guilty of the usury, then it must be so pleaded; and if so found, then they have used, on an individual contract, the monies of the corporation, and are answerable for it; but the corporation has received the usurious interest, and if it could be punished as a natural person, still it would not have incurred the penalty, as it was not the usurer, should it be decided to be a contract with the President and Directors individually. But, if it could not be pleaded to, and avoided, as a contract with A. B. and C., but must be pleaded to, or is pleaded to, as a contract with the corporation, then the corporation would be the usurer and also the receiver of the money, and not A. B. and C., the individuals present at the Board of Directors,

175 *or D. the cashier, who paid over the nett proceeds; and of course, they could not, in their natural and individual characters, be punished, as it had been argued that they could.

For these, amongst other reasons, I am of opinion, that though there may be a contract with a Bank, which would be usury if made with an individual, and a receipt of usurious interest, which would subject that individual to the penalties of the second section of the statute, there is no one, in the case of the Bank, who can be subjected to those penalties. In other words, an incorporated Bank is not a person, within the meaning of that section of the Act.

But it is contended, that though this may be the case, still a contract with a banking corporation, which would be usurious and void in case of an individual, may be pleaded to and avoided, either as one made with the corporation, or as one made with individual members of the board; and that though pleaded to as a contract with the corporation, as is the plea in this case; and although the corporation may not be a person, within the meaning of that word as used in the first member of the first section; yet, it being a contract for usurious interest, it is within the meaning of the

second member of that section, and may be avoided by such plea as is pleaded in this case.

If I understand the argument, it is this; that the Act, in the first member of the first section, provides, that no person shall, upon any contract, take for loan, &c. more than six per cent. He shall not receive more than that. If he does, he shall be subjected to the penalties of the second section; and although it is conceded that a banking corporation is not a person, who can be charged as having, upon a contract for that purpose, taken for a loan a greater sum than is by law allowed, so as to be punished therefor under the second section; yet, as the first section proceeds to declare that "all bonds, contracts, &c. to be made for payment of any money, &c. lent, on which a higher interest is reserved or taken, 176 &c. shall be utterly "void," it is competent, by plea, under this statute, to avoid such contract, though it is made with one who is not a person within the meaning of the other provisions of the law; in other words, that though the Bank, by its officers, knowingly makes the contract, and knowingly receives the interest, and although there is no one who can be punished for this corrupt contract and receipt of usury, the contract is void.

This construction seems to detach the first member of the first section from that section, and to attach it to the second section as a necessary appendage to it. But it will be found, that the second section is complete in itself, and does not require the aid of the first section to make it so. In fact, it is taken nearly verbatim from the statute of 37 Hen. 8, chap. 9, which inflicted that punishment without forfeiting the debt. The first member of the first section must, therefore, be taken as properly belonging to that section, and indeed is coupled with the second member by the word and. That section, therefore, seems to me to mean the same thing, as if it had said, "no person shall contract to take directly or indirectly for loan, &c. above the value of 6 per cent. &c.; and all bonds, contracts, &c. for payment of any money, &c. so lent, on which a higher interest is received or taken, &c. shall be void, &c." But the words "so lent," it is said, merely mean at a higher rate of interest; but those expressions themselves immediately follow those words, and therefore, I think it most fair to refer them back also to the contract and the person with whom it was made. Suppose the words had been, "no natural person shall, upon any contract, take, &c.," this would stand better with the second section, if I am right in supposing that a body politic cannot be punished. But could it then be contended that the second member, "and all bonds, contracts, &c. for payment of any money, &c. so lent," extended to contracts made with an artificial person or body politic? It would seem to me, (to say nothing of the penal nature of the statute,) that such construction 177 *could not be maintained. On the whole, it seems to be at present, that the person who lends, and whose contract is to be avoided by a plea of the statute,

must be a person within the meaning of that word as used in both sections, and that if the same word means a natural person in the second, it means such person in the first also. It is very usual in legislation, when it is so intended, to say every person or persons, bodies politic or corporate. But, this is not done where pecuniary penalties are inflicted, as corporations cannot be so punished. Their legitimate punishment for violating the law of their existence, seems to be a destruction of that existence itself by the power who created them. As the plea in this case does not allege the contract to have been made with a natural person, it is not necessary to speculate further on what would be the result had it done so. It admits that the contract was made with the artificial person, and that that person took the alleged usurious interest. It seeks to present a case, not only of a contract to take, but an actual taking of unlawful interest by such person.

But, in addition to this general view of the subject, it may turn out, on a sound and reasonable construction of the law, that it was not intended by the Legislature to subject the Banks to the Statute of Usury. These corporations were instituted by the Legislature, at the instance of the whole community, for great public and State purposes as aforesaid. The deep pecuniary interest taken in them by the State, as well as the watchful guardianship and powerful control retained by her over them, has united her interest and direction of them, with that of the monied capitalists who became joint stockholders with her. The estates and income of widows and orphans, in short the solvency of the Banks to their various creditors and cestui que trusts, public and private, depends on the faithful management of these institutions, and that as little of the capital as possible should be put to hazard, or subjected to loss. The main object was, to create a 178 monied capital, to "be used principally in loans and discounts, and in facilitating exchange by the purchase of bills, &c., and that those entitled to accommodation might have the use of that capital at reasonable interest, for the advancement of trade, agriculture, manufactures, &c. The management, of course, was to fall into the hands of persons of high trust and confidence, who, though they might have some interest in the fund itself, would have more interest in the legal and regular exercise of the trust, and in the preservation of the fund, than in putting it and the existence of the institution itself, to hazard, by usurious contracts, for the small gain which would fall to their share, on that score; more interested in holding their offices, than in forfeiting them, for the gain arising from such mismanagement. The inducements to avoid all contracts contrary to the charter, would be predominant with them. The remedy, in case of misconduct, was prompt and easy, whilst the fund would be secured against the consequences of their ignorance or wilful misdeeds, by exempting it from heavy forfeitures in consequence of such ignorance. Justice to the public, as well as to

the innocent stockholders, seems to require that the fund should not be forfeited, through the ignorance or misconduct of agents thus acting under a special and limited power; whilst oppression by usury, to any great extent, could not be apprehended. On the other hand, if it could be supposed that these agents, many of whom act without reward, were to be subject to great individual loss, arising from their ignorance or mistakes, few would be found willing to risk such consequences. When they are made personally responsible or punishable, the misconduct for which such liability is incurred, is distinctly stated in the law. If, then, any loss to the institution had been supposed possible, under the statute against usury, it is reasonable to suppose that a provision would also have been made in that case, to throw the loss on those who should occasion it, unless, indeed, the difficulty of getting agents who would encounter such hazard, prevented it. But, if ¹⁷⁹ a loss by culpable misconduct in this respect, had been supposed possible, it would have been as reasonable to visit that on those guilty, as in the other cases provided for by the Act. But, no inducements existed for such misconduct, and if, from inadvertence or ignorance, (as in receiving interest in advance,) usury should take place, it would not be such a case as to require the severe inflictions of the statute; inasmuch as, if usury never had gone further than that, the statute probably never would have been made. In fact, to borrow money from such an institution, acting by agents under a limited power, and then to seek, on such grounds, to forfeit the whole money received, to the ruin of the innocent and helpless stockholders, seems to me, in a moral point of view, not to be better than griping usury itself, and ought not to have been sanctioned by law. Nor can I perceive that it would have been sound policy to have declared by law, that a borrower from such a fund, by connivance with such an agent, and inducing him in any way whatever, knowingly and culpably to violate the trust reposed in him, might thereby take to himself the funds of the innocent. Justice to them would have required protection against such fraud and combination, instead of punishing the innocent, and letting the guilty go free. Had the question, then, been presented to the Legislature, it is reasonable to suppose that they would not have subjected the Banks to the laws against usury.

But, the subject seems so far at least to have been before them, as to allow the Banks to take a rate of interest, which, in cases of individuals, would be usury. This part of the Act seems to me to have considerable bearing on this question, not only in support of the general view I have taken, but as it regards the pleadings in such a case. Had the Act declared, that on their discounts and loans, the Banks should not take more than legal interest, this reference to the statute against usury would have afforded a more plausible ground to say, that it was intended to subject them to that statute. But, the terms are, that they shall not take

¹⁸⁰ *more than one half of one per cent. for thirty days, thereby exempting them from the effects of that statute, at least so far as this exceeds the legal rate. Having thus far raised, in this case, the legal rate of interest, without superseding the sanctions of the statute against usury, in case of exceeding this rate, (as has been uniformly done, both here and in England, when the rate has been changed,) affords, to me, a very cogent reason for believing that it was not intended that those sanctions should be applied; especially, as it seems to me, that justice, public morality, and sound policy, required that they should not be applied.

But, let us test this question by the course of pleading, which would seem to me to be necessary to support a defence, going to a total bar of the action under this statute.

The plea under consideration, shews the difficulty counsel had in presenting such a defence. It seems to be neither under the one statute, nor the other; but to rely on both; and on that account would, perhaps, be bad on a special demurrer. Suppose it had been simply and singly a plea under the Statute of Usury, that more than 6 per cent. had been contracted for and taken; it is said that this would have thrown it on the plaintiff to reply the Act, and shew, that by it, the Bank had a right to take more. Perhaps this would have been right, if this is to be considered a private Act; but, considering it a public law, I incline to think that the plea would have been bad on demurrer, or in arrest of judgment. But, suppose the plaintiff had replied the Act; then it is said that the defendant could rejoin and say, "the Bank contracted for and had taken more than the rate so allowed." But, would not this involve a difficulty something like a departure in pleading? Under which statute would he claim the forfeiture of the debt? Suppose that after raising the interest to 6 per cent. there had been a plea of the statute allowing but 5 per cent.; and the plaintiff had replied the new statute, and that the contract arose under it; to which the defendant rejoined

a contract for more than 6 per cent.; ¹⁸¹ he would then be obliged *to conclude, and avoid the contract under the last statute. But, that statute would have a clause avoiding it, which this has not. But, if the plea had on its face shewn, that the contract was after the statute allowing 6 per cent. the plea would have been bad on demurrer. Here, the plea admits the contract to be with the Bank, and, of course, under a law allowing a greater interest to be taken than 6 per cent.; and yet it claims to avoid the contract under the law which avoids contracts where more than six per cent. is taken. Suppose then that the plea had gone on the latter law, and had stated that by the Act of incorporation, the Bank was not allowed to take more than one half of one per cent. for thirty days, on its loans and discounts, and that there was an agreement to discount the note in question, and to take thereon more than one half of one per cent. for thirty days, and which was actually taken, could such plea have regularly concluded, that by virtue of that Act, (to wit,

the Act which vacates contracts when more than six per cent. was contracted for or taken) the note so discounted was void? I doubt exceedingly, whether the plea could have claimed to avoid the contract under the usury law. There has been no law that I can find, either here or in England, in which the rate of interest has been generally or partially changed, in which it was not deemed necessary to re-enact the penalties or forfeitures for the usury, if they were intended to be applied in such case. In this State, the rate of interest was at one time high, then reduced until it got down to five per cent. and was again raised to six per cent.; and in every case, this was the course of legislation. A departure from such an uniform course, especially in the case of a statute so highly penal, is, with the other considerations above noticed, enough to satisfy me that the Legislature did not intend to apply the penalties and forfeiture inflicted by the Statute of Usury, to the Banks.

Suppose a law should pass, raising the rate of interest in a certain species of contracts to seven per cent., inflicting
182 "a personal punishment on the lender for taking more, and omitting to avoid the contract or punish the party under the usury law, if more was taken; would he be subject to that law? It seems to me he would not. We would hardly be at liberty to say it was an omission and oversight of the Legislature, and infer an intention still to subject him to that law. In the case before us, though the rate is raised, and that, in regard to a corporation, who could not even be punished under the second section, but who may be punished under the Act of incorporation, by destroying its very existence.

This view of the case, if entertained by a majority of the Court, would put an end to this cause. As I stand alone, however, on this point, it become necessary to take a brief view of the other questions arising in the case.

The plea, then, presents this question arising under the Statute of Usury; whether an application to lend money, and to discount the note of the borrower, endorsed by certain endorsers, and to continue it for eighteen months, taking a discount in advance of one half of one per cent. for thirty days, (which, though more than six per cent., is admitted not to be usury, is no more than one half one per cent. for thirty days had been taken) is usury, because taking it in advance makes it more? In other words, is a discount of a note on a deduction at the rate of legal interest on the whole sum secured by the note, usury? It seems to be admitted, that in regard to commercial paper, (within which class the note in question falls,) the long usage and custom of trade has sanctioned this course, provided the paper has but a short time to run, as sixty, ninety, or perhaps one hundred and twenty days; and the Courts seem to have sanctioned this custom. This course of decision, I understand it to be admitted, ought not now to be disturbed.

But, it is said, that this custom and course of decision only apply to notes of

third persons offered for discount, and not to a note given to secure a loan pre-
183 viously agreed *on, however short the time it has to run; and a fortiori, not to a loan which, it is agreed, is to run for a long time as eighteen months.

Had the note been taken, payable at the end of eighteen months, whether given by the borrower himself or by a third person, and offered for discount, it would not have been within the mercantile usage. But, though the agreement stated in the plea was to continue the discount or accommodation for eighteen months, yet it was also agreed that the notes should be renewed every sixty days; which put it in the power of the party to pay at any time, and thus stop the interest. So that, it seems to me, the case is reduced to one of a loan for sixty days.

The paper is then one of a mercantile character; and as to the time of payment, is within the usage. But it was on a loan to the maker. The doctrine urged on this point is a very serious one; and if sustained, will affect a great majority of the transactions at our Banks; probably every case in which the maker is directed to be credited with the proceeds, as it is the maker, in such case, who offers the note for discount.

But the difference, if any, between a note discounted at the instance of the maker, and at that of the payee, or of a third person, who is the holder, seems to me to be so slight in the real substance of the transaction, that I would be very unwilling to sanction the doctrine contended for. It may be, that in reality the endorser is indebted to the maker, though ostensibly it is otherwise. The mercantile character of the paper precludes any enquiry or necessity of enquiry, into its real consideration as between the parties to it; and in fact, in all cases of discounts, the object is to raise money presently for money to be paid hereafter. There might be more doubt, perhaps, in the case of a note given by the borrower directly to the Bank, secured by a pledge of stock, should interest be taken in advance. But, concerning this, I mean to intimate no opinion. On the whole, I think the demurrer to this plea was properly sustained.

184 *The remaining questions in the cause are presented by the bills of exceptions. I think both of the instructions mentioned in the first bill of exceptions were correct. But although these instructions were given at the instance, and on the motion, of the defendant, and that part therefore operating in his favour, was excused to by the plaintiff; yet 't seems, the defendant either did not think the instruction so given went far enough; or, doubting whether the jury would draw from the evidence the conclusions which that instruction permitted them to draw, and which the Court seemed to think it was necessary for them to draw, in order to find for the defendant, he moves for another instruction; the whole evidence is spread on the record; and the Court is asked to instruct the jury, that if they believe that the defendant wrote a certain letter to the President of the Bank, and

that the cashier, acting under the instructions of the Board of Directors, returned a certain written answer, and that that was the only answer ever communicated to him, (although it be admitted that a certain resolution of the Board was entered into, but not communicated;) and that a contract or agreement was made by the Bank with the defendant, in conformity with the terms of the letter from the cashier; and that the discounts and renewals, &c. took place; and that the \$10,000 on the discount charged in the account to the defendant, consisted of one hundred Bank shares estimated at par, when, on the 14th day of February, 1821, they were worth, at the cash selling price, not more than \$9,000, which was known to the Board of Directors; and that the note sued on was in consideration of the contract; then the jury ought to find for the defendant.

Now, if the object of all the evidence introduced by the defendant, was, to prove the case as stated in the first instruction mentioned in the first bill of exceptions, and if it was necessary, as I think it was, in order to entitle the defendant to a verdict on the evidence, that he should make

out his case as stated in that instruction; then it seems to me, that the jury were, at least in the first instance, to the proper tribunal to try the fact, and draw the inferences necessary to make out the defence. The jury were there instructed, that if they believed from the evidence that the Bank, on or about the 14th day of February, 1821, loaned to Erasmus Striebling \$2,500 or thereabouts for eighteen months, but made it a condition precedent to the granting of the said loan, that he should buy one hundred shares of the Bank stock at \$10,000, giving his note therefor, and that he complied therewith; and that the price of one hundred shares of stock, on the terms by payment prescribed and agreed to, was palpably and obviously an over price for the said stock, having reference to the then selling price in market, and that the defendant was influenced in agreeing to give the over price demanded, by the offer of the said loan of \$2,500; and that the purchase at such over price, operated as an inducement to the Bank to make the accommodation discount which it did make, and that the note sued on was given in consideration of this transaction; then, they ought to find for the defendant. But, if it was not made a condition of the loan of \$2,500, that the defendant should purchase the stock at that price; or, that the said loan was independent of the said purchase; or, that the purchase of the said stock was the principal object of the defendant, and that being accomplished, the Bank afterwards agreed to lend the \$2,500; then, such loan was not usury.

Now, so far as I can understand the case, it was necessary for the jury to come to all these conclusions on the one side, and against those on the other, in order to justify a verdict for the defendant. His counsel, however, instead of excepting to the opinion and instruction given, moved for a new instruction, less precise and clear, and consequently more calculated to

embarrass the jury, than the instruction given; and in which, some things are withdrawn from the jury, which, it seems to me, it was their exclusive province, at least in the first instance, to decide.

186 *Thus, the instruction moved for refers it to the jury only to say, whether certain letters were written, and whether a contract was made between the parties, in conformity with the terms in the cashier's letter, and consequently leaves it to the Court exclusively to decide, what was the intention of the parties in that contract; whether a loan, on condition to take stock at a given price, was intended, or a sale independent of a loan, as was contended on the other side.

As to the value of the stock too, nothing was left to the jury, but to say, that the cash price was not more than \$9,000; throwing it on the Court to decide whether, considering the offer to purchase at par, and the other circumstances of the case; the terms of payment agreed on, and the conflicting evidence as to the price on a credit, &c., together with the possible influence of the offer to lend the \$2,500, &c.; it was a sale, or in substance an usurious loan of the whole money. It seems to me that it was an attempt to evade or forestall the province of the jury to weigh the circumstances, and decide on these matters, contrary to the great principles of the jury trial, and to the authorities on this subject, so far as I have been able to examine them; and the more especially, as the whole merits of the case seem fairly and fully to have been submitted to the jury, on the first instructions given.

But, the assumption in the instruction moved for, that the resolution of the Board of Directors, though before the Court and jury, was not to weigh with either, in deciding what was the contract, (as it undertakes to confine the enquiry on that subject to the letter of the Cashier alone) is another reason with me, to justify the rejection of that instruction.

The next instruction asked for, simply relates to the question, whether, taking the interest in advance in this case, was usury; and which, for the reasons before given, I think was properly rejected.

As to the motion for a new trial, I feel more doubts; for, although I deem it wrong to withdraw from the jury the

187 *decision of the facts of the case, and think it their province to draw all the inferences and conclusions arising from particular circumstances; yet I am equally clear, that what they may do is always subordinate to the control of the Court, by granting a new trial in a proper case. The case, however, was tried before a Court and jury who heard the evidence, and who concur in opinion that no usury was practised. The negotiation was opened by an offer to purchase the stock; and although that was accompanied by an application for a loan on it, which was rejected, that circumstance, though it shewed that the purchaser was in want of money, I presume did not disqualify the parties from selling and purchasing. It was not unknown to either of them, and at any rate, not to the defendant, that he could

at once raise money at a neighbouring Bank, on the stock, nearly to the amount he asked of the Valley Bank. A purchase of stock, therefore, would give him a great portion of the relief he wanted. The power to make such an use of stock, will always enhance its value in a contract on time; but surely that does not disqualify a holder from selling on time. Had an offer been made to a private stockholder to purchase on the same terms, he might have refused, though the cash price was but \$80; for, he might have argued thus: "My stock will give me six per cent. on the par value, which is all that is offered; and at or before the end of eighteen months, it may be above par, and in the mean time, I cannot use it." But, there was an offer to lend \$2,500 on the security of a note endorsed; and this, on the one hand, induced the defendant to purchase the stock at the price, whilst the offer of that price induced the Bank to agree to that loan. If this was so, then the Judge instructs the jury that it was usury; and they, from the circumstances, were to say whether the fact was so or not. They say it was not so. They, who lived near the Bank, and heard the evidence, saw no reason to believe that the Bank would not have extended that accommodation to the defendant, on the se-

188 curity offered, "whether he purchased the stock or not; and it would be strange if they would, provided they were looking out for secure customers, as was probably the case. The jury also may have thought, that the purchase of stock on time was the great and primary object; as it gave to the party the chance of probable rise in the price, as well as the certain means of raising a large sum of money; and that he would have effected this object at all events. It seems to me, that they were the proper, if not the exclusive, tribunal, to weigh the circumstances, and decide this matter; and as that decision was confirmed by the Judge before whom it was made, I cannot say that it was wrong.

On every ground, therefore, I am for affirming the judgment.

JUDGE CABELL.

In arguing the demurrers filed in this cause, a preliminary question was made by the counsel for the appellant, whether the Act of Assembly establishing the Bank of the Valley be a public or private Act. Without adverting to other considerations, there is one which satisfies me that we must regard that Act as public, and not as private. By the 7th section, (see 2 Rev. Code, 97,) it is directed, that in addition to the capital stock of the Bank, to be raised by subscription, there shall be created in the name of the Commonwealth, for the benefit of the Fund for Internal Improvement, a number of shares equal to 15 per cent. on the amount of stock subscribed. The Commonwealth is thus made a member of the corporation, by the law giving it existence, and prescribing its privileges; and as the corporation thereby becomes a matter of public concern, in which every man in the community is directly interested, that law must be a public law.

The counsel for the appellant, endeavoured also to make a distinction be-

tween the Bank's discounting a note, where the transaction is in fact a loan, and 189 the note taken as a "mere security; and the discounting a note previously given for valuable consideration; and contended, that in the former case, it would be usurious if the Bank exacted in advance, interest on the full amount of the note. It is true, that in ordinary loans, it would be usurious to stipulate for the payment of interest in advance, on the whole amount of the loan. But, many privileges are allowed to commercial paper. One of these privileges is, that in discounting such paper, full interest may be required in advance, even where the transaction is a loan, provided it be done in the usual course of a business. The English books are full of decisions on this point. The Act of Assembly puts notes negotiable at this Bank on the footing of foreign bills of exchange, the most favoured class of commercial paper. There is, therefore, no ground for the distinction contended for.

In considering the exceptions to the opinion of the Court on the motion to instruct the jury, and on the motion for a new trial, the questions arise, 1. Whether the Act entitled "An Act to reduce into one Act the several Acts against usury," (1 Rev. Code, 373,) be applicable to corporations generally? 2. Whether that Act applies to this particular corporation? 3. Is the transaction, as detailed in the bill of exceptions, usurious?

1. Does the Act against usury apply to corporations generally? That Act was made for the benefit of the whole community, to protect the necessitous against the advantage which others might be disposed to take of their imprudence. Its terms are very general. "No person shall, upon any contract, take, &c. above the value of six dollars, &c. and all bonds, contracts, &c. on which a higher interest is reserved, &c. shall be utterly void." The mischiefs to the community, from the practice of usury, would not be less when carried on by a monied corporation, than when carried on by individuals in their natural character. Corporations are as sensibly alive to their own interest, as individuals; nor am I aware that legal sanctions are less 190 necessary "to restrain artificial, than natural, persons, from the commission of wrong. The term "person," used in the law, is unquestionably sufficiently comprehensive to embrace corporations; and it must be held to embrace them, unless there be something in the law shewing the Legislative intention to restrict its application. It is said, that such intention is manifested by the second section of the law, which prescribes as a punishment on the "person" taking usurious interest, the forfeiture of double the value of the money or thing lent, &c.; that there is no instance in which corporations have been subjected to pecuniary penalties; and that, therefore, it is fair to be presumed, that corporations were not intended to be embraced by the word person in this section of the law: from which an inference is attempted to be deduced, that the term "person" was intended to have a restricted ap-

plication in the first sentence also. It may be that there is no other case, in which corporations have been subjected to pecuniary penalties; as to which, however, I have not enquired, and therefore give no opinion. Let it be so. It would by no means satisfy me, that it was not the intention of the Legislature to subject them to the penalty in the case of usury. If a practice be highly injurious to the community, which it is deemed expedient to restrain by pecuniary penalties, and if corporations may be supposed to be exposed to the temptation of engaging in that practice, as well as natural persons, why should not corporations be equally subjected to the pecuniary penalty? It would certainly be competent to the Legislature to subject a corporation to such a punishment; and it would seem to be an appropriate punishment. Personal punishment cannot be inflicted on a corporation, and a forfeiture of the charter might not be deemed expedient for every offence. It is said, that punishment might be inflicted on the agents of the corporation. That is very true; and such punishment might be very proper as an additional sanction. But, it by no means follows, that the corporation itself should be not only exempted
 191 from punishment, *but should be allowed the benefit of the wrong committed by its agents.

But, I see no necessary connection between the first and second sections of the law. If, therefore, it were true, that corporations could not be punished under the second section, it would not follow that their contracts are not to be vacated under the first section. The great object was to protect the fleeced borrower, and that object requires that the provision, as to vacating the contract, should apply to artificial, as well as to natural, persons; and such, I think, was the intention of the Legislature.

2. Does the Act against usury apply to this corporation?

The argument, on this point, presupposes that the law applies to corporations generally. If there be an exemption in favor of this corporation, those who contend for it must prove it. The exemption is attempted to be deduced from the last clause of the 10th fundamental article of the constitution of the Bank, (p. 101.) "Neither shall the said corporation take more than at the rate of one half of one per cent. for thirty days, for or on account of its loans or discounts." But, if the general usury law would apply to this corporation but for this clause, I cannot perceive how this clause exempts it from such application. A subsequent law is held to repeal a former one, only by express terms or by necessary implication. It is not pretended that the former law is repealed, in this case, by express terms. It is repealed by necessary implication? The necessary implication, by which a subsequent law repeals a former law, is where the two laws are so inconsistent, that they cannot stand together. But, there is no inconsistency here, except that the rate of interest is changed as to this corporation, from six per

centum per annum, to six per centum for three hundred and sixty days. In all other respects, the two laws are consistent and in harmony. In all other respects, this corporation, therefore, is subject, as before, to the general law concerning usury.

192 *3. Is the transaction, as detailed in the evidence stated in the bill of exceptions, usurious?

It is impossible not to see that Stribbling was in great want of money; and that, in his negotiation with the Bank, money was his only object. It is true that he was willing to receive Bank stock in part, but it was to be received, and so he informed the Bank, only as the means of getting money. It is impossible not to see that the Bank availed itself of his distress for money, to pass off to him, one hundred shares of their stock, at a price nearly twenty-five per cent. above its real value, in order to enable him to raise a part of the sum he wanted. This pretended sale of stock was, directly and inseparably connected with an actual loan of the residue of the money that he required. A case of more palpable usury, was never attempted to be covered by a shift or device.

In the case of Pratt v. Willey, 1 Esp. Rep. 41, in an action by the endorsee of a promissory note against the defendant as maker, the plea was usury. The usury attempted to be proved on the part of the defendant, was, that the plaintiff had, in discounting the note, given in part a diamond ring, for which he charged much beyond the value. Lord Kenyon says, that he and Buller, Justice, had ruled on former occasions, that if in discounting a bill, the party discounting it gives goods in part, if these goods are of a certain ascertained value and are given at that value, it is not usury; but, that if the party discounting the bill, makes the holder of it take them at a higher value, that that shall be deemed usury; for, that a party, by substituting goods for money, shall not, by colour of the pretended value, take above the legal interest, and evade the statute.

The case of Davis v. Hardacre, 2 Camp. 375, goes still farther. That was an action by the endorsee of a bill of exchange drawn by the defendant, payable to his own order, and the defence was usury. It appeared that the defendant, being much pressed for money, applied to the plaintiff to discount the bill in question.

193 The plaintiff refused *to do so, except upon the condition that the defendant would take a landscape in part, to be valued at 150l. The defendant then offered to prove that the picture was worth not more than 32l. But, he was stopped by Lord Ellenborough, who said, that "it lies upon the plaintiff to prove that it is worth the 150l. When a party is compelled to take goods in discounting a bill of exchange. I think a presumption arises that the transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods. by the person who sues on the bill." And there being no such proof in that case, the plaintiff was non suited.

These cases are apposite in principle to the

one before us. I will only cite one other; Doe, on the demise of Davidson v. Barnard, 1 Esp. Rep. 11; and I refer to it to shew, that there is no difference between stock and goods in this respect.

In that case, it appeared that a person having occasion for a sum of money, applied to another, who said that all his money was in the funds, and that to sell out stock at that time, would be a considerable loss, stock then standing at 73; but that, if he would take it at 75, he should have the sum he wanted. This was agreed to. Stock to the amount of 1500l. was taken, valued at 75, which was sold out the same day at 72½, that being the then current price. Lord Kenyon held the transaction to be clearly usurious, and non-suited the plaintiff.

But, it is contended, that the Court could not give the second instruction asked for, without invading the province of the jury. I admit that it is the exclusive province of the jury to determine disputed facts. But, when the facts of a case shall be ascertained by a special verdict, or shall be admitted by the pleadings, it is the province of the Court to state the law arising upon those facts; and in all such cases, the question whether the facts constitute a sale or loan, or whether they constitute usury or not, is a question of law, which the Court must decide. I will cite 194 only *Gibson v. Fristoe, 1 Call, 62, in our own Courts, and Marsh v. Martindale, 3 Bos. & Pull. 154, in the English Courts. The later case is very remarkable, as shewing that when the facts of a case make usury, the quo animo with which the thing was done, is not regarded; for, in that case, it is expressly found by the jury, that "they believed the plaintiff did not think he was acting contrary to law."

But, the most usual mode of obtaining the opinion of the Court on points of law, is for the party desiring it to move the Court to instruct the jury. All that is necessary for this purpose, is, for him to state his case hypothetically; and if it be pertinent to the cause, the Court is bound to pronounce the law on the case thus stated. This is no invasion of the rights of the jury; for, if the jury shall believe that the case, as proved, is different from that stated by the part, the opinion of the Court having no application to the case as proved, can have no influence on the verdict of the jury.

I am of opinion that the Court ought to have given the second instruction moved for by the defendant; and that the judgment be reversed.

Judgment reversed.

195 *Graft and Others v. Castleman and M'Cormick.

May, 1827.

Chancery Practice—Bill against Representative of Executor—Administrator D. B. N.—Where one is appointed by will, trustee of the real estate, and executor of the personal, and dies, the children of the testator may file a bill against the representative of the executor and trustee, for an account of the proceeds of the real estate, without having an administrator de bonis non appointed of the estate of their testator.

Executors—Application of Assets—Individual Purposes.—An executor cannot apply the assets of his testator to his own individual purposes, unless he is in advance to the estate to the same amount; and a purchaser, knowing of such application, purchases at his peril. This rule applies as well to a purchaser who advances his money at the time of the purchase, as to one who takes the assets as a security for a preceding debt.

Trustees—Payment of Private Debts.—A trustee cannot alien the trust fund, in payment of his own debts.

Same—Assignment of Trust Fund for Individual Benefit.—A trustee sells real estate committed to his charge by the will of a testator, and takes a deed of trust for the purchase money. He then makes a contract for his own individual benefit, and assigns the instalments due for the land, in execution of the contract. The assignment contains a reference to the deed of trust, which refers to the original deed, and the latter refers to the will, by which the trust was created. The party to whom the assignment of the instalments was made, will be considered as having notice of the trust, and that the instalments were derived from the sale of the trust property; and the cestui que trust will be entitled to the money.

This was an appeal from the Chancery Court of Winchester. For a complete history of the cause, it is only necessary to refer to the following opinion.

Johnson, Stanard and Wickham, for the appellants.

Jones and Leigh, for the appellees.

May 28. JUDGE CARR delivered his opinion.

These suits arise out of the will of John D. Orr, and proceedings of his executor and trustee under it. In 1816, Dr. Orr died, leaving a will, by which he devised and bequeathed to his brother Benjamin G. Orr, his whole estate, real, personal and mixed, upon the following trusts: "In the first place, to sell and dispose of the same, or such part of the same, as he may deem most beneficial for the general interest of my estate, and to apply the proceeds
196 of *the same, or such yearly income or profits as may be made from the same, to the payment of all my just debts; meaning hereby, to subject all my estate,

*Executors—Breach of Trust—Liability of Participants.—If there is any proposition which ought to be regarded as settled law in Virginia, it is that a party concerting with an executor or administrator in a breach of trust, cannot claim credit for the money actually advanced by him. It is not for him to say that the fiduciary ought to have applied the money to the purposes of the estate. When he aids him in any manner contrary to the duty of the executor, he takes upon himself all the hazards of a misappropriation of funds. Utterback v. Cooper, 28 Gratt. 286, citing the principal case.

And in Wilkinson v. Holloway, 7 Leigh 291, it is said: "Look at the case of an executor: he is so far the representative of the testator, that he has the legal title to the personality; yet, because he is a fiduciary, any individual creditor of his own, who receives in discharge of his debt, assets of the estate, knowing them to be such, or whoever deals with the executor for any of the assets, in any way which makes him a party to the breach of trust, must account for such assets to those who are entitled under the will. Graft v. Castleman, 5 Rand. 195." To the same point, see the principal case cited in Downman v. Rust, 6 Rand. 592; Davis v. Christian, 15 Gratt. 48; Jones v. Clark, 25 Gratt. 657; Callaway v. Price, 32 Gratt. 10; Brockenbrough v. Turner, 78 Va. 446; Smith v. Henning, 10 W. Va. 641; Wolf v. McGugin, 37 W. Va. 561, 16 S. E. Rep. 799.

See further, monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Purchasers—Notice—Possession.—It is well settled that whatever puts a purchaser on enquiry is equivalent to notice. Possession of the property by a person other than the vendor is universally regarded as sufficient to put a purchaser on enquiry and to affect him with knowledge of the claims of the possession. Rorer Iron Co. v. Trout, 83 Va. 419, 2 S. E. Rep. 713, citing principal case.

real, personal and mixed, to the payment of my just debts, and to leave the application of the same to that purpose, and the mode of raising the necessary funds from the estate, to the sound discretion of my said brother. In the second place, after the payment of all my just debts, the surplus of my estate, or the proceeds of the sale thereof, to be given and divided by my said brother to and among my three children, Mary, Ellen and Thomas, in such shares and portions, as in the sound discretion and judgment of my said brother, to him shall seem most agreeable and expedient, according to the situation and conduct of my said children. And it is my will and desire, that such division and distribution as he shall actually make of my estate among my said children as aforesaid, or such division and distribution as he shall by writing under his hand, or by last will and testament, direct and appoint, shall be valid and binding; it being my intention to place my said brother, in respect to my said children, to all intents and purposes, in loco parentis. And it is also my will and intention, that he be fully empowered and authorised, not only for the purpose of paying my debts, but to raise and provide a fund for division and distribution among my said children, and for their immediate maintenance, support and education, according as he shall deem it most expedient either to sell or dispose of the same or any part, in specie, to be applied to the purposes aforesaid." The testator also appointed his said brother guardian of his children, and executor of his will, and exempted him from giving bond and security. The executor qualified. On the 11th of March, 1817, he conveyed to Castleman and M'Cormick, for the consideration of \$30,000, payable in instalments, a tract of land in Frederick county, belonging to the estate of his testator, called Poplimento, and thus described in the deed, "formerly the property of Rawleigh Colston, esquire, 197 *and by him sold and conveyed to the late Dr. John D. Orr, by whom it was devised to the said Benjamin G. Orr, as appears by his will recorded in Frederick County Court." On the same day, Castleman and M'Cormick conveyed the same land to Henry St. George Tucker, in trust to secure the purchase money. This deed describes the land thus; "the estate called Poplimento, being the same land conveyed to the said Castleman and M'Cormick by an indenture of even date herewith, and to be recorded in the County Court of Frederick, by reference to which a more complete description of the said land may be obtained."

By deed dated the 10th of December, 1818, Benjamin G. Orr assigns and conveys this deed of trust to Frederick C. Graff, together with the lands and premises therein mentioned, and all the right, title and interest of the said Benjamin G. Orr, of, in, and to the same. This deed of assignment minutely and particularly describes the deed of trust, and concludes thus; "to which reference is hereby made, as a part thereof, as if the same were here fully recited." This deed of assignment was made as a security to Graff for the sum of \$12,000, to be

advanced by him towards completing certain water works, for supplying New-Orleans with water, "according (says the deed) to the terms and conditions of a certain agreement, bearing even date herewith, between the said Benjamin G. Orr, Graff and H. Latrobe." This agreement is in the record, and shews a partnership between Orr, Graff and Latrobe in the adventure of supplying New-Orleans with water; and that Graff, in purchase of one third of the shares for Orr, and two thirds for himself, was to advance the \$12,000 as they should be wanting for carrying on the work. Before this assignment of the deed of trust to Graff, Castleman and M'Cormick had paid all the instalments which had grown due; leaving five still to be paid, the first on the 15th of April, and the others annually, on the same day. The instalment of the 15th of April, 1819, they paid to Graff; and this reimbursed him the 198 \$3,000 he had advanced to *Orr for the purchase of his shares in the water works. When the time for paying the instalment of 1820 was drawing near, Orr gave notice to Castleman and M'Cormick to pay no more to Graff, as no more was due to him under their agreement. Graff demanded the money; and hereupon, in April, 1820, Castleman and M'Cormick filed a bill of interpleader in the Winchester Chancery Court, stating the facts, and calling on the parties to interplead. Pending this bill, Orr, by deed of November 28th, 1820, assigned to the Bank of Washington, the deed of trust of Castleman and M'Cormick on the Poplimento land, describing the trust deed particularly, and adding, "to which reference is hereby made as part hereof, as if the same were here fully recited." This assignment recites, that it is made as a further security for a debt due from B. G. Orr to the Bank. Being informed of this fact, Castleman and M'Cormick, in April, 1821, filed an amended bill, and made the Bank a party. On the 4th of March, 1822, the children of Dr. Orr gave a written notice to Castleman and M'Cormick, that they claimed the money in their hands, and warning them not to pay to any other person; whereupon, Castleman and M'Cormick, by another amendment, added them to the defendants, in their bill of interpleader. In April, 1822, B. G. Orr died intestate, insolvent, and without having made any appointment among the children, in execution of the power given by his brother's will.

The parties defendant (except Graff,) answered, setting out their claims. Each party defendant also filed a bill making all the rest defendants. All answered, except Graff. It was agreed, that his original bill should be taken as the exhibition of his claim: that the children of J. D. Orr and the Bank should be taken as parties thereto; and that the exhibits in that case be received in the cases of interpleader.

During the progress of the cause, all the instalments, as they became due, were 199 paid into Court. In 1823, the *children filed their bill against the administratrix of B. G. Orr for an account. She answered that she was willing to account. A reference was had, a report re-

turned, and not being excepted to, was confirmed. It showed a balance of \$8,052 45 cents, for which there was a decree when assets. The record of this case is by agreement admitted as an exhibit in behalf of the children; and in 1825, the cases being consolidated, and coming on to be heard by consent, as to all parties, the Court rejected the claims of Graff and the Bank, and decreed that the receiver pay to the children the money and interest in his hands, deducting the costs of Castleman and M'Cormick. But the fund in the hands of the children, was decreed to be subject to the claims of the creditors of J. D. Orr, if any there be yet unsatisfied, and legally and equitably entitled to come upon that fund. The payment to the children was, therefore, suspended, till they should each give to the marshal bond with good security in double the amount decreed to them, conditioned to pay their proportions of any debts, which may be established by due course of law, against the estate of J. D. Orr, and against the fund in their hands. From this decree the appeal is taken by Graff and the Bank.

This cause, so important in its principles, so interesting in its character, has been most elaborately and ably argued by counsel.

The first objection taken to the decree is, that the proper parties are not before the Court. It is insisted that, after the death of B. G. Orr, and administrator de bonis non of Dr. Orr, should have been appointed, and made a party to the suit; that the estate of Dr. Orr, for want of this proceeding, is unrepresented; and the case of *Hays v. Hays*, 5 Munf. 418, is relied on, where this Court dismissed a bill brought by persons suing as children of a deceased residuary legatee, because they were not the legal representatives. This objection seems to me to be founded on a mistake of the nature of the fund. Dr. Orr devised the

200 *land to B. G. Orr, and subjected it to the payment of his debts. He also appointed B. G. Orr his executor and trustee. But, this did not make the land legal assets. This Court decided, in *Jones v. Hobson*, 2 Rand. 483, that the proceeds of land devised to be sold, are not a testamentary subject; that executors hold such proceeds, not as executors, but as trustees; and that the sureties of an executor are not responsible for the proceeds of land sold by him. Here, the trust embraced not only the payment of debts, but the maintenance and education of the children, and the distribution of the surplus among them; a trust highly confidential and personal. An administrator de bonis non of Dr. Orr would have nothing to do with this fund, and therefore need not be before the Court. The fund certainly belongs either to Graff, the Bank, or the children; and it will seem, that in decreeing it to the latter, the Court of Chancery took especial care to protect their father's creditors. This objection, therefore, has nothing in it, in my opinion; and should be the rather discountenanced, as the parties went to a hearing by consent, intending to waive all irregularities, and come to a decision on the merits.

Taking it up, then, upon the merits, we are to enquire, to which of these claimants the property belongs. All derive title from the will of Dr. Orr; the children, directly; the others through the medium of B. G. Orr. By the will, it is clear, that B. G. Orr was a fiduciary merely; that he had not the slightest beneficiary interest in the estate. It is all devised to him, first, to pay debts; secondly, to distribute among the children. Ample powers and a wide discretion are given him, but solely for the attainment of these objects. All the property is subjected to the payment of his debts; "leaving the mode of raising the funds from the estate, to the sound discretion of my brother." After payment of the debts, the surplus is to be divided among his children, "in such shares and proportions, as in the sound discretion and judgment of my brother, shall seem most agreeable and expedient." As re-

201 gards the "children, the will places him in loco parentis; but, this relates merely to his power of managing the fund for them, and distributing it among them. It gives him no individual interest in, or right to, one cent of it. If all the children had died infants, he could not, under the will, have claimed an atom of the estate.

But, granting all this; it was contended in the argument, that under the powers given to B. G. Orr, and the circumstances attending these transactions, the law would compel this Court to support the assignments of the deed of trust, both to Graff and the Bank; and that, whether B. G. Orr acted as executor or as trustee in the assignments. Let us examine this, taking him first as executor, and secondly, as trustee.

In the cases of *Nugent v. Giffard*, 2 Ves. 269, and 1 Atk. 463; *Meade v. Ld. Orrery*, 3 Atk. 235, and *Tanner v. Ivie*, 2 Ves. 466, Lord Hardwicke would not suffer creditors or legatees to follow assets into the hands of a purchaser from the executor or administrator, unless there was evidence of fraud or collusion between them. Nor did he consider it evidence of such fraud and collusion, that the executor was applying the assets to the payment of his own individual debt, and this, with the knowledge of the purchaser.

In *Whale v. Booth*, cited 4 Term Rep. 625, note, Lord Mansfield went quite as far. He said, "the general rule, both of law and equity, is clear, that an executor may dispose of the assets of the testator: that over them, he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous, if it were otherwise; for, then no one would deal with an executor. He must sell in order to effect the will; but who would buy if liable to be called to an account. It is also clear, that if, at the time, the purchaser knows they are assets, that is no evidence of fraud, for all the testator's debts may be satisfied; or, if he knows that the debts are not all satisfied, must he look to the application of the money

202 *No one would buy on such terms. There is one exception, indeed, where a contrivance appears between the pur

chaser and the executor to make a devastavit."

These decisions have certainly been much narrowed and modified, if not overruled, by the later cases. Thus, in *Bonny v. Ridgard*, 1 Cox. 145, Lord Kenyon, Master of the Rolls, speaking of the case of *Meade v. Ld. Orrery*, says, "It certainly becomes me to think much, before I differ from Lord Hardwicke, but I cannot subscribe to his opinion in that case; and if it had come before me, I should have decided it in direct opposition to that authority." "Nothing can be clearer," he says, "than that an executor may go to market with his testator's assets, and that in general a purchaser will not be bound to see to the application of the money; but, common honesty requires, that if there is either express or implied fraud, the parties shall not avail themselves of it." The circumstances of the case before him were these. R. W. having several leasehold estates, made his will, and gave them to his wife, and their daughters, to be equally divided between them; and desired that his said estates might be sold the first opportunity, as his executors might think most proper; and made his wife and another, executors. The widow alone proved the will, and entered on the premises. She married *Ridgard* soon after; they mortgaged the premises to M.; and afterwards, assigned the equity of redemption to *Barnard*, and 6l. paid in hand, at the date of the assignment. The bill was filed by the daughters and their husbands against *Ridgard* and wife, *Barnard* and his vendee, to set aside the assignment to *Barnard*, and for account, &c. Sir Thomas Sewal, Master of the Rolls, before whom the cause was first heard, thought that the children should not be prejudiced by the assignment, and decreed accordingly. The cause was re-heard before Lord Kenyon. After laying down the general principle before quoted, he applies it thus; "The fund in the hands of the widow was applicable to the payment of the debts, and after that, 203 to 'certain defined purposes declared by the will. *Barnard* had full notice of the will. He knew that after the debts were paid, this fund ought to be so applied; and he therefore connived at its being misapplied. If then the case turned on this, I should be bound to set aside the transaction, or rather to turn the defendants into trustees for the plaintiffs." But, on the ground of delay, (near twenty years having passed after the youngest child came of age, before filing the bill) he dismissed the cause.

The next case I shall cite is *Scott v. Tyler*, 2 Dickens, 712. In that case, an executrix, as a security for her own debt, had disposed of bonds, the assets of her testator, four years after his death. The Bankers swore that they knew nothing of the will, and believed the bonds to be her own property, not that of the testator. Lord Thurlow says, "If one conceals with an executor, by obtaining the testator's effects at a nominal value, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private

debt of the executor, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser or his pawnee, and make him liable for the value." He concludes, "I think the defendant *Hankey* must deliver up the bonds, and account for the interest they have received upon them." The part of Lord Thurlow's opinion touching these bonds, was not delivered in Court, because that part of the case was compromised; but in 17 Ves. 165. Lord Eldon says, "With regard to the case of *Scott v. Tyler*, I can confirm the assertion of Mr. Dickens, that the judgment stated by him contains Lord Thurlow's opinion, intended to have been delivered as his judgment, if a compromise had not taken place."

In *Hill v. Simpson*, 7 Ves. 152, Sir William Grant set aside the transfer of assets by an executor, to secure his individual debt, under circumstances of gross negligence, though not of direct fraud in 204 the creditors, to whom *they were transferred. He says, "Though it may be dangerous, at all to restrain the power of purchasing from an executor, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to sell the assets; but it is not essential, that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debt." Of the creditors he says, "I do not impute to them direct fraud; but they acted rashly, incautiously, and without the common attention used in the ordinary course of business. It was gross negligence not to look at the will, under which alone a title could be given to them."

The case of *M'Leod v. Drummond*, 14 Ves. 352; 17 Ves. 152, was one of a pledge by the executor of the testator's bonds, upon advances of money. The bill was filed by a co-executor, and it was dismissed by Sir William Grant. The bonds pledged were specifically bequeathed by the testator, and the money was advanced at the time the pledge was made, and upon the credit of it. The Master of the Rolls said he had found no case, where the money had been advanced at the time to the full value of the assets, that it was ever called back. Lord Eldon, on the appeal, affirmed the decree at the Rolls, on the length of time and some other particular circumstances; but it seems clear, that on the general doctrine he did not agree entirely with the Master of the Rolls. He goes into a laborious and able review of all the cases. "The Master of the Rolls," he says, "truly observes that there is a great difference between advancing money at the time upon securities, and taking a security in discharge of an antecedent debt; but that is by no means conclusive. The argument is carried nearly to this extent; that a person lending money at the time, upon the deposit of the securities, can hardly be supposed to mean fraud, as there is no 205 temptation *to fraud. Admitting,

however, that the Bankers had no other motive for the advance upon such a deposit, than they generally have; if it appears in the transaction itself, that the borrower is about to apply the money so raised on the testator's property, to objects with which his affairs have no connection, I should hesitate to say, that as the temptation was so slight, this Court would not examine, whether that was not a most inequitable transaction, with reference to the persons entitled to that property."

I also refer to the case of *Field v. Schieffelin*, et al. 7 Johns. Chan. Rep. 150, where the cases are reviewed by Kent, Ch., and the conclusion from the whole drawn with his usual clearness and ability.

In the case of *Dodson v. Simpson*, also 2 Rand. 294, the doctrine is correctly, though briefly laid down.

The latest English case that I have met with, is *Keane v. Roberts*, 4 Mad. Ch. Rep. 332. There the Vice Chancellor gives the result of an examination of all the cases, thus: "Every person who acquires personal assets by a breach of trust, or devastavit in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust, by buying or receiving as a pledge, for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will, or otherwise; because this sale or pledge is held to be *prima facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is *prima facie* inconsistent with the duty of an executor. I preface both these propositions with the words generally speaking, because they both seem to admit of exceptions. Thus a sale or pledge for the private debt of the executor, has been supported under special circumstances, in *Lord Hardwicke's*

206 two *cases of *Nugent v. Gifford*, and *Meade v. Lord Orrery*, though not entirely to the satisfaction of every succeeding Judge; and Lord Eldon seems to consider the case of *M'Leod v. Drummond* as an exception to the first proposition. It was upon the principles of these propositions, that Sir W. Grant proceeded in *M'Leod v. Drummond*. He there supported the pledges of the testator's bonds, because they were deposited in respect of advances made at the time. In the same case, Lord Eldon, on the appeal, admitted these principles, but seemed to consider the circumstances of that case, as forming an exception to the general rule. The advances, though made at the time, were made to two executors who were partners as army agents, and necessarily, therefore, for their private purposes; and he inclined to think that the Bankers were, for that reason, as much parties to the breach of trust, as if they had applied the money to pay the private debt of the executors. I cannot," he adds, "but lean strongly to Lord El-

don's view of that case. If a party dealing with an executor for the personal assets, pays his money to the executor, so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it. But, if in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or to the private trade of the executor." This is a clear statement of the doctrine as settled by a long course of decisions; settled too, as I think, on the basis of reason and equity; for, I heartily agree with Sir William Grant, that it is not essential that an executor should have the power of paying his own creditor with the assets; nor is it just that one man's property should be applied to the payment of another man's debt.

Let us apply this doctrine to the case of the claimants here: and first to *Graff*, whose case is certainly much the strongest.

He took a transfer of the trust property, as a *security for money to be advanced to the private trade of the executor; a trade, having not the slightest connection with the estate of the testator, or the objects of the trust. But, it is objected that he had no notice of the nature of the fund, or the right in which B. G. Orr held it. Of express notice, there is no proof; and it is insisted, that this is a case, to which constructive notice does not apply; that it applies to the purchaser of real estate only, who cannot protect himself as a purchaser without notice, till he has used due diligence in the examination of his title. No authority is cited to support this distinction. In all the cases which I have adduced, personal chattels were the subject; and yet the doctrine of implied notice is considered as applying to them; and the case of *Hill v. Simpson* is decided expressly on that ground.

Again. The assignment here, was of an incumbrance on land, in effect a mortgage; and we know that the doctrine of constructive notice, is constantly applied to such incumbrances. Upon the ground of reason, what difference is there, whether the subject be real or personal estate? He who purchases any subject, with notice of the equitable right of another, is the trustee for that other, to the extent of his equity; and this, whether the notice be express or implied. Express and implied notice differ, not in their effect, but in the mode of proof only. In the one, you prove the fact of notice expressly; in the other, you prove circumstances, which raise a presumption of notice; and if the presumption be strong enough to fix the notice, it affects the conscience of the party just as much as express notice. Thus in any purchase, if there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon a particular enquiry, he will be presumed to have made that enquiry, and will be charged with notice of every fact, which that enquiry would give him; and this conclusion is a just and necessary one; for, if a party means to deal fairly, self-interest, the strongest principle

of action, will prompt him to the enquiry; and if he means to deal fraudulently, the rule prevents him from voluntarily shutting his eyes, and saying he had no notice. This reasoning applies as well to real as personal estate. Both upon reason and authority, then, this is a case to which constructive notice applies; and of this, there was the clearest and strongest.

The deed of assignment refers to the deed of trust as a part of itself. The deed of trust refers expressly to the original deed, and that as expressly, to the will of Dr. Orr, where the whole trust is declared. Of this trust, then, Graff had full notice, and knew that by the trade, the executor was committing a gross breach of trust. He was a party to that breach, "by paying his money to this private trade of the executor."

But it is said, that this was an advancement of money at the time; and it cannot be imagined that there was any temptation to the lender to commit a fraud for the purpose of securing the return of that same money, which he then had, and might have kept; and Sir William Grant's opinion in *M'Leod v. Drummond*, is relied on. We have seen, however, that Lord Eldon differed from Sir W. Grant in this; as did the Vice Chancellor in *Keane v. Roberts*. But in truth, this was neither an advancement at the time, nor was it a simple loan of money. It was a purchase of shares in the New Orleans water works, and an agreement to advance, as the money should be wanting for carrying on the work. The strong temptation was held out to Graff, of entering into a speculation, by which he might double and treble his money, at the same time that he provided for his safety by taking a security on the trust fund. His case, therefore, does not come at all within the reason of those, where a party, meaning simply to lend his money at legal interest, (which he can always do,) is supposed to lie under no temptation to commit a fraud, in taking a security for its return.

I have thus far considered B. G. Orr as executor; but it is, in truth, a case of pure trust, as I have already shewn: 209 *and this, it will be found, makes it a much stronger case for the cestui que trusts. Thus, in *Andrew v. Wrigley*, 4 Bro. Ch. Cas. 125, Lord Alvanley, Master of the Rolls, says, "With respect to a trust for payment of debts, there is no pretence that such a trustee could alien in payment of his own debt;" and he refers to *Ithel v. Beane*, 1 Ves. 215. There an estate was devised to a son, subject to payment of debts. The son mortgaged the land to a creditor of the father, who also advanced to the son more money. Lord Hardwicke held that this mortgage should interfere in no manner with the rights of the father's other creditors. He says, "This is not like the case of an executor, who, having power to administer the assets, and the legal estate in him, may sell a term, and the vendee retain it, and this even to satisfy a debt of his own. But, that is owing to the legal power of an executor over the assets, upon which this Court will not break in.

But, it was never held, that if a devisee in trust mortgaged to a creditor of his own, for satisfaction or security of that debt, such mortgagee having notice of the trust, should retain the estate against the creditors under that trust."

In *Read v. Snell*, 2 Atk. 642, Lord Hardwicke, in considering the power of executors, who were also trustees, and to whom a very large discretion was given by the will, says, "Here the executors are made trustees, and therefore, from the nature of the thing, are to take nothing for their own benefit, unless it had been particularly given to them. They have no ownership, and therefore cannot alter the interests of the cestui que trust."

In *Mabank v. Metcalfe*, 3 Atk. 95, Lord Hardwicke says, "There is an established difference in this Court, between an executor and a trustee. For, the trustee has the legal right only, and is merely nominal; but, an executor has something more in him than the mere legal right as a bare trustee; for, he has a beneficial interest, if there is any surplus."

Dickerson v. Lockyear, 4 Ves. 36, is also a strong case to shew the difference between an executor and a trustee.

210 *There, an act done by a trustee was set aside, though no fraud was imputed; the Chancellor saying, that if it had been the act of an executor, he should not have quarrelled with it; because the executor had the whole legal property, was bound to pay debts, and might convert assets. "But," (he says,) "what was Lockyear's situation, what was his legal power? He was no executor. He is devisee nominally, it is true, of all the effects; but in trust, &c.," for the purposes of the will. Thus we see, that taking B. G. Orr for what he really was, a trustee, the case is still more clear against those who dealt with him.

It was contended in the argument, (but, as I thought, not with confidence,) that at the time of the assignment to Graff, B. G. Orr was so far in advance to the estate of his brother, as to be authorised to appropriate to his private trade, the \$15,000 due on Poplimento. The answer seems to be, that Graff being a purchaser with notice of the trust, dealt with Orr at his peril: that it devolved on him to shew Orr's authority for diverting the trust fund to his individual use: that if he had meant to rely on Orr's being in advance, he should have made that a part of his case, put it in issue, and had an account settled to establish the fact. Nothing of this kind was done. The fact is not stated in Graff's bill, and the only evidence we have on the subject, is a report made by a commissioner, in a case to which Graff was no party. A report made with no view to the fact of Orr's being in advance to the estate at any particular time; and which, if evidence at all in Graff's case, by no means establishes the fact.

I shall waste no time on the case of the Bank, which is much weaker than Graff's, and to which all the law and reasons adduced apply a multo fortiori. Nor shall I trouble myself with canvassing the claims of Graff or the Bank against B. G. Orr

individually. It is enough for the purposes of this cause, that they have no claim upon the trust fund.

I am clear that the decree of the Court below be affirmed.

JUDGES GREEN, COALTER and CABELL concurred, and the decree was affirmed.*

211 *Land, &c. v. Jeffries, &c.†

June, 1827.

Conveyance of Personality—Retention of Possession by Grantor—Effect.—Where the grantor of personal property remains in possession after an absolute conveyance, such conveyance will be deemed prima facie fraudulent.

Same—Same—Same.—But, such possession is not conclusive evidence of fraud, but is open to explanation.

Same—Same—Same—Conveyance by Woman—Pending Marriagej—Case at Bar.—Therefore, where a woman about to be married makes a conveyance of her personal property to a third person, with the privity and approbation of her intended husband, the marriage takes place a few minutes after the conveyance, and the husband takes possession of the property after the marriage; the property thus conveyed will not be subject to the husband's creditors, as his possession after marriage was not that of his wife, (she not being sui juris,) and her short possession between the time of the conveyance and that of the marriage, not being sufficient, or of a nature to render the deed fraudulent.

Same—Same—Same—Same—Same—Recordation.—Such a conveyance, although not recorded, is not void under the statute of frauds, (even supposing it to be a deed of trust) against the creditors of the husband, as the statute only applies to creditors of the grantor. The case of *Pierce v. Turner*, 5 Cranch's Rep. 154, reviewed and approved. Dissentiente GREEN, Judge.

Deeds—Construction—Evidence—Parol Declaration of Grantor.—Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made. Per J. CARR.

This was an appeal from the Richmond Chancery Court. The case was this: Mrs. Birdsong, a widow, being entitled

*The PRESIDENT absent.

†For the opinion of JUDGE CABELL in this case, see Appendix, No. 1, p. 599.

Sale of Personality—Retention of Possession by Grantor—Fraud Per Se.—On this subject, see footnote to *Davis v. Turner*, 4 Gratt. 422, where the subject is discussed and the cases on the subject collected.

The principal case is cited to the point in *Claytor v. Anthony*, 6 Rand. 208; *Bird v. Wilkinson*, 4 Leigh 278; *Sydnor v. Gee*, 4 Leigh 546; *Lewis v. Adams*, 6 Leigh 337; *Mason v. Bond*, 9 Leigh 185; *Tavennier v. Robinson*, 2 Rob. 286; *Davis v. Turner*, 4 Gratt. 450, 454, 455, 460.

Husband and Wife.—On this subject, see monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 150. See principal case cited in *Fletcher v. Ashley*, 6 Gratt. 339.

Unrecorded Deeds—Statute—Creditors Protected.—In *Snyder v. Martin*, 17 W. Va. 287, it is said: "Formerly it was held that the 'creditors' who are protected by the statute against unrecorded deeds, were the creditors of the grantors only. *Pierce v. Turner*, 5 Cranch 154; *Land v. Jeffries*, 5 Rand. 211; *Prior v. Kinney*, 6 Munf. 510. In the case of *Land v. Jeffries*, JUDGE GREEN, 'in one of the ablest opinions ever delivered by that learned judge,' as observed by JUDGE ALLEN in *Thomas v. Gaines*, 1 Gratt. 347, dissented from the opinion of the court. MR. JUSTICE JOHNSON also dissented from the opinion of the court in *Pierce v. Turner*. In *Thomas v. Gaines*, 1 Gratt. 347, the court overruled the former decisions and established the law in accordance with JUDGE GREEN's dissenting opinion in *Land v. Jeffries*. But after the last decision was announced at the revival of 1849, the question was settled by statute."

See Va. Code, 1827, § 2472. On this point, the principal case was also cited in *Harvey v. Fox*, 5 Leigh 41; *Thomas v. Gaines*, 1 Gratt. 357, 358, 359. (In this case, the headnote reads: "The case of *Pierce v. Turner*, 5 Cranch 154, and the opinions of JUDGES CARR, COALTER and BROOKE, in *Land v. Jeffries*, 5 Rand. 211, overruled"; *McCandlish v. Keen*, 13 Gratt. 637; *Harman v. Oberdorfer*, 33 Gratt. 504.

to sundry slaves, as her dower 'in the estate of S. B. Birdsong, her former husband, and intending to marry Jeffries, executed, on the 3d day of October, 1814, a deed, conveying to Land, her brother, the said slave, together with certain household and kitchen furniture, of which she was absolute owner. The deed is a simple bill of sale, without condition or trust expressed on its face. The marriage took place immediately after this deed was executed. It was made for the purpose of securing the property of Mrs. Birdsong from the claims of the creditors of Jeffries, who was then greatly involved in debt. At the time of the execution of the deed, Land, the grantee, was absent in the public service. The slaves continued in the possession of Jeffries after the marriage, and were hired to him by Land. The deed was admitted

to record on the 13th day of May, 1815, in the "County Court of Sussex, (all the parties residing in the said county, and the property being there situated,) upon the certificate of two magistrates, that Mrs. Jeffries "acknowledged the within writing to be her act and deed, and that she made the same before her intermarriage with her present husband John M. Jeffries, during her single life, and in willing the same should be recorded in the County Court of Sussex." The subscribing witness also, Nathaniel D. Land, made oath that the bill of sale was signed and acknowledged before the intermarriage of Mrs. Birdsong with her present husband John M. Jeffries.

Charles H. Stewart having obtained a judgment against Jeffries, caused an execution to be levied on some of the slaves conveyed by the bill of sale to Land. Mrs. Jeffries, by Land as her next friend, and as her trustee, filed a bill to injoin the sale of the slaves aforesaid, and for general relief.

Depositions were taken in the cause, the substance of which, so far as they are material to this report, are stated in the opinion of Judge Carr.

The Chancellor granted an injunction, and afterwards dissolved it; from which order an appeal was granted.

Attorney General and Wickham, for the appellants.

May and Johnson, for the appellees.

June 4. The Judges delivered their opinions.

JUDGE CARR.

Mrs. Birdsong was a widow possessed of some slaves, which she held in right of dower, and some furniture, of which she was absolute owner. Being about to be married to the defendant Jeffries, she executed an absolute deed of gift of her slaves and furniture, to her brother, J. W. Land. This deed was drawn by the

213 defendant Jeffries, (a lawyer,) and executed with his assent, and in his presence. The marriage took place on the same day: Land, the brother, was absent when the deed was executed, and no delivery of the property to him, was made. It went, on the marriage, into the possession of the defendant Jeffries. In 1815, he executed a note to Land, the brother, pur-

porting to be for the hire of the slaves. The deed was acknowledged by Mrs. Jeffries, before two magistrates in May, 1815, and on their certificate, admitted to record. The slaves remained with the husband about three years, when an execution of the defendant Stewart, on a judgment against Jeffries, was levied on some of them; and the wife, by Land as her next friend, and also as trustee for her, filed a bill to restrain the sale, and have a decree for the property. The bill states, that the deed, though absolute on its face, was intended to be a deed of trust, conveying the property to Land for the separate use of his sister, and with the express purpose of securing it from the creditors of Jeffries, who was known to be very much involved. The creditor Stewart, and Jeffries the husband, are made defendants. Jeffries answers, acknowledging the statement in the bill, the purpose of the deed, his belief that his wife would not have married him, without having her property secured to her separate use; and that the deed was drawn by him to effect that purpose. Stewart answers, denying his knowledge of any secret trust; denying that the deed was ever properly recorded; stating that the husband had full possession; that the note executed for hire was a mere sham; and contending that under the circumstances, the property was subject to his execution.

The Chancellor dissolved the injunction, thereby disaffirming the claim of the plaintiffs, and subjecting the property to the payment of the husband's debts.

The decision of this cause depends mainly upon the effect which we are to give to the deed executed by the widow just before her marriage. Accordingly, the principal stress of the argument has turned 214 on this deed, and it has *been assailed in every shape which ingenuity could devise. Let us consider, in the first place, what kind of deed it is.

Upon its face, it is a simple deed of gift of slaves and furniture. If the evidence of parol declarations of the widow previous to the execution, and at the very moment of executing it, be admissible, I should feel very little doubt that her fixed purpose was, not to marry, without having her property secured in such a way, that it would remain for her use, protected from the creditors of the husband. That previous declarations are admissible, we have several cases to shew. 2 Vern. 303; Waltham v. Johnson, 2 Call, 275; Jones v. Robertson, 2 Munf. 191. In this last case, the party had executed a deed of gift, and afterwards brought a bill to set it aside, on the ground that she supposed she was executing a will. The defendant, who was charged with the fraud, denied it by his answer; and the subscribing witnesses to the deed, agreed with his answer in their evidence; but neither of them swore that Mrs. Robertson read the deed, or heard it read. On the other side were the previous declarations of Mrs. Robertson, that she meant to get the defendant to alter her will; and it was also proved, that she appeared greatly astonished, when she afterwards discovered that she had executed a

deed of gift. This Court did not hesitate to set the deed aside, on this evidence.

In the case before us, several witnesses prove, from a month before the marriage up to the moment of executing the deed, that the widow uniformly said she would never marry Jeffries, unless her property was secured to her, and from his creditors. It is proved that she knew he was involved. She had been talked to by her friends; and had received the advice of her former guardian, to have her property conveyed to her brother, and let him see the deed; and we have the evidence of another brother, who afterwards subscribed the deed as a witness, that on the morning of the marriage, she asked him to shew

the deed to Wyche, her former guardian, (then in the house,) and *get him to examine it, and witness it; and what is still stronger, it is proved by a female witness, who stood behind her chair when she executed the deed, that just as she was about to sign her name, she turned to Jeffries and asked if that was sufficient to secure her property to her; and he answered, yes, her property could never be taken for his debts. I know very well that it is a general rule, as laid down by this Court in several cases, and among others in Ratcliffe v. Allison, 3 Rand. 537, "that parol evidence is inadmissible to contradict, or substantially vary the legal import of a deed or written agreement;" but I know also, that it is an exception to that rule, that "fraud, mistake or surprise, in the execution of a contract, deed or other writing, may be shewn by parol evidence." The evidence here proves clearly to my mind, that (if not fraud,) at least mistake and surprise, have intervened. It no where appears that Mrs. Birdsong ever read the deed, or heard it read; and if she had, I presume she would hardly have known the difference between a common deed and a deed of trust. Her determination was fixed, to have her property secured to her. How this was to be effected, she probably knew no more than a child. She tried to avail herself of the experience of her former guardian. But, here she was thwarted by the confidence of her brother in Jeffries. He had said the deed was sufficient; and the brother did not think further enquiry necessary. What more could this helpless woman do? That the object she had in view would have been best effected by a deed of trust conveying the legal estate to her brother for her separate use, is most clear; but instead of that, she has executed an absolute deed of gift, divesting herself wholly, both of the legal and equitable title. Did she mean to do this? All the evidence, the whole aspect of the transaction, prove that she did not: that she thought she was doing the very opposite, securing the property to herself. Is not here then mistake, surprise? And could there be a more legitimate, appropriate object, for the aid of equity? 216

*Suppose her brother, being clothed with the whole interest, had taken possession of the property, claimed it as his own, and refused to let her in to the receipt of the profits. Can it be doubted, that on a bill by her, equity would have

corrected the deed, and set up the trust? But her brother is the plaintiff, has declared the trust in his bill, and asked the aid of equity to execute it; and if there were nothing else in the cause, there would be no difficulty. But the property was never delivered to the grantee; remained with the widow till her marriage; then went into the possession of her husband, where it continued till a creditor of his levied an execution on some of the negroes. This brings up the question, is this property subject to be taken to satisfy the debts of the husband's creditors?

It is contended that it is so subject, because the deed to Land is void as to those creditors, 1st, as a deed fraudulent per se; 2d, under the statute of frauds.

1. Was the possession of the widow, from the execution of the deed to her marriage, such as to constitute fraud per se? Before we pronounce upon this, it may not be amiss to reflect a moment upon this doctrine of fraud per se. It is not statute law, and therefore not a strict positive thing. It is a rule of the Courts, founded in reason and convenience. It is not every possible case, in which possession remaining with the grantor constitutes fraud. The possession may be consisted with the deed. The purpose of a deed is to convey the title of the property to the grantee; and if the conveyance be immediate and absolute, possession ought to accompany it. If it remain with the grantor longer than in the natural course of fair transactions it ought, it creates a strong presumption of a secret trust; and unexplained, constitutes a fraud; but it may be explained. For instance; if I buy a slave, pay for him, and take an absolute bill of sale; he remains three or four months with the seller; this, without explanation, would amount to fraud. But, suppose I prove that during the whole of that time, he was so ill that a removal would have endangered

217 *his life; this would remove the imputation of fraud. Suppose I buy a horse in the country, and tell the seller, I will send for him to-morrow. In the mean time an execution is levied on him; does any body doubt that I would recover him?

In *Lady Arundel v. Phipps*, 10 Ves. 144, Lord Eldon says, "The mere circumstance of possession of chattels, however familiar it is to say that it proves fraud, amounts to no more than that it is prima facie evidence of property in the man possessing, until a title not fraudulent is shewn, under which that possession has followed. Every case from *Twyne's Case* downward, supports that."

The case of *Kidd v. Rawlinson*, 2 Bos. & Pull. 58, and *Watkins v. Burch*, 4 Taunt. 823, speak the same language. In *Wilt v. Franklin*, 1 Binn. 502, the deed was made on Saturday night, just after a judgment had been recovered against the grantor. It conveyed all the debtor's property to a trustee for the benefit of his creditors. The trustee lived twenty-three miles off. On Monday, before the trustee had received notice of the deed, and while the property was yet in possession of the debtor, the execution of the judgment creditor was levied on it; and the question was, whether

the deed was fraudulent. The Court decided that it was not. Ch. J. Tilghman said, "The 13th of Elizabeth, (the provisions of which go no further than the common law, as now understood,) never had it in contemplation to invalidate a fair transaction." He adds, "I agree in general, the continuance in possession of the grantor, is one of the strongest marks of fraud, especially if such possession continues a long time. But possession is not always, in itself, conclusive evidence of fraud, but is open to explanation."

Let us now consider the point of Mrs. Birdsong's possession. The first reflection which strikes us here, is the difference of situation between Mrs. Birdsong and that class, to which these doctrines of fraud are generally applied.

218 *The debtor, who finds himself deeply involved, and expects soon to be stripped of his property, is under a strong temptation to make such a disposition of that property, as may shield it from his creditors, and yet not deprive him wholly of its use. But, this would be dishonest; and to prevent it, is the object of the Statutes of Frauds, and the doctrine of the Courts in furtherance of them. Every step of the debtor is watched with the utmost care, and looked upon with jealousy and suspicion. The end he has in view being fraudulent, it is the object of the law, and the effort of the Courts, to defeat it, whatever may be the means resorted to. But, how does this reasoning apply to Mrs. Birdsong? She had no creditors. The property was her own. No one had a right to object to any disposition of it. She had constantly declared openly, that the creditors of Jeffries should never have it; that she would put it out of their reach. This was an object which she had a perfect power and right to effect. Her intended husband had no objection to it. There could not exist, therefore, the least inducement to secrecy, collusion or fraud. The end being fair, it was natural that it should be attained by fair and open means. Accordingly, we see not a vestige of concealment in the execution of the deed. The wedding guests seem generally to have known it. These considerations furnish strong prima facie evidence against the idea, that in executing the deed Mrs. Birdsong intended to commit a fraud; and we are told by Mr. Justice Doddridge, in *Shepard's Touchstone*, 67, that "when a conveyance is not fraudulent at the time of making it, it shall never be said to be fraudulent for any matter ex post facto."

In *Estwick v. Callaud*, also, 5 Term Rep. 425, Ashurst, J. says, "The question here is whether this were or were not a legal deed; and that depends on the intention of the parties, at the time when it was executed."

If there was no imagination of fraud in the execution of the deed, it is difficult to conceive how the retaining possession from that time till her marriage, could be considered *fraudulent. She was married the same day, perhaps the next hour. In this brief space, it is impossible to believe that possession could conduce either to her own advantage, or to

the deception of others. No one indeed can suppose, that in that anxious and interesting moment, her mind turned for an instant to the subject; and if it had, possession could not have been delivered, as her brother was absent. Her possession, then, after the deed, I consider as furnishing not the slightest evidence of fraud.

But it is said, that immediately on the marriage, her husband took possession of all the property, which remained with him three years; thus holding out to the world the idea that he had acquired it by marriage, and tending to deceive creditors. Taking the ground that this was intended to be a deed of trust, preserving the property to her separate use, this possession of the husband was not incompatible with the deed. In fact, it was the natural course of things. She having the slaves in possession, and living with her husband, they would of course seem to be in his possession. This was the case in *Jarman v. Woolleton*, and *Haalington v. Gill*, 3 Term Rep. 618; and in those cases the Court said the wife was the agent for the trustees. But again: If the wife made the deed honestly, how could the possession of the husband affect it with fraud? On the marriage, her power and will ceased. She was no longer *sui juris*. She could oppose no obstacle to the possession of her husband; and surely, it would be a most harsh construction which should sacrifice her rights to that possession. Suppose he had chosen to exercise acts of ownership of the most unequivocal character. Ought this to have bound her? Could she have been considered as consenting?

In *Lady Arundel v. Phipps*, 10 Ves. 139, there are several features resembling very much the case before us. By a marriage settlement, Lady Arundel had several estates settled to herself and husband for life, then in strict settlement, and for default of heirs, to be disposed of as she

220 * (notwithstanding coverture,) should, by deed or writing, under her hand and seal, &c. direct, &c. They had two daughters; no son. Lord Arundel becoming very much involved, and his creditors pressing him, Lady Arundel, by her trustees, made a contract with him, by which she purchased certain paintings, plate, jewels, china, glass, &c. about his mansion houses of Wardour, Lanherne and Irnham, for the sum of 12,000*l.* to be raised out of her estates, and applied towards the payment of his debts; the plate, jewels, &c. to be conveyed by Lord Arundel to her trustees, for her separate use. The deeds were executed. The plate, jewels, &c. remained in the different mansion houses; and a creditor of Lord Arundel levied an execution on some of them. An injunction was applied for to stop the sale, and granted. On a motion to dissolve. Lord Eldon considers the case very fully in various points of view. As to the possession remaining with the husband, he says, "What is the nature of the property, and the sort of possession naturally to be looked for? When Lady Arundel was making a settlement for the benefit of her daughters, afterwards, in all probability, to enjoy the possession of this ancient family seat,

there was neither legal nor moral fraud in taking the property, for which she paid the value. But the nature of the property, the relation of the parties, the circumstances that she could have no object but to transmit it to her family, and that she must live with him who sold it; these circumstances, are very material as to the possession. It is said, that Lord Arundel dealt with creditors as if this was his property; and there might be a considerable question, whether his or the steward's dealings in conversation or correspondence with creditors, as if this was part of the husband's property, is to be admitted in a question between husband and wife."

These remarks seem to me very sound, and very applicable to the case before us. I do not think, therefore, that the possession of the husband can be so referred to the deed, as to charge the wife with

221 fraud in the execution of it. *If

the husband had remained five years in possession, it would have raised the question under our statute of frauds, how far such possession would have given his creditors a title; but that question cannot arise here.

But it is said, that this deed has never been recorded according to law, and therefore is void as to the husband's creditors. I think it unnecessary to decide whether this deed has been properly recorded; for, taking it as an unrecorded deed, I do not think it void as to the creditors of the husband.

Consider this, first, under our Act of conveyances. This deed comes neither within the first or second sections of that Act, as it is neither a conveyance of lands, nor a covenant or agreement made in consideration of marriage. The fourth section declares all bargains, sales, and other conveyances of lands, &c., all deeds of settlement upon marriage, &c., all deeds of trust and mortgages, &c., void as to all creditors and subsequent purchasers, &c., unless recorded according to the directions of the Act. It is only as a deed of trust, that the deed before us can come within this Act. It is certainly not a deed with a trust declared on the face of it; and it was contended in the argument, with great force, that to such only did the case apply. But, without deciding that point, we will take it as a deed of trust within the Act. For want of recording, it is declared void as to all creditors, &c. This cannot mean all creditors in *rerum natura*. If not all, it is natural to ask, what creditors does the Act mean? I answer, creditors of the person from whom the estate moved, the grantor. As to those creditors meant by the law, the deed operates nothing. The estate attempted to be conveyed, remains in *statu quo*. It is declared void for the benefit of those creditors. Now, is it the creditors of grantor or grantee, who are benefited by the nullity of the deed? Surely the former; for, the deed being void, the estate remains in their debtor, and they may resort to it. But, it cannot mean the cred-

222 itors of both grantor and *grantee; for, they claim in different rights; one against the deed, the other under it. If the deed be void, the creditor of the

grantor has free access to the subject; but if void, the creditor of the grantee can claim nothing, because his debtor could claim nothing.

In the case before us, it is said that the creditors of the husband do not claim under the deed of the wife, but against it. But, they must claim under the husband. He is their debtor. It is in the character of creditors that they claim; and if not under their debtor, then I ask under whom they claim. It is compared to the case of a man's making a fraudulent deed of his property, which, though binding on him, is void as to his creditors, and they may take the property, though he could not. But, the comparison does not hold; for there, the grantor had property in him. He attempted to part with it, and did, so far as he was concerned; but the deed being void as to creditors, the property, as to them, still remained in their debtor. But, here the debtor never, for an instant of time, had a scintilla juris in the property. The deed intercepted his marital rights, and having his assent, binds him and all claiming by, through, or under him. If the creditors do not thus claim, they are not bound by the deed. But I should like to know, how else they can claim. Did the husband commit any fraud upon his creditors, by assenting to the deed? Certainly not. They might wish indeed, that he could so drive his matrimonial bargain, as to enlarge the fund accessible to them; but they could not say to him, "you shall do nothing which may intercept your marital rights, and thus keep from us the property of your intended bride." If the husband was guilty of no fraud towards them, still less can it be imagined that the wife, in securing her property from them, committed a fraud.

The question, what creditors are meant by the law, and whether it comprehends the creditors of the husband, is so clearly and fully treated in the case of *Pierce v. Turner*, 5 Cranch, 154, that I cannot do better than refer to it, in support of my opinion. Taking the deed before us as a deed of trust, the two cases are exactly similar in principle; for, though the husband signed the deed there, he assented to it here, which was just as effectual to bind. There the feme, just before marriage, executed a deed of trust, conveying her property to a trustee, for the use of herself and husband during life, and to her heirs. The husband signed merely as evidence of his assent. The deed was never recorded. On the marriage, the property, (slaves and land,) went into his possession, and remained with him till his death; less than five years. The widow took possession of the property, and the husband's creditors sued her, contending that the slaves were subject to their debts, because the deed not having been recorded, was, as to them, void, under our Act regulating conveyances. This brought up the very question, whether the words in that Act, "all creditors," included creditors of the husband. The Court consider, first, the general question, whether in deeds within the Act, all creditors mean creditors of both grantor and grantee. They say

(in effect, for I am not quoting their words,) that it can never be the interest of the creditor of a grantee, to insist that the deed to the grantee is void; except in one case, to wit, where a better title can be set up for the grantee, paramount the title of the grantor; for, in every other case, the creditor must derive his title under the deed of the grantor; and, if it be void as to the grantee, the creditor can found no claim upon it, in right of the grantee. "It would be strange," they say, "that a deed should be binding as to the grantee and his heirs, and yet void as to persons claiming under him, for a valuable consideration. Indeed, it would seem repugnant and absurd, to apply the same expressions (all creditors) to persons who, if they claim at all, must claim under the deed, and also to those who claim against the deed. In the latter case, the invalidity of the deed is consistent with the 'claim; in the former, it is destructive of it." The Court then proceed to speak of the particular case, and observe, that it may be said that the general reasoning does not apply to it, because the creditors of the husband do not claim under, but against the deed, and thus stand on the same ground with the creditors of the grantor. But, (they ask) by what rule of construction can the invalidity of the deed be applied in this particular case, to creditors claiming, not under the grantor, but another party to the deed; when in every other case which can be stated, that invalidity is applicable to the creditors of the grantor or those claiming under him, and to none other? The Court then put several cases, shewing the absurd consequences which would follow from taking the words all creditors to include creditors of the husband; and observe, that these difficulties are all avoided, by restraining them to their proper meaning. "If they are construed to mean creditors of the grantor and those claiming under him, then the deed being good between all the parties to it, no estate vested in Turner, but such as the deed itself vested in him. The title of his creditors being clearly derivative, if he had no title under the deed, then his creditors could have none. But, if he had a title incompatible with that granted by the deed, then he was not bound by the deed; contrary to the statute which declares that he was bound. If his creditors have any title, it cannot be derived from him, when in point of law, he had none in himself; and independent of his title, it is impossible to shew any in them." The Court, (after some further remarks,) conclude thus: "To say in this case, that upon the marriage of Turner, or at any time afterwards, the law cast upon him an estate in the property conveyed by this deed, (of which he had notice, and to which he was a party,) inconsistent with the estate conveyed to him by that deed, (and this must be said, if the creditors can claim such estate in his right,) is, in the opinion of the majority of the Court, repugnant to the plain meaning and spirit of the law."

225 *To apply this last sentence (as the whole opinion is strictly applica-

ble) to our case, "To say that on the marriage of Jeffries, or at any time after, the law cast upon him an estate in the property conveyed by Mrs. Birdsong's deed, (of which he had notice, and to which he assented,) inconsistent with the estate conveyed by that deed, (and this must be said, if the creditors can claim such estate in his right,) is, in my opinion, repugnant to the plain meaning and spirit of the law."

It was objected, that the case of *Anderson v. Anderson*, decided by this Court, 2 Call, 198, is in conflict with the construction I give to the words "all creditors." That it is not, the Court has clearly shewn, in that same case of *Pierce v. Turner*. The two cases are materially different in their circumstances. In *Anderson v. Anderson*, there was nothing to intercept the marital rights; here there was a deed binding on the husband, and effectually intercepting and preventing the existence of such rights. In that case, too, at the time when the slaves were taken, it was perfectly contingent whether the wife could ever claim any interest in them, in opposition to persons deriving title under the husband. For, if the husband should have survived the wife, or they should have had issue, the absolute legal estate which the husband gained by the marriage, would have remained unaffected by the deed, according to its plain words.

It remains to enquire, how the deed before us is affected by our Statute of Frauds; and to give the objection its full weight, we must here take the instrument to be an absolute deed of gift unrecorded. The second section of the law declares every gift, grant, &c. made, &c. of malice, fraud, covin, collusion, &c. to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, &c. shall be deemed and taken (only as against the persons, their heirs, &c. whose debts, &c. by such guileful and covinous devices and practices, shall or might be in any wise disturbed, hindered,

226 "and utterly void, &c. I ask what creditors are the Legislature here protecting? And from what are they protecting them? Are they doing so vain a thing, as shielding the creditors of A. from the fraudulent grants, gifts, &c. of B. C. D. &c.? Why, what is it to the creditors of A. that B. C. D. &c. are giving or granting their property? How can it interfere with their rights? How can it delay, hinder or defraud them? No; the law was not attempting this vain and useless thing. It meant simply to guard creditors from the fraudulent attempts of their debtors, to delay or hinder the recovery of their debts, by disposing of that property which those creditors would have a right to seize, so soon as they obtained judgments. The very term creditor implies all this. There can be no creditor but where there is a debtor, and he is only the creditor of the man who owes him money.

It is the latter part of this section, on which it is contended that the deed here is void; but, this first part has a decisive influence on that. The words are, "and

moreover, if a conveyance be of goods and chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this Act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged or proved," &c. Fraudulent within this Act; what does this mean? Was it the Legislative intention to make the deed an absolute nullity, of which every stranger might take advantage? If so, the deed could not be fraudulent within this Act, (by which is meant, in the manner declared by this Act); for, the Act had declared those deeds, spoken of in the former part of the section, fraudulent only as to those persons, whose debts were or might be hindered or delayed by them. The deeds in this part of the section, then, both by the words and the reason of the law, must also be fraudulent only as to those who have rights in, or claims upon, the property which may be affected by the deeds: and what shadow of right or claim had the creditors of Jeffries on this property

227 of the widow, "when she conveyed it to her brother? None upon earth. It was fairly and honestly made, for the very purpose of preventing those creditors from ever having any thing to do with that property; a purpose not only legal, but I may say laudable.

It is said, that if this deed had not been made, the creditors of the husband would have had a right to the property. I say no; for, from the evidence, if the deed had never been made, the marriage would never have taken place. But, the deed was made, fairly made. It defrauded nobody. The creditors of Jeffries were not the creditors of the grantor, and never had any interest in the property. As to them, therefore, it was of no importance whether the deed was recorded or not; and it is equally true, under the Statute of Frauds, as under that of conveyances, that the creditors of the husband are not within the law.

JUDGE GREEN.

The decision of this case will depend, in a great degree, upon the construction which may be put upon the words "creditors" and "purchasers," as used in our Statute of Frauds and Perjuries. On the part of the appellants, it is contended, that the statute extends only to the protection of creditors of, and purchasers from, the grantor, whose deed is impeached; whilst, on the other hand, it is insisted that it extends to all creditors and purchasers, no matter of and from whom, whose interests are affected by the conveyance. The literal terms of the statute, adopted from those of the 13th and 27th of Elizabeth, favor the latter proposition. It avoids all conveyances made with intent to defraud creditors and purchasers, (without specifying of or from whom,) as against the person or persons, (without exception or limitation,) and every of them, whose debts, suits, demands, estates, thereby shall or might be in any wise disturbed, hindered, delayed, or defrauded. It was impossible to adopt more general

228 terms to embrace all creditors "and purchasers, who, but for the conveyance, would have been entitled to subject

the property conveyed, to the payment of their debts; or would have had a good title to the property purchased. And these terms have always received a beneficial and liberal construction in the English Courts, in favor of all creditors and purchasers, and in suppression of fraud. *Twyne's Case*, 3 Co. Rep. 826. In *Burrell's Case*, 6 Co. Rep. 72, the grandfather made a long lease to the father, who, in the life-time of the grandfather, assigned it to the son. The grandfather died, having retained the possession of the land. The reversion descended on the father, who had previously sold the lease to another; and the lease made by the grandfather, and the assignment by the father, were both held to be fraudulent and void as to the purchaser from the son, under the 27th of Elizabeth; and the Court held, that "the words of the 27th of Elizabeth are general, and there is no need that he that sells the land, should be the maker of the fraudulent estate or incumbrance; but, if the estate be fraudulent, the purchaser shall avoid it, be who will the seller."

In the *Magdalen College Case*, 11 Co. Rep. 74, it was stated by the Chief Justice, that a purchaser from a tenant in tail, by a common recovery (which would bar the reversion, if in a common person, but not if in the King,) might, under the Statute of 27th Elizabeth, avoid a conveyance made by the reversioner to the King, with intent to prevent the purchaser from having the benefit of the recovery.

In *Clarke v. Rutland, Lane*, 113, cited in 13 Vin. Abr. 528, pl. 15, it is said, if the father make a lease for forty years to a stranger, and continues in possession, and dies, the land descending to his heir who sells it, the lease is void against the purchaser.

In these cases, the conveyances were held to be void against those purchasing, not from the grantor, but from others, whose conveyances would have given a good title, if the fraudulent conveyances had not been made; and in *Burwell's Case*, and in that in *Lane's Reports*, the leases of the father would have been void against the creditors of the heir; for, the words of the 13th, are as general as those of the 27th of Elizabeth.

In *Kynaston v. Clarke*, 2 Atk. 204, the father, upon his marriage, settled his estate upon himself for life, remainder to the issue of the marriage in tail; the reversion remaining in him. He had an only child, a son, and died intestate. The son took an estate tail, and the reversion in fee descended on him. He died without issue, and devised the estate to the defendant; and the question was between a specialty creditor of the father, and the devisee of the son. Lord Hardwicke held, that the devise was void under the statute of fraudulent devises, of 3d and 4th Wm. & Mary, and the creditor entitled. The son was never a debtor in any sense of the word. No suit could, at any time, have been brought against him. An estate tail is not assets; nor is a reversion after an estate tail assets, until it falls into possession, and this never fell into the son's possession in his life-time. 2 Saund. 7, note. The

preamble of the statute of fraudulent devises, speaks only of the creditors of the devisor, and makes void the devise as to such creditors. This decision was founded upon an equitable construction of the statute; because, if the devise had not been made, the creditor would have been entitled to satisfaction of his debt out of the reversion; which, in that case, would have descended to the heir at law of the father. Our Statute of Frauds is, in its terms, large enough to embrace all such cases, without any equitable construction.

In the case of *Haslington v. Gill*, reported in a note to *Jerman v. Woollaton*, 3 Term Rep. 620, the husband and wife, before marriage, joined in a conveyance to a trustee, of a stock of cows, to hold to the separate use of the wife; and the husband covenanted to permit the wife to enjoy the property to her separate use, and to carry on the trade of a cow keeper and milk seller, for her separate benefit. The cows belonged to the wife. After the marriage, she enjoyed the use of the cows, according to the terms of the deed; and a creditor of the husband took them in execution; and the trustees sued the sheriff, and recovered. The Court put the case upon the ground that the deed was made for valuable consideration, and that the possession was consistent with the terms of the conveyance. But all admitted, that if the husband had enjoyed the use of the property, so that the possession would have been inconsistent with the terms of the deed, the conveyance would have been void as to the husband's creditors. Lord Mansfield said, "If the settlement had been made after marriage, or the husband had carried on the trade in his own name, and contracted debts in it, that would have varied the case." Willes was of the same opinion. Ashhurst said, "The possession alone of the wife does not make this transaction fraudulent; for, it was consistent with the deed of settlement." And Buller said, "It has been frequently determined, that possession alone is not evidence of fraud. The transaction must be shewn to be fraudulent from other circumstances. If the possession be inconsistent with the conveyance, that is evidence of fraud. But here the possession is consistent with the deed."

The terms of the statute and these cases, I think, completely justify the construction contended for by the counsel for the appellees. No case has occurred in this Court, which can be supposed to have involved this question, except that of *Prior v. Kinney*, 6 Munf. 510, in which a creditor of the husband sought to impeach a conveyance made by the wife, on the eve of marriage. Neither the arguments of the counsel, nor the reasoning of the Court, are given in the report of the case, and it is probable that the reporter was not present, and had no reference to any sources of information, but the record. The facts of the case are imperfectly reported, and the decision of the Court was made without much time for consideration; the case being argued on the 16th, and decided on the 18th of February. Upon examining the record, I find that

the cause was heard on the bill, answers and replication, without any evidence whatever. The answers were, in all material particulars, responsive to the interrogatories of the bill, and were therefore evidence, and the only evidence, in the cause. It appeared that two days before the marriage of Peggy Lewis to Allen Prior, she, (in consequence of a previous agreement with her sister Eliz. Lewis, that whichever of them died or married first, the other should have all her property,) conveyed all her property to the said Elizabeth. The consideration above mentioned was not expressed in the deed; but the bill called for a discovery of the real consideration. This deed was recorded on the proof of one witness, and of the hand-writing of another, who was dead. The answer of Elizabeth Lewis states, that "this defendant, after the said intermarriage of her sister Peggy with Allen Prior, lived with her sister and the said Prior, and since that time has continued to live partly with the said Prior, and occasionally with her brother-in-law Andrew Lewis: that she hath allowed her brother-in-law Allen Prior, to have the use of the negroes except two, Maria and Charlotte." The answer of Allen Prior states, that the conveyance was made with his privity: that the slaves, except Maria and Charlotte, have generally been in the use and employment of this defendant, loaned by the said Elizabeth Lewis, for the use and convenience of her sister Mrs. Prior; the said Elizabeth occasionally residing with this defendant, and exercising acts of ownership over the said slaves: that the slaves taken in execution (being those conveyed by the deed, and taken September 10, 1803,) had then never been in his possession, but were in the possession and employment of Col. Andrew Lewis, the brother of Elizabeth, and who then resided with the said Andrew. The marriage was on the 25th of May, 1803, and the subpoena at the suit of

232 Prior's creditor issued on the 1st of April, 1809. *The deed in question was made upon a valid and valuable consideration. But, if the Court had considered that possession had continued without interruption in Peggy Lewis before her marriage, and of Prior after, by virtue of the loan admitted in both answers, they must have decided in favor of the creditor, under the provision of the Statute of Frauds in relation to loans, even if upon the other provisions of the statute, a creditor of the husband could not, under other circumstances, in any case impeach a conveyance made by the wife before marriage, with the assent of her husband. The Court, therefore, must have considered that the possession of the property accompanied the deed, and remained with the grantee (residing at Andrew Lewis's) from the time of the execution of the deed on the 23d of May, 1803, until taken in execution in September, 1803; and that after it came to the hands of Prior, the donee resided usually with him, and exercised acts of ownership over it, and had such a possession of it, as not only to take the case out of the clause of the statute in relation to loans, but upon the whole case, to negative the charge that

there had been any possession inconsistent with the terms of the deed; so as to leave no ground for the imputation of fraud. There was, therefore, no occasion to decide the question under consideration; and if the Court had considered and decided it, they would surely have given their reasons for their judgment upon a question so important and entirely new with us.

Our statute avoiding unrecorded deeds as to "all creditors and subsequent purchasers," presents the same question as the Statute of Frauds and Perjuries, as to what description of creditors and purchasers were intended to be protected. The only difference in the description of creditors and purchasers in these statutes, is, that the latter, in terms, limits its operation to such only as may be injured by the fraudulent conveyance in any way; the former embraces "all creditors and purchasers," without any limitation in the terms of the law.

But the operation of the law is 233 *necessarily limited by the nature of the subject, to such as may in any way be injured by the existence of the unrecorded deed.

The case of *Pierce v. Turner*, 5 Cranch's Rep. 154, was strongly relied upon by the counsel of the appellees, as establishing a contrary doctrine, as to the invalidity of unrecorded deeds. The decision in that case limits the application of the words "all creditors and subsequent purchasers" in the statute regulating conveyances, to creditors of, and purchasers from, the grantor only, in all possible cases.

The consequences of this doctrine are so important, as to justify and call for a critical and careful examination of every argument urged in support of it.

The Court, after stating the case, say, "The deed not having been recorded within the time prescribed by law, it is contended by the plaintiff in error, that the same became void, as to the creditors of C. Turner" (the husband) "whose rights remained unimpaired by that deed, in the same manner as if it had never been made; in which case, it is not denied that an absolute estate" (in the personal property) "would have vested in the husband, on his marriage. This argument proceeds upon the grounds, that by the words all creditors and subsequent purchasers, is meant as well the creditors of the grantee and subsequent purchasers under him, as those who might derive title under the grantor" (that is, creditors of, and purchasers from, the grantor,) "although the words are certainly broad enough to comprehend the whole, it is believed by a majority of the Court, that the construction should be such as to limit the application of them, to the creditors of, and subsequent purchasers from, the grantor. In no case but one, where a title can be set up for the grantee paramount the deed, can it ever be the interest of a creditor of the grantee to insist upon such a construction as is insisted upon in this (case) for as he" (the creditor of the grantee) "must (in all other cases) 234 derive his title under *the deed, if it be void as to him," (the creditor of the grantee) "it is impossible for him to found a claim upon it in right of the

grantee, whose only title is under the deed. It would be strange, that a deed should be binding upon the grantee and his heirs, and yet be void as to a person claiming under him for valuable consideration;" (creditors of, or purchasers from, the grantee:) "and yet such would be the consequence, if the words all creditors and subsequent purchasers, should be understood to apply to persons claiming under the grantee," (his creditors and purchasers from him) "as well as to those claiming under the grantor. Indeed, it would seem repugnant and absurd, to apply the same expressions to persons, who, if they claim at all, must claim under the deed; and also to those who claim against the deed. In the latter case, the invalidity of the deed is consistent with the claim; in the former, it is destructive of it."

The Court here assume, that the plaintiff's claim asserted as a general proposition, that by force of the statute, an unrecorded deed was void as to the creditors of, and purchasers from, the grantee, in all cases; which, if not true as to all cases, was not true as to any; and then shew that this proposition is absurd in cases where the grantee had no title prior to the deed, and would not have had any title if the deed had not been made, or is void; and therefore not true, even in cases in which the grantee had a prior title, or but for the making of the deed, would have acquired a title by operation of law. This, I think, is the substance of the argument, although I confess that I have had some difficulty in comprehending it.

The argument on the part of the plaintiff did not assert the proposition imputed to it; nor was that proposition necessary to support it. It asserted only, that an unrecorded deed was void as to the creditors of, and purchasers from, any person upon whom an interest would have devolved, if the deed had not been made, and out of which the creditors would have been, in

that case, entitled to claim satisfaction
235 *of their debts, whether the debtor was a grantee under the deed or not; they claiming under him, not as grantee, but as one upon whom a better title would have devolved by law, if the deed had no existence in fact or in point of law. In such a claim there is no more inconsistency, than in the ordinary case of a claim by the creditors of, or a purchaser from, a grantor, who claim under him, although he and his heirs are bound by the deed, and have no estate in themselves. In the case which the Court had under consideration, the husband was a grantee of a life estate in his wife's land. If her whole property had been settled to her separate use, he would not have been a grantee but a grantor, to the extent of his marital rights; and not one word of this argument would have been applicable to the case. And can it be seriously contended, that the Legislature intended, that if the husband took nothing by the deed, and so was not a grantee, it should be void as to his creditors or purchasers from him; and good, if he took some trifling interest under the deed, which would not have devolved upon him, by virtue of his marital

rights, and so was a grantee? Suppose a father were to convey his estate, by an unrecorded deed, to a stranger, and retain the possession until his death; and his heir at law then to enter upon and enjoy the estate, and sell to a purchaser without notice; would not such a purchaser or judgment creditor of the heir be entitled against the grantee of the father? I think it clear that they would. In such case the heir would not be a grantor. So, if the father were to convey by an unrecorded deed to an only child, an estate for life or years, with remainder to another in fee, and to retain the possession during his life, and upon the death of the father, the son entered and held and enjoyed the estate, and sold it to a purchaser without notice, or a creditor by judgment against the son extended the land; would the circumstance that the son was a grantee of a particular estate, vary the rights of the purchaser and creditor, from what they would be in the former case? I can see no difference

236 in the cases. *In both, the parties claiming under the heir would claim under him as heir, and not as grantee, enjoying an estate which would have devolved on him by operation of law, if the deed had not been made. The case of a husband, in respect to the personal property of his wife coming to his possession, is the same as that of an heir, in respect to real property.

The expressions in this paragraph, "must derive his title under the deed," "to persons claiming under the grantee," and "if they claim at all, must claim under the deed," although applicable to creditors of, and purchasers from, a grantee, who, if the deed had not existed, would have no title whatever, have no application to the creditors of, or purchasers from, one (an heir, for instance, or a husband,) who, but for the deed, would have a title, although a grantee, or if a grantee, would have had a better title by law than by the deed; unless the proposition which involves the question under consideration is assumed as true, to wit, that wherever the heir or husband is a grantee, their creditors or purchasers from them must claim under the deed, and cannot claim against it. Even if that were admitted, as it is not, it would not follow that it would be applicable to a case, in which the heir or husband claimed nothing under the deed, and was not a grantee.

The Court proceeds, "It may be said, however, that these observations are inapplicable to this particular case, because the creditors of the husband do not claim under but against the deed, and in this respect, stand upon the same ground as the creditors of the grantor. But in every other case that can be stated, the invalidity of the deed is applicable to the grantor or those claiming under him," (creditors of, or subsequent purchasers from, him,) "and to no others. By what rule of construction, can the same words have a more extended meaning," (than the creditors of, and purchasers from, the grantor,) "so as to be applied to persons who claim in right of a party to the same deed, other than the grantor?"

237 *The argument in this sentence is, that the case then under consideration, in which the husband was a grantee, was the only case that could be stated, in which the deed could be held to be invalid as to any creditors or purchasers, except those of and from the grantor; and therefore the terms creditors and purchasers, ought not to be extended to that particular and single case. It seems to me, that both the premises and the conclusion of this proposition are incorrect. Besides the cases of the invalidity of deeds, as to the creditors of, and purchasers from, the grantor, and the particular case of the creditors of, and purchasers from, a husband, who is a grantee in the deed, there are the cases of the creditors of, and purchasers from, an heir, to whom a particular estate is conveyed by the ancestor, with remainder to another; and of the heir, when the estate is conveyed by the ancestor, and nothing is conveyed to him; and of a conveyance by the wife to a trustee for her separate use, or absolutely to a stranger, the husband taking nothing under the deed, to which this invalidity is applicable, as before mentioned. In these two last cases, the words of the statute would not be applied "to persons who claim in right of a party to the same deed, other than the grantor."

All these cases of the creditors of, and the purchasers from, the grantor, heir and husband, when the grantee is a stranger, or when the heir or husband are grantees of particular interests less than they would have taken by operation of law, fall within one general rule: that the deed is void as to all creditors and purchasers, who, but for its existence, would have a right to subject the property to their debts, or would have had a good title by their purchases. This is the literal effect of the terms "all creditors and subsequent purchasers." The word all is used, not as contradistinguishing creditors from subsequent purchasers; but applies to all subsequent purchasers, as well as to all creditors. If the intention of the Legislature had been to confine

238 these words to creditors of, and purchasers from, the grantor, the language would have been, "creditors of, and subsequent purchasers from, the grantor." If in truth, as the Court supposed, no possible cases could exist, besides that of the creditors of a grantor, or purchasers from him, in which the existence of the deed could prejudice the creditors of, or purchasers from, any other person, except only in the single case of a husband and wife, in which the husband was a grantee, it would afford no shadow of reason for excluding the latter case from the operation of the statute, for that cause only; especially if it came both within the words and reason of the law. I have noted in parenthesis my understanding of the meaning of the Court in the expressions which they used. If they meant by "those claiming under him," the creditors of those claiming under the grantor by operation of law, it would embrace the creditors of heir and husband, who claim under the ancestor and wife, alike by operation of law, and would put an end to the argument.

The Court proceeds, "If the deed in question had granted to Charles Turner (the husband) an estate in fee as to the land, and for life in respect to the slaves, would it have been void as to simple contract creditors, who could only go against the personal estate, and good as to specialty creditors, who might subject the real assets? And yet, if the deed be void at all as to the creditors of the husband, it must be so throughout; in which case it might well be doubted, whether the land could be made liable to the payment of the husband's debts. Or, to present the question in a less doubtful shape, would the deed be void as to a purchaser from the husband of the slaves, and good as to a purchaser of the land?"

The Court here state, that if the deed be void at all, it must be void throughout; by which they mean, that it must be void as to all the creditors of the husband, simple contract as well as specialty creditors, if void as to any of his creditors. They did not mean to say, that a deed cannot be void as to a part of the subject

239 conveyed, and good *as to another part. Their expressions do not import that; and it is clear, that a deed may be good as to a part of the subject conveyed, and void as to a part. As, if a man were to make a voluntary conveyance of two estates to one person, and the grantee afterwards sold one to a purchaser for value, and the grantor sold the other, the original deed would be good as to the property and the purchaser of it, sold by the grantee, and void as to the property and the purchaser of it, sold by the grantor. Or, if two estates were conveyed to one person by an unrecorded deed, and the grantor sold one to a purchaser without, and the other to a purchaser with, notice of the unrecorded deed, the unrecorded deed would be good as to the estate purchased with notice, and void as to that purchased without notice. The Court were certainly right in saying, that if the deed be void as to a part of the creditors of the husband, it must be void as to all of his creditors; and they have stated a case, in which they seem to take it for granted that the deed would be void as to the simple contract creditors, and good as to the specialty creditors, if the statute was applied to the creditors of the husband; the case of a claim by the creditors after the husband's death, in which case the simple contract creditors could, if the deed were void, pursue the personal property, but not the real; whilst the specialty creditors could pursue the real, upon the ground that the deed was good as to that subject. The deed would be good as to the land, against and in favor of all creditors of the husband; because as to that subject, it could not injure them, and if avoided, the title would remain in the wife, unaffected by the marital rights of the husband, and as to the land, both specialty and simple contract creditors would have an equal right to subject the land in the husband's life-time, by obtaining judgments and extending it, which is the only way in which it could be reached. As to the personal property, the deed would be void, because it injured the creditors of the hus-

band; and that as to all creditors, 240 both simple *contract and specialty, both of who could subject it, either in the life-time of the husband, or after his death. The simple contract creditors, after the husband's death, could not reach the land, not because the deed had not the same effect as to both classes of creditors; but because, upon general principles of law, a simple contract creditor cannot subject the real assets, even where there is no question as to the title. As to the real property, therefore, the deed would be good throughout, that is, as to all creditors of the husband; and as to the personal property, it would be void throughout as to all the husband's creditors; and the dilemma supposed by the Court could not exist, to wit, that a case might occur in which it might be necessary to hold, if the statute embraced the husband's creditors, that it was void as to some creditors, and good as to others. The Court say, that it may be doubted in that case, whether the land could be made liable for the husband's debts, without suggesting the grounds of the doubt. I cannot conceive any other ground, than that of the hardship to the wife; but, this would go to repeal the statute in toto; for, no grantee loses the property by failing to record his deed, without the same hardship. This burthen is thrown upon the wife, to save creditors and purchasers from injury, which they would have no other means of avoiding; whereas the wife might prevent any injury to any person, by having the deed recorded as the law requires. The Court present the question without answering it; as if there was no doubt as to the answer, whether in such case, the deed would be good as to a purchaser of the land from the husband, and void as to the purchaser of the slaves. I think it would; and that it would be no more than the common case of a deed void as to one subject conveyed, and good as to another; or void as to the purchaser of a part, and good as to the purchaser of another part. The Court proceeds, "Let the true interpretation of the words all creditors and subsequent purchasers, be once 241 ascertained, and every difficulty in the case is at an end." *All the difficulties alluded to by the Court, arose from the assumption of the proposition as true, that a creditor can claim nothing which his debtor could not claim; which was the very question to be decided. They proceed, "If they are construed to mean the creditors of the grantor or subsequent purchasers from him, then the deed being good between the parties to it, no estate vested in C. Turner, but such as the deed itself passed to him. The title of his creditors being clearly derivative, if he had no title under the deed, (and being himself bound by it, he could have none which was inconsistent with it,) then his creditors can have none. But, if he had a title incompatible with that granted by the deed, then he was not bound by the deed, contrary to the statute which declares that he was bound. If his creditors have any such title, it cannot be derived from him, when in point of law, he had none in himself; and independent of his title, it is impos-

sible to shew any in them:" that "a subsequent purchaser, with notice of a prior unrecorded deed, is bound by it; and the husband, being a subsequent purchaser, had not only notice, but was a party to the prior unrecorded deed; and if the creditors claim an estate in his right, (by virtue of his marital rights,) they claim against his notice of the prior deed, to which he was a party; which would be repugnant to the plain meaning and spirit of the law." The Court did not, for a moment, advert to the policy on which the law was founded; which is the best if not the only criterion for determining its spirit.

The doctrine that a deed may be good as to the party, and binding upon him and his heirs, and void as to others, is perfectly familiar, both under the statutes, and at common law; and by force of our statute of frauds and perjuries, creditors may have satisfaction out of property, to which their debtor never had any sort of title; as in the case of a loan by an unrecorded deed, or by parol, for more than five years. It is competent to the Legislature to enable a creditor to claim satisfaction out of 242 property, to which *his debtor has no title, and could assert no sort of claim. The only question is, whether they have intended to do this, in the particular case; and if they have, it is no ground for refusing to execute the law, to say, that the creditor can only claim under the debtor; and that, therefore, the creditor can claim nothing, which the debtor could not. This argument is as completely applicable to our statute respecting loans, as to the case of husband and wife, and more so; for, if the loan were not made, there would be no title by which the property would belong to the loanee. But, in the case of husband and wife, if the deed were not made, her personal property would devolve on him by law; and in favor of creditors of, and purchasers from, the husband, that title is, in contemplation of law, vested in him, unless notice of the deed which intercepts it, is given by recording it as the law directs. In like manner, the possession of the loanee, though it gives no title to him, yet in contemplation of law, gives him title so far as his creditors are concerned. The argument of the Supreme Court proves too much. It would apply to the ordinary case of the creditors of the grantor. He is a party to the deed, is bound by it, and can set up no title inconsistent with it; and his creditors claim under him, in the same sense as the creditors of the husband claim under him.

The Court declared that they felt some difficulty in consequence of the decision in *Anderson v. Anderson*, 2 Call, 198; but contented themselves with saying, that with regard to the point under consideration, that decision was believed to be right, and proceed to shew upon what grounds. The Court of Appeals proceeded solely upon the ground, that it was an agreement in consideration of marriage, void for want of recording. I am not satisfied with the reasoning of the Supreme Court, to prove the decision of the Court of Appeals right, independent of the statute; and think that the wife would have succeeded, if the stat-

ute had not been in her way. The case was this: The intended husband executed an instrument of writing 243 *agreeing to settle her property, (which consisted of slaves,) upon the intended wife. This paper, although recorded, was not recorded within the time prescribed by law; and was held to be no impediment to the creditors of the husband. The wife filed her bill against her husband and his creditors, for the purpose of protecting the property against the claims of the latter. It was argued on the part of the plaintiffs, that it was clear that if the husband only was concerned, relief would be given against him, and that his creditors could only have the same rights that he had: that the failure to record the instrument was a fraud in the husband: that there was a distinction between the property of the wife and the husband; and that the husband was a trustee for the wife. The counsel for the defendants relied upon the force of the Act of Assembly as avoiding the instrument. The Court propounded and decided that as the only question on the merits of the case. If there had been no law requiring marriage settlements to be recorded, or if a settlement of the wife's property upon her, or rather his agreement to settle it, was valid against the husband's creditors without recording, then clearly the husband was a trustee for the wife by force of the agreement, and that trust attached upon the property, the moment his marital rights gave him the legal title; a trust which, if not avoided by the statute, a Court of Equity would have been bound to enforce, both against the husband and his creditors, unless the possession had been inconsistent with the deed. In a Court of Equity, the rights of all parties were precisely the same, whether the husband or any other was trustee; and the bare legal title in the husband, was no more subject to the claims of his creditors, than any other legal title which he might hold in trust for any stranger.

The Court, in *Pierce v. Turner*, after coming to the conclusion that unrecorded deeds are void, only as to the creditors of the grantor, add, "That creditors of the husband, or purchasers from him, may be injured by the construction which this

Court feels itself compelled to give to 244 *this law. need not be denied; but it is not for this tribunal to give them relief. It might perhaps be well, if the law were so amended as to render deeds made in contemplation of marriage, void, in express terms, as to the creditors of the husband, and purchasers from him, in case the same should not be recorded within the time prescribed by law;" thus admitting that the case was within the policy of the law, as they had already admitted that the words of the law were broad enough to embrace it. It seems to me, that the necessary conclusion was, that the case was within the provisions of the statute, unless that conclusion were clearly inconsistent with some other provision or obvious purpose of the statute.

Upon the best consideration that I have been able to give to this question, I think, upon the words and policy of the law, and

the construction given to the statutes concerning analogous subjects in England, that the statute of conveyances avoids a marriage settlement, or an agreement made in consideration of marriage, by which the property of either the husband or wife is settled, or agreed to be settled, if it be not duly recorded; both as to the creditors of, and purchasers from, the husband and wife, no matter to which the property originally belonged, if any right which the creditors or purchasers would have had, if the deed or agreement had not existed, would be injuriously affected by the deed, if it were held to be valid.

It is not, however, very material to the decision of this case, that the Court should come to this conclusion, since I think, as indeed was admitted by one of the appellant's counsel, that the paper in question was neither a marriage settlement, or covenant, or agreement, in consideration of marriage. The case therefore turns upon the effect of the statute of frauds; and in considering it in that view, several distinct questions occur.

The first of these is, whether the possession of the property was inconsistent with the terms of the deed; and if so, whether, in the absence of all proof as to any 245 agreement *between the parties, collateral to the deed and varying its effect, the deed would be void as to the husband's creditors. Secondly, whether such proof of such a collateral agreement, is admissible; and if not, whether the deed in that case, appearing on its face to be a conveyance made without a consideration deemed valuable in law, would be good against the creditors of the husband, if duly recorded.

It appears that Mrs. Birdsong, being about to intermarry with Jeffries, who was known to be greatly involved in debt, and on the day of, and before the marriage, executed to her brother Land, then absent in the military service of his country, an absolute and unconditional bill of sale; which was written by Jeffries himself, conveying all her personal property, without any consideration of money or other valuable thing passing from Land, either expressed in the deed or alleged by the parties. No change of possession followed this deed, either immediately upon the execution of the deed, or at any time afterwards; but, the property remained in the possession of Mrs. Birdsong until her marriage, and afterwards, in that of Jeffries her husband, without interruption, for more than three years, and until it was taken in execution by a creditor of Jeffries; and was during this time used by Jeffries, precisely as if the deed had never been made; he exercising all acts of ownership over it, except that it does not appear that he sold any part of it. This possession and use were with the assent of Land, after he was apprised of the existence of the deed; which was soon after the marriage, and at least as soon as the 1st of January, 1815; for, the bond of Jeffries exhibited by Land bears date on that day, and though not proved, is evidence against him, to shew that he was then appraised of the existence of the deed; although it may not be admis-

sible evidence to account for the possession and use of the property by Jeffries, so as to take the case out of the operation of the Statute of Frauds and Perjuries. And

if it were admissible for that purpose, it* is obviously colourable only.

Jeffries was insolvent, and no security was required. The existence of the bond was, as far as appears, kept a profound secret. This is alleged in the answer, and not contradicted by the proofs. It was not even witnessed. The payment of it has never been demanded, and no bond was taken after that, although the possession and use continued as before.

Upon these facts, in the absence of all others, it is clear that the possession was inconsistent with the deed; and it cannot be for a moment doubted, that such an absolute deed, the donor retaining the possession and use without interruption for upwards of three years, in an ordinary case, would be void as to creditors of the donor, according to the uniform decisions of the Courts in England and Virginia, and of the Supreme Court of the United States; so that, if Mrs. Birdsong had never been married, the deed in question, under such circumstances, would have been void as to her creditors. And if Jeffries had made such a deed for the property in question, after his marriage, or for his own property, and retained such a possession and use of the property, it would have been void as to his creditors, and purchasers from him.

But, it was said at the bar, first, that a gift without consideration, or a sale by the intended wife, of her property, before marriage, with the assent or knowledge (which is equivalent to assent) of her intended husband, is good against the husband and against his creditors; that a gift or conveyance by the intended wife, with such assent of the intended husband, no matter with what intent or for what purpose made, divests the legal title of the wife, as between the parties (even fraudulent transactions being good between the parties) and prevents the husband's marital rights from attaching on the property: that creditors claiming under the debtor, cannot claim what the debtor was never entitled to; that, therefore, in such case, the conveyance does not delay, hinder, or defraud such creditors, as they are not thereby deprived of any right or remedy,

247 *which they were ever entitled to as to such property; and consequently, that the Statute of Frauds and Perjuries does not avoid any conveyance made by the intended wife before marriage, as to the creditors of the husband, unless the conveyance be also void as to the husband.

Secondly, it is said, that this case does not come within the principles of the adjudged cases upon the subject of a continued possession and use of the property by the donor, inconsistent with the terms of the deed, since after the marriage, Jeffries, (and not his wife, the donor) had the possession and use of the property; and

Thirdly, that the circumstances of this case, (without proof of any agreement between the parties, as to the objects of the

deed, inconsistent with the terms of the deed) sufficiently explain the possession of Jeffries, and obviate the charge of fraud as to Mrs. Jeffries; since she was disabled by her coverture, after the marriage, from completing the transaction by changing the possession of the property; and before the marriage, she could not deliver the property to Land, he being absent.

It is certainly true, that a sale or voluntary gift of her property to another, by a woman before marriage, if not fraudulent as to her intended husband, is good both as to him and his creditors, and purchasers from him. The husband is not, by the marriage, a purchaser for valuable consideration, of his wife's property, but only of the marital rights devolving on him by law; and therefore, all her rights fairly transferred (as to the intended husband,) by her to another, before the marriage, are effectually withdrawn from the operation of his marital rights. He neither acquires any interest in fact, or in contemplation of law, in the property so transferred to another; and his creditors can, in such case, have no claim against it. But, if the wife, conveying her property before marriage, with the assent of her husband, reserves to himself, by express provision, or by a secret trust, any interest in such

property, either legal or equitable: 248 such interest devolves, by virtue *of his marital rights, on the husband, unless it be reserved in a legal and effectual way, for her separate use, notwithstanding her future coverture; and his creditors can assert their claims against such interest of the husband, notwithstanding any covinous contrivance to defeat their rights; and although the husband or wife may have precluded himself or herself, from asserting such right at law, and may have depended wholly on the faith of the donee of the property for the due execution of the trust reposed in him. No man can hold property by any title which is not liable to the claims of his creditors. It is not necessary that a creditor shall shew that his debtor has an interest, which he can assert at law or in equity, in order to enable the creditor to subject it to the satisfaction of his demand. In all cases of fraudulent conveyances, the party is bound and can assert no claim, either at law or in equity; and yet his creditors are not bound as he is, and they may assert their rights against the property, as if the conveyance never existed.

In this case, the possession and use being inconsistent with the deed, is conclusive proof that it was not the intent of the parties, that the wife should give away her property to her brother; but, that he should hold the nominal title in trust for her general use; and that right in her devolved by law upon her husband, (he having possession of the property, with the assent of the trustee) and was liable to his creditors. No special trust for the separate use of the wife, any more than for the joint use of the husband and wife, can be inferred from this possession; and without any other evidence of the intent of the transaction, the legal inference is, that the object of the parties was to delay, hinder and dis-

turb the rights of the husband's creditors. It is upon these grounds, that the rule has been established, that a possession and use inconsistent with the terms and professed objects of the deed, makes the deed per se fraudulent and void; since it proves conclusively, notwithstanding any colourable conveyance, that the beneficial

249 *right to the property is in the person who has such use and possession; and, therefore, such use and possession is conclusive evidence of an original fraudulent intent in the making of the deed, and avoids it ab initio; so as that it cannot be considered as having any effect, from the beginning.

As to the suggestion, that the fact of the possession and use, as it was in this case, does not bring this case within the principles of the adjudications on this subject, because it was not a continued possession by the donor, but after the marriage, the possession passed to, and continued in, the husband; it is sufficient to observe, that the suggestion would have had more force, if the property, after the marriage, had continued under the exclusive control of the donor; for then, in fact, the possession might be said to be affected by the deed, and not to go as if the deed had no existence; and a trust might possibly be inferred from that fact, for the sole and separate use of the wife; and the deed might be supposed to have been intended to have affected, in some way, the real and beneficial title to the property. But, the possession of the husband was the natural consequence of a merely colourable conveyance, not intended to change the real and beneficial title to the property, and ought to have the same effect, as if the donor had never married, and had sold or given the property to some other, after making the deed, and that other had continued in the uninterrupted possession and use of the property; which would, if possible, afford more decisive evidence of the secret trust for the general use of the grantor, connected with the first deed, than if she herself had continued in possession.

As to the third suggestion from the bar above mentioned, it may be observed, that in the aspect of the case now under consideration, it can have no effect.. Mrs. Jeffries professed to give her property by the deed in question, absolutely and unconditionally, to her brother. It is he who asserts a title under this deed of

250 gift; and if it was *really intended that the deed should give him any beneficial interest, the incapacity of the donor, after marriage, to deliver the possession to him, without her husband's consent, was no impediment to his demanding possession from the husband, and compelling the surrender of the property. It is from his failure to assert any right to the property, and his acquiescence in Jeffries' possession and use of the property, that the inference of law arises, that he never was intended to have, and had not, any interest in the property. The omission to deliver the property is urged, not against the rights of the grantor, but against the pretended rights of her pretended donee. Although the continuance of the possession in the

donor, and her husband coming into possession under her by operation of law, whilst Land was absent and incapable of receiving the possession, (and perhaps ignorant of the existence of the conveyance,) might not be considered as a possession inconsistent with the deed, if he had claimed the possession as soon as these impediments were removed; yet, his long subsequent acquiescence in such possession, after he was informed of the existence of the deed, and might have asserted any right which he had, relates to the origin of the transaction, and demonstrates its real original character.

In this view of the case, I therefore conclude, that the possession and the use of the property by the donor and her husband, in her right, in a way totally inconsistent with the terms and legal import of the deed, is conclusive evidence that the deed was made for the sole purpose of securing to the donor and her intended husband, such possession and use, by veating a title in the donee for the use of the donor generally; or was only colorable, and not intended to affect the title at all, except so far as to protect the property for the use of Jeffries, against the claims of his creditors; and in either case, the property is liable to the payment of Jeffries' debts.

But, if it be competent to the appellants to allege and approve an agreement and objects contrary to the legal import

251 *of the deed, so as to shew that such possession and use, although inconsistent with the terms of the deed, was not inconsistent with the objects of the deed and that agreement of the parties, not expressed in the deed, but collateral to it, then if such averments and proofs are found in the record, the appellant should prevail, unless the transaction would be void, otherwise than by virtue of the second section of the Statute of Frauds and Perjuries. But, was it competent to the parties to make such averments, and give such proofs? The common law prohibits any averments or proofs inconsistent with the deed, or with the written agreement of the parties, so as to vary their legal effect, unless in cases of fraud or mistake. If it were otherwise, the solemnity of a deed, or the precaution of reducing agreements to writing, would avail but little; and the spirit of the Statute of Frauds strongly enforces this principle of the common law. If the parties were permitted to give parol proof of an agreement, in relation to the possession of property absolutely conveyed, inconsistent with the legal effect of the deed, the rule of law, which declares that such possession makes the deed per se fraudulent and void, would have no effect. In all such cases, such possession might, and probably would, be accounted for by parol proofs. If such parol proofs were admissible, then proof of a loan would sufficiently explain away the apparent inconsistency of the possession. And if such evidence was admissible, it would be absurd to say, that such inconsistent possession per se made the deed fraudulent and void in point of law; for, all the evidence ought, in that case, to be left to the consideration of the jury, to have such

effect as it ought to have. This point is well established by the uniform current of authorities. Thus, in *Edwards v. Harden*, 2 Term Rep. 587, the grantee took an absolute deed; but, it was agreed between him and the grantor, that it should only operate as a security for a debt: that the grantor should retain the possession for fourteen days, and if the debt was not then paid, the grantee should take possession of the goods and sell them for the payment of the debt. If this were admissible evidence, then the possession of the grantor was fairly accounted for; since it was consistent with the proved agreement of the parties, though inconsistent with the terms of the deed. Yet it was held, that this possession inconsistent with the deed, per se rendered the deed fraudulent; and the evidence offered to explain this possession by proof of a collateral agreement as to the possession, was disregarded.

So in *Alexander v. Deneale*, 2 Munf. 341, the deed was absolute on its face, but proved to be for securing debts due from the grantor to the grantees; and so the possession, although inconsistent with the deed, was consistent with the proved agreement. But, the Court disregarded this proof, and declared the deed to be fraudulent per se. And in *Williamson v. Farley*, Gilm. Rep. 15, the grantee was a purchaser for full and valuable consideration, and at the time of the purchase took an absolute bill of sale, and then hired the slaves to the grantor for one year for their food and clothing, and took a bond for their return at the end of the year; such possession, consistent as it was with the collateral parol agreement, was notwithstanding declared to render the deed fraudulent and void, because inconsistent with the deed. Many other cases might be cited to the same effect, in this Court and elsewhere.

But, although parol proofs cannot be given, for the purpose of explaining a possession inconsistent with the deed, by shewing an agreement of the parties collateral to the deed, yet such proofs may be given, to shew that there is really no inconsistency between the possession and the deed itself. As, if the deed be conditional on its face, proofs may be given as to the performance or non-performance of the condition; or, if upon the face of the deed, the property is to be disposed of by the grantor for the benefit of the grantee; or, if the grantor retains the possession, not for his own use, and does not use it, but only for safe-keeping until the grantee can take possession, as if the grantee be at a distance; or, the deed is to trustees for the purpose of selling and paying debts, and the property remains, for safe-keeping, in possession of the debtor, (as is usual in such cases,) until a sale can be conveniently made; or, if the property be in such a situation as that it cannot be delivered, (as at sea,) so that it be delivered as soon as practicable; or, if the grantee purchase at a Sheriff's sale, and leave the property in the possession of the debtor, and for his use, this possession is not inconsistent with the idea of a bona fide absolute and effectual conveyance from the

Sheriff to the purchaser; or, if the possession be a social possession, so that a possession of the grantee may be implied; such cases do not, in fact, come within the rule under discussion, since no proofs are given to contradict or vary the terms or effect of the deed, but only to shew that the possession is not in fact inconsistent with the terms of the deed itself; and of this character are all the cases cited at the bar, as forming exceptions to the rule.

There is no ingredient of fraud or mistake in this case, to exempt it from the operation of the general rule, and to justify the admission of the parol proofs, as to the real objects of the deed. No such fraud or mistake is alleged in the pleading; and if it were, none is proved. The deed is drawn in the very terms intended by the party who drew it; and he verily believed it would have the effect intended, whatever that might be. His mistake, or the mistake of any of the parties, as to the legal effect of their deliberate and intended acts, is not such a mistake as any Court can take notice of. 1 Madd. Chan. 41; *Hodges v. Hodges*, 2 Vern. 615.

The next question is, whether the recording of the deed (supposing it to be duly recorded) will render it valid; although it might be void if not recorded. This question arises under that clause of the statute which declares, "and moreover, if a conveyance be of goods and chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act, unless recorded, or unless possession shall really and bona fide remain with the donee." It might be argued, that in such cases, the statute intended to substitute the recording of the deed for the possession of the property by the donee. But this clause, which is not in the English Statute, was obviously introduced for the purpose of enlarging, and not of abridging the former parts of the statute; not for the purpose of making good what would otherwise be void, under the former part of the statute, but for the purpose of avoiding (if the deed be not recorded, nor accompanied with possession,) such voluntary deeds as would be good under the former part of the statute; as, the case of a person, not at all indebted at the time, making a gift by deed, as has been repeatedly held in cases lately decided in this Court. In the case of *Chamberlayne v. Temple*, 2 Rand. 384, a deed of gift was made by a father to his infant daughter, when it did not appear that he was at all indebted; which would have been good against the father's creditors; but, for this clause of the statute, was held to be void as to his creditors, for not being duly recorded; whilst other deeds of gift, made to his other children when he was greatly in debt, and which were duly recorded, were held to be void under the former part of the statute. If the creditors of the husband could in no case impeach the voluntary deed of the wife, then it is immaterial whether her deed was recorded or not; and if they can impeach it for fraud under the statute, this is a case of fraud under the former part of the statute, and in that case, it is immaterial whether the deed was recorded

or not. I have, therefore, not considered the question, whether the deed was or was not duly recorded. If it were material, I should incline to the opinion that it was not. If Land had taken possession of the slaves, and Jeffries had sued him for them, I doubt whether the deed recorded upon the wife's acknowledgment after the coverture, could be given in evidence against the husband, without further proof of its execution.

255 *Supposing, however, that notwithstanding the presumption of law already discussed, when the possession and use of property are not, in consequence of a conveyance, in any degree changed or affected, so far as creditors and purchasers were concerned, it were yet competent to the parties to repel this presumption of law by parol proofs of a collateral agreement, in relation to the effect and objects of the deed, inconsistent with its terms; then it becomes necessary to examine the proofs in this case, in relation to the alleged agreement.

The allegations of the bill, and of Jeffries' answer, cannot be regarded further than as they are supported by proofs. All the proofs in relation to the declarations of Mrs. Birdsong in the absence of Jeffries, as to her determination not to marry Jeffries unless her property was secured to her against the claims of his creditors, and as to his declarations as stated by her, that he would not sign a marriage agreement, but that she might do as she pleased with her property, and that it should be secured to her, are inadmissible evidence, and to be thrown out of the case. This will leave, upon this point, the testimony of one witness only to be considered. All the rest speak only of Mrs. Birdsong's declarations made in the absence of Jeffries; and Louisa N. Lane alone speaks of any communication between Mrs. Birdsong and Jeffries on this subject. She states that Mrs. Jeffries, before the marriage, signed a paper, the contents of which, she, the (witness,) knew not: that before she signed the paper, Mrs. Jeffries asked Jeffries, "if that was sufficient to secure her property to her," and he replied, "Yes; her property could not be taken to pay his debts." Of the numerous witnesses examined in the cause, and who were present at this transaction, and amongst others the subscribing witness to the deed, not one testifies to this conversation, except Louisa N. Lane, or to any other communication between the parties, as to the objects and purposes of the deed.

The declaration of Jeffries stated by
256 Louisa N. Lane, does *indeed shew, that the object of making the deed, was to preserve the property against the claims of his creditors, but not against himself, or to her separate use; and is not at all inconsistent with the presumption of law arising from the continued possession, that he was to have the beneficial use of the property, as if the deed had not been made; and it is precisely this intent, to give or leave to him the beneficial right to the property, and to secure it at the same time from the claims of his creditors, which the law condemns as fraudulent as to them. But, if this evidence can be supposed

to have any other effect, and to shew that it was intended that Mrs. Jeffries should have the separate use of the property, ought the strong and well-founded jealousies of the law against the allowance of parol proofs to add to, or vary, or contradict, the legal import of deeds and other instruments of writing, or to control the effect of a possession inconsistent with the deed, to yield to evidence so slight and uncertain as this? And ought not such evidence to be clear and conclusive, beyond any doubt? This person was not called upon to witness any transaction or agreement between the parties. She was not even apprised of the purport or objects of the instrument of writing about to be executed. She casually heard a single question and answer, which she testifies to many years after; and this testimony is to overrule the effect of the deed, and continued possession of Jeffries, although the slightest mistake of the witness in her recollection of the precise terms of the question and answer, might essentially vary the rights of all parties, whose interests were liable to be affected by the execution of the deed. If the question had been, "will this secure my property against your creditors," (as I think it probably was, from the terms of Jeffries' answer,) the evidence then would have no effect whatever. I do not think this evidence ought to be considered, even if admissible for that purpose, as sufficient to vary the legal import of the deed, and effect of the possession.

257 *If the appellants could succeed in this case, it would produce infinite frauds upon the creditors of husbands apparently in possession of the property of their wives, by virtue of their marital rights, and upon purchasers of such property from the husbands. In all cases, secret conveyances made by the wife before marriage, and concealed with intent to be used or not, as the future circumstances of the husband might make it expedient, and purposely to defraud creditors and purchasers from the husband, might deprive creditors, (who trusted on the faith of the apparent title, and the possession of the husband by virtue of his marital rights,) of their remedies against the property, and purchasers dealing with the husband in the same confidence, of their title to the property so purchased. For, if such creditors and purchasers have no right to impeach such conveyance on the ground of fraud, in any case, it is wholly unnecessary to record the deed as to them, either under the statute of frauds, or statute of conveyances.

JUDGE COALTER.

I shall consider this case, first and principally, as arising upon an absolute deed made by the female appellant to her brother, on the eve of her marriage, and in contemplation thereof, unaccompanied by any expectation on her part or agreement on his, to hold the property conveyed for her use, but made solely with a view to intercept the marital rights of her intended husband, and the rights of his creditors; and shall throw out of the case the alleged hiring of the slaves by the grantee to the husband, after marriage.

Secondly, I will enquire whether, if the case would be with the appellants under that view of it, it is against them on the ground, that at or before the execution of the deed, there was an expectation or understanding that the property would be held in trust for her, and which has since been agreed to and admitted by the grantee, because such understanding or agreement was not stated in the deed.

258 *If the slaves had been the property of the husband, and had been so conveyed, although there had been a parol trust agreed upon in favor of the wife, and in consideration of the marriage, it would have been void as to his creditors. *Alexander v. Deneale*, 2 Munf. 341; 2 Vern. 490. But the property belonging to the wife, and the intended husband being in debt, and not worth a cent, as is admitted in the answer, it was perfectly honest and correct that her property should be protected from his creditors, provided the husband assented thereto, and was willing to marry her on those terms; even if she preferred to make a voluntary gift of it to her brother, rather than that they should go to pay his debts. Suppose she had made a gift of them by parol, or a sale for \$10, which, as to her creditors, would have been considered a voluntary gift, and had delivered the possession to him; this would have vested the legal title in him; and if so, he could have disposed of them as he pleased. Having the legal title thus in him, suppose that a few days after the marriage, he had hired or lent them to the husband, and they had thus remained in possession; would this be considered her possession, so as to defeat the absolute gift or sale? If it would as to her creditors, (as such voluntary gift or pretended sale would be void, even without such possession,) would it as to his creditors? It appears to me that it would not, and that this may be considered as settled by this Court in *Pryor v. Kinney's ex'ors*, 6 Munf. 510. In that case, if Mrs. Pryor had been in debt, and judgment had been recovered against husband and wife, and his estate had been insufficient to pay the debt, I presume a sale of the slaves would have been decreed to pay her debt, though the creditors of the husband could not, in that case, subject them to theirs. If the title passed, without a fraud on the marriage, the marital rights of the husband were intercepted, and he did not become a purchaser of the property by the marriage. I consider this question also settled, by the decision of the Supreme Court of the U. States in the case of *Pierce v. Turner*, 5 Cranch, 154.

259 *In the case of *Crump v. Dudley*, 3 Call, 507, the wife, on the eve of marriage, made a bill of sale for a small consideration, of her reversionary right to a slave. This was attempted to be set aside by the husband as a fraud on his marital rights, but he failed; and I presume his creditors would also have failed.

Marriage, it is true, is to the world *prima facie* a purchase by the husband of the wife's personal property; but, it is not always a purchase. She may sell it before marriage, or it may be settled upon her. If it be sold, given away, or settled, it is

his, although he does not get immediate possession of it, and his creditors can resort to it. Possession or want of possession is, therefore, not a certain indicium of property or title. A man marries the daughter of a wealthy father, and brings home with her slaves, &c. *Prima facie* they are his; but, they may be only on loan. His creditors derive title through him, and unless possession remains five years, are only entitled where he is entitled.

But, this was not a parol gift, or sale accompanied with the immediate transfer of possession, but was a bill of sale to a brother, not then present. Did that bill of sale vest the title in the brother, as it regarded the grantor and her future husband?

I have always supposed that a title to personal property may be transferred by deed, without actual delivery of the property at the time to the grantee, who, whether present or absent when the deed is made, is invested with the title. *Fowler v. Lee*, 4 Munf. 373; *Edwards v. Harben*, &c. 2 Term Rep. 587. Thus, deeds of trust, where the grantee never saw the property, or even knew of the execution of the deed, and where the possession remains in fact with the grantor, passes the legal title to the trustee. So a bill of sale of property at sea, &c. It is true, that as to third persons, creditors or subsequent purchasers, the deed, under circumstances, is avoided by statute; but this shews that a statute

260 was necessary, in order to avoid them as to such *parties, who might otherwise be defrauded. If, as to the grantor and the intended husband, the title passed to the grantee, though he was not present, and did not then receive possession, and must stand good as to them, was it fraudulent as to the creditors of the husband, at the instant of the execution of the deed? And if not, do the after events make it so? It was not fraudulent when executed, but she had a right, as it regarded his creditors, to give her property to whom she pleased, if done in a way not fraudulent as to the intended husband.

Suppose the sheriff, with the execution in his pocket, had been present at the marriage, and had, immediately after its solemnization, levied it on this property; would it have been liable to this execution as the property of the husband? I think not. If his marital rights did not then attach, they never did. His rights by possession afterwards, are of a distinct nature from his marital rights.

Do the after circumstances avoid it? It was executed on the day of the marriage, and a few minutes before its celebration; was known to, approved of, and actually written by the intended husband, a lawyer, and in consequence of repeated declarations by her, that his marital rights were not to attach on her property. Possession could not be delivered instantaneously to the grantee, who was not present. The possession, then, which remained with her for those few minutes, would not, I apprehend, make that deed fraudulent *per se*, even as to her creditors, if it would not have been void as to them, for want of consideration. After the marriage, the possession was no longer hers, nor had she any power to control it.

Suppose she had proposed to send the property to her brother's plantation, there to remain until his return; the husband could have prevented this. The possession then was his, and no longer remained in the grantor. Suppose the husband had so sent them, and on the next day, the brother having come home, had brought them back, and lent or hired them to the husband, and they had remained, as they did, in his

261 possession; *would this have barred the rights of the creditors? I presume that under such circumstances, they could not have claimed, unless possession had remained for five years. But, if they had been the property of the husband, and had been parted from by an absolute bill of sale, for full value even, such slight change of possession would not have barred his creditors. The transaction would have been considered fraudulent as to them. This shews that a sale or gift by the wife, in contemplation of marriage, is a very different thing from a like transaction by a debtor in relation to his own property.

A voluntary gift by the wife, *dum sola*, accompanied with a transfer of possession, and consent of the future husband, provided neither husband nor wife were ever afterwards in possession, would certainly be good as to the creditors of the husband, though not as to those of the wife. It would be bad as to the latter, for want of consideration. This shews that parting with the title in any way, by the parties to the intended marriage, is not, at the time such title is parted from, fraudulent as to the then creditors of the husband; nor will it so become afterwards, unless some statute makes it so. The deed then was fair, legal and proper, at the moment of its execution. It was a moral duty, as well in her as in him, to protect this property from his creditors, who had no right to oppose it, for the future support of their family, and was a transaction which the Courts will approve and support; and is much more fair, than for a man in debt to settle his property, so as to make his wife and children purchasers by the marriage, and thus to defeat his creditors; yet this is lawful. The few moments possession by her, from the time of the execution of the deed to the celebration of the marriage, would not avoid it as to him, so as to make him a subsequent purchaser by the marriage. He knew that the title had passed from her, and that too as a precedent condition to the marriage. After that, the possession was no longer hers but his, until claimed by the true owner, who could assert his right at any time

262 *within the five years. The doctrine, then, now under consideration, and which avoids the deed within the five years, because of the grantor remaining in possession, seems to me not to apply; first, because the grantor was not the debtor, and secondly, because possession did not remain with her. Had the witness to the deed, or any other person but the husband or grantee, taken or retained possession, the creditors could not claim; and yet, if it was the husband's property, or if his marital rights had attached upon it, they could, notwithstanding such possession in a stranger.

If it be said that, as to the world, the husband had the same kind of possession that he would have had if his marital rights had attached, and that so far they might be deceived, and that it will open a door to perjuries, if we justify the setting up claims inconsistent with such possession; I answer, that in every case where a man acquires possession of personal property, that possession is, to a certain extent, and according to circumstances, *prima facie* evidence of right. Thus when a man, not in debt, marries the daughter of a wealthy father, and brings home with her personal property, it will generally be supposed to be his. Yet it may, in reality, be a loan; and if not, and he becomes embarrassed, a loan may afterwards be set up by perjury. But, the Court and jury are to judge of this; for surely, a loan in such case as this, may be proved, and may within five years be declared by deed. But, if the husband was in debt and not worth a cent, as in this case, a loan or some settlement would generally be presumed; and if declared by deed at the time, known to and proved by a number of witnesses, though not recorded, it would stand good for five years, and the property could not be taken within that time, to pay the husband's debts. It may be, that the possession by the husband of the property which belonged to the wife before marriage, is stronger evidence to the world that he became the purchaser of that property by the marriage, than in the case *just put.

But yet, every body knows that his marital rights may have been intercepted; and if this is proved without a shadow of doubt, or appearance of fraud or perjury, as in this case; and as there is no act of the Legislature which prevents a woman from fairly parting with her property before marriage, I cannot see how we are to avoid the conveyance made by her, in this case.

As to the second point. I do not consider this deed as a marriage settlement. In fact, he had nothing to settle; and she could settle her property, by his consent, as she pleased. No marriage settlement here deprived his creditors of any thing; as it might have done, if he had had property to settle. It was, therefore, not necessary to record it. It is said indeed, that the intended husband refused to give it that shape; and although this is only proved as her declarations, that he so refused, yet this is a part of the *res gesta*; and his drawing the instrument in the form he did, he being a lawyer, shews that what she said was true. The form, then, of an absolute deed, (she depending on the justice and liberality of her brother,) was adopted, as one which, it was believed, would, and I think did, answer the purpose intended. Had he been present, and possession delivered to and retained by him, even until the celebration of the marriage, there would have been no doubt, I presume, with any one, that the title passed, and that he could the next day, have settled the property in trustees, or could have declared himself possessed for her separate use, and have given possession to the husband. If he could do so the next day, he could have done so at any time within five years, not-

withstanding the possession of the husband in the mean time. He agrees in the bill, that he is trustee for this purpose. Such agreement surely will not destroy his title under the deed.

But take it, that there was no trust to her separate use declared or agreed on, at the time the deed was executed. It was certainly intended that his marital rights, and of course the rights of his creditors, should not attach. This *could be prevented either by an absolute gift to her brother, or by a deed of trust to her separate use. An absolute bill of sale executed, let it be admitted, under a belief or hope that he would hold for her use, in such a way, as to prevent the creditors from taking the property, was resorted to. How can such expectation or belief prevent the legal title from vesting in the brother, or prevent his agreeing afterwards to hold it in trust to her separate use? Had he, by deed, declared a general trust, so as to give the creditors a claim, they could only have claimed through that deed made by him, as the absolute owner, not on the original marital rights of the husband.

But suppose he (Land) had been in debt, and the dispute had been between his creditors and those of the husband; the latter could only prevail on the ground of this belief and expectation in the wife, that the property would be held in trust; and that Land therefore held the property clothed with this trust, which would cut out his creditors. But, if they resort to that, it would turn out that it was to be held in trust, in such way as to defeat them; that is, in trust for her separate use; and then the question would recur as to Land's creditors, whether such expected trust, not declared in the deed, would defeat the legal title as it regarded their debts. Suppose Land, so in debt, or afterwards contracting debts, had taken possession and hired out the slaves to others than Jeffries, and had applied the hires to the maintenance of his sister, no trust being declared either in the deed in question, or in any deed made by him. His creditors, I apprehend, could have taken the property, he having the legal title, unaccompanied by any trust affecting them; and that they would stand on different grounds from the creditors of Jeffries. Would his hiring or lending to Jeffries differ the case from what it would be, if the hiring or lending had been to any one else? I think not.

If Land then had the legal title, he could declare a trust afterwards, or a loan, and although this might not affect
265 *his creditors prior to such declaration, and subsequent creditors might also come in, if there were prior ones; and if there were no creditors, such declaration, if not for the separate use, might give Jeffries an interest which would enure to his creditors; yet they would claim under his marital rights then attaching under this declaration of a trust, and not before. But the trust is declared now in this bill, and it is declared for her separate use. The possession, in the mean time, has been in Jeffries, either on hire or loan. (I care not which,) and for a less time than

five years; within which time the owner can declare a trust or loan. Suppose, before this execution had issued, Land had executed a deed referring to the one now in question, then remaining in the Clerk's office, and had conveyed the property to a trustee, to be held for her separate use, or had declared himself, as in this bill, to be such trustee, and that deed had been duly recorded; could any but his creditors have complained of such deed? I think not. An absolute bill of sale, by one in debt, of his goods, of which he afterwards retains the possession, is deemed fraudulent as to his creditors, because a secret trust in his favor is presumed, even if the grantee is also a bona fide creditor to the full value of the goods. A fortiori, if the deed, on the face of it, is voluntary and for the sole use of the debtor, will it be void as to his creditors. But in this case, such trust for the sole use of the grantor, and to exclude the marital rights of the husband and his creditors, would have been just and meritorious. So, an absolute deed, without consideration, would have been good against his creditors. But, here is an absolute deed, accompanied with possession in the husband after the marriage; and therefore, as it has been decided that such a transaction by a man in debt, is void for the supposed secret trust, it ought to be equally so here. But, there is one manifest distinction between the two cases. There it would not do that this secret trust should appear on the face of the deed; it must be secret, and of course, fraudulent.

Here, no secrecy was necessary.
266 *no inducement to secrecy. Property settled to the sole use of the wife, (she to be permitted to use and enjoy it) is more for the benefit of the husband, who is in debt to insolvency, than either a secret trust, or one declared on the face of the deed for her use generally. There is, therefore, no motive for secrecy or fraud. But, we must presume there was a secret trust, and that this secret trust was in fact for the husband. I see no necessity for this strained application of the rule, as applicable to a debtor parting with his own property. Why are we to presume a trust at all, if none was declared at the time? Why not take it as an absolute gift, and the possession to be such as the brother might have permitted of other property of his; or at most, as a hope that he would agree to hold for her use, which he had a right not to disappoint. But, if we must presume a trust of some kind, are we bound to presume it a trust for the husband and his creditors? Could he, in a suit for that purpose, insist upon it as a secret trust for him? What head of equity have the creditors to stand on, that he has not? I cannot perceive any. What principle of equity or public policy compels us to infer a trust for him and his creditors, contrary to every declaration and manifest intention, both by him and her, that his marital rights were to be intercepted? I confess I can see none. On the contrary, it has been decided by this Court, where a woman, about to marry a man much involved in debt, settles her own property with his consent, in trust that the husband and wife should

enjoy the interest and profits of the said estate jointly during their lives, gives no claim to his creditors, as it would defeat the avowed object of the settlement. *Scott, &c. v. Gibbon*, 5 Munf. 86.

If we are bound to infer a secret trust of some kind, shall we infer one which in fact destroys the deed in toto; for, if it was generally for the wife, without any remainder over for children, then the husband would take as absolutely as if no such deed had been made. Yet the deed was good when executed; and had the possession passed to, and remained
267 *with, the brother, would have given him full right to declare what trust he pleased.

But the creditors claim, not on the rights of Jeffries acquired by the marriage; they were gone, and continued out of him, at least for so long a time as to put it in the power of Land to assert his rights under the deed, and get possession. After this, the possession remaining in Jeffries, it is said, affects the deed itself, and the undoubted title which Land would have held, but for this possession, so as to avoid it, and places Jeffries and this property, not as between him and his wife, but as to his creditors, in the same situation as if the deed had not been made. True, the possession of Jeffries may so enure to his creditors, though he might not be able to retain the property to himself. But, under what law will it so enure? Not under the terms or policy of the first section of the Statute of Frauds, as I think I have before shewn; but under that where a possession of more than five years, without trust or loan declared, &c. recorded, will give such right. I consider that this was the decision in *Pryor v. Stribbling*. The conveyance in that case intercepted the marital rights. Pryor had been in the general possession of property more than five years before the suit. That was a deed absolute on the face of it, and did not express the real consideration on which it was said to have been made. The possession began, probably as soon as a husband's possession could begin, that is, at the end of the year; they being in the possession of Andrew Lewis at the time of the marriage, and continued in his (Pryor's) possession, even for more than five years. This possession was adverse to the terms of the deed, and had it been uninterrupted for the five years, there would have been no doubt as to the rights of the creditors; but, that had not been the case; and *Beaseley v. Owen*, 3 Hen. & Munf. 455, was relied upon on that point. This case may not be law, but I am humbly of opinion that it is; as also the case of *Pierce v. Turner*; and if they are, I think they support my

268 position throughout. *In this latter case, the deed was not considered a marriage settlement, though signed by the husband to shew his assent thereto. It was, like this, the case of a woman about to be married, securing her own property to herself with the assent of her intended husband; and consequently, did not fall within the meaning of the statute concerning conveyances, and did not require to be recorded. Creditors there had not that

legal notice of it, which the statute intended; and the trustees let Turner into possession, who died in possession within the five years. This was relied on in the case. But, there was a trust declared in the deed, and the possession was not contrary to that. But what had creditors, ignorant of it, to do with that? Here the husband was in possession of the wife's property; and when the creditor trusts him, and sues his execution, he is met with a deed. But, it has a trust in it, and so all is fair and right. Yes, all was fair and right, thus to secure her own property, and that in a way to let her husband into possession, and not to record the deed, but to have her rights asserted and made known at any time within five years.

It was contended, that though such possession might remain, and the deed would be good for eight months, yet not being recorded, it was void ab initio as to creditors. But it was decided, that the marital rights were intercepted by the deed, and that it was not void, so as to let in those rights. If this case does not go the whole way required for the one under consideration, it is only because in the one case the deed contains a declaration of trust, and in the other it is absolute. It establishes every point contended for, except what may grow out of that difference in the cases; and I cannot perceive, for the reasons aforesaid, why that difference in the case ought to vary the decision.

JUDGE CABELL delivered his opinion, that the decree should be reversed; but, as it is not now in possession of the Reporter, it will be given in the Appendix if it can be procured.

269 *The PRESIDENT.

I concur entirely with Judge Carr in his statement of the facts in this case. In the argument of it, many questions have been raised; but, I shall confine myself to the consideration of it in two aspects only; first, as regards the rights of the parties to the property in question before, and secondly, after the marriage.

In the first aspect of the case, none of the parties had any ground of complaint. At the time the deed in question was executed, the creditors of the husband had not the slightest interest in the property; nor had they any interest in his assent to the deed, as his knowledge of it was quite enough to intercept his marital rights to the property. The interest of the intended wife in the deed was very palpable. She knew that her intended husband was insolvent. She had been advised to take care of her property; and her object was, to secure it both against him and his creditors. He had refused to enter into a marriage contract for that object, from the apprehension, probably, of some imputation on his integrity; though he had declared his willingness that she should dispose of it in any manner she chose. It is obvious, that the object of all parties was a fair one, and the deed was intended to effect it and it only; and whether it has done so, is the first question. Though the word "gift" is inserted in it, I think the force of the terms "bargain and sell," &c. make it an absolute bill of sale on the face

of it, and in the controversy between the parties to it, would have the effect to pass the title in the property to Land, the intended trustee; and in an action at law, the bargainor would have been estopped to deny consideration, by her seal, though none is expressed in the deed; and though, also, in a Court of Equity, she might have insisted on the intended trust for her sole use. Or, had the marriage never taken place, in contemplation of which the deed was executed, she might have insisted on a re-conveyance of the property by the intended trustee. As regarded the husband, the property being solely the wife's, he had not a scintilla of interest in it; and his knowledge of the deed intercepted his marital rights, as before remarked. That a Court of Equity, upon the facts in this case, would have compelled Land, the intended trustee, to hold the property to the sole use of the wife, as against both himself and Jeffries, I can have no doubt. The mistake or ignorance in drawing the deed, would, though absolute on its face, have warranted its jurisdiction; nor would it impair the rule, that contracts under seal are not to be changed by parol evidence. Matters collateral to the deed may always be proved by parol evidence. *Ross v. Norvell*, 1 Wash. 14, and the cases there cited. Nor, in this first aspect of the case, could the husband insist, that the few hours possession of the property, after the deed was executed, and before the marriage, was inconsistent with the deed. Until that moment, and for some time after, it was impossible to deliver the property to the bargainee; as it appears by the evidence, that he was at too remote a distance to receive it. Before the marriage, he had no interest in it; and immediately after, he, and not the wife, had the sole control of the possession. She was no longer *sui juris*. I admit that if the intended trustee had permitted him to exercise rights of ownership over it, and she had failed to assert her claim to it in due time, there might be some ground for the imputation of fraud. But nothing of this appears in this case; and in any case, it ought very clearly to appear, to divest a wife of her rights; who, though as regards the property settled to her sole use, is to be considered as a single woman to all intents and purposes, cannot be so considered in a controversy with her husband, or those claiming under him, to impute laches to her. There is nothing in the Statute of Frauds affecting this question of possession. It depends on a rule of law which is laid down by Lord Mansfield, in the case of *Cadogan v. Kennett*, Cowp. Rep. 432, with great precision, and in several subsequent cases. He says, "if

271 *there is a sale of goods, and the vendor remain in possession and appear the owner, it is evidence of fraud, because goods pass by delivery only. Such a possession and ownership, unexplained by evidence of circumstances accounting for it, makes the deed fraudulent *per se*," upon the general principle that *prima facie* evidence uncontradicted, becomes conclusive of the fact which it is intended to prove. The case of *Edwards v. Harben*, and the

cases in this Court, go no further. It would be wasting time to produce cases shewing that such explanation may be given, when it is confined to unavoidable circumstances, in exclusion of any agreement or assent of the parties, inconsistent with the deed.

In the second aspect of the case, as regards the rights of the creditors of the husband, who are supposed to be more favoured, if the transaction was *bona fide* at the time the deed was executed, and all objection is removed to the short possession of the wife after that period and before the marriage, there is neither any thing in the Statute of Frauds, nor in the rule of law, to avail them. If indeed there was any contrivance between the parties, to give to the husband the effectual ownership of the property, and at the same time to defeat the claims of the creditors, the transaction would be justly considered as fraudulent. But, there is certainly no evidence of such a design in this case. The error in the argument on this point was, in treating the marital rights as in existence at the time the deed was executed. They potentially existed, it is true; but not in the will of the husband only. It depended on the will of the intended wife; the more especially as the property was hers, and nothing of the husband's property was to be affected by the deed. His creditors, therefore, if the transaction was *bona fide* as to all the parties to it, have nothing to complain of; although in the event that the marriage had taken place without the deed, they would have been entitled to the property. Claiming through the rights of the husband as they must do, against a fair and *bona fide* contract,

272 *they cannot stand on better ground than he does. As the title to the property passed out of the wife while sole, to the intended trustee Land, the marital rights did not attach upon it, and the pretensions of the creditors of Jeffries are no better than his. Nor will a Court of Equity be very willing to favor them in such case. In the case of *Hastington v. Gill*, 3 Term Rep. 620, note, which has been cited, Lord Mansfield said, that Courts of Equity, for ages past, have thought the rules of the common law too hard, and he thought it right to protect the property of the wife against the extravagance of the husband, in cases clear of fraud. This is done, he said, by the intervention of trustees; and thus far the wife is to all intents and purposes a single woman, and wherever the trust can be supported in a Court of Equity, it will consider the trustee entitled to the legal estate. In the case of *Cadogan v. Kennett*, he also said that the Statute of Frauds in such case ought not to be construed to make innocent parties sufferers.

Considering the deed in this case as an ordinary bill of sale on the face of it, it is not necessary to enquire whether it was duly recorded. There is no statute requiring such a deed to be recorded. If recorded, it would have given no notice of the trust intended. Nor, if it is to be considered as a deed of gift, was it material to record it in this case. In that character, it would have

passed the title to the property, with the knowledge of the intended husband, to the donee; and being executed with good faith, could not be complained of by him, or his creditors claiming through him. It was not a marriage contract, but a bona fide transfer of the property of the wife, with the knowledge of her intended husband. A construction which would let in his creditors in such case, would be in restraint of marriage, which would not be countenanced by the Court. It would be a fraud on the wife to defeat an object fair in its circumstances at the time, and in the attainment of which, there was no will to conflict with her own. *I admit that if an ex post facto character could be given to such a transaction, fraud might be imputed to it. But, there is certainly no ground for such imputation in the present case.

This view of the case renders it unnecessary to discuss the merits of the decision of the Supreme Court of the United States, in the case of *Pierce v. Turner*, of which I entirely approve. Taking the legal title to the property to be in Land, the intended trustee, he might have been left to his remedy at law against the defendant Stewart, but for the nature of the property in question, which, upon the principles of the Court in such cases, cannot be compensated for in damages.

On the whole, my opinion is, that the decree of the Chancellor be reversed, and the injunction perpetuated.

Decree reversed.

Bells v. Gillespie.

June, 1827.

Wills—Construction—Fee Tail.—A will is made between the 1st day of January, 1787, and the 1st day of January, 1820, by which the testator gives to his sons several tracts of land, and if either of them should die without lawful issue the part allotted to him to be equally divided among his surviving brothers, &c., this is a fee tail, and not an executory devise.

This was an ejectment brought in the Superior Court of Louisa county, by John Doe, lessee of Robert, George, Nathan and Ashley Bell, surviving sons and devisees of George Bell, deceased, by his last wife, against David Gillespie.

At the trial, the jury found a special verdict, the substance of which is fully stated in the opinion of Judge Carr. The Superior Court gave judgment for the defendant, and the plaintiff obtained a supersedeas.

This case, and the following one of

•Wills—Construction—Fee Tail.—In *Nowlin v. Winfree*, 8 Gratt. 346, a testator, who died in 1803, devised his estate, both real and personal, to his three daughters and "their heirs lawfully begotten of their bodies." "And, in case either of my daughters should die without heir or heirs as above mentioned, the surviving ones to enjoy their equal part." ALLEN, J., delivering the opinion of the court, said (p. 348): "The question presented by the special verdict as to the proper construction of the will of Benjamin Hall deceased, has been frequently under consideration in this court. The case of *Bells v. Gillespie*, 5 Rand. 273, presented precisely the same question, and the principle there settled rules this case. That case conformed to the earlier decisions of this court, giving a construction to the laws docking entails; and it has been recognized and followed in the subsequent cases of *Broadbuss v. Turner*, 5 Rand. 308; *Griffith v. Thomson*, 1 Leigh 321; *Callava v. Pope*, 3 Leigh 103; *Deane v. Hansford*, 9 Leigh

Broadbuss v. Turner, involving the same principles, were argued together.

Leigh, for the appellant, referred to the cases of *Pells v. Brown*, Cro. Jac. 590; *Fearne on Cont. Rem.* (Butler's edition,) 468, 470; *Hill v. Burrow*, 3 Call, 350; *Porter v. Bradley*, 3 Term Rep. 143; *Fearne*, 474, notes; *Crooke v. De Vandes*, 9 Ves. jr. 197; *Roe v. Jeffery*, 7 Term Rep. 589; *Hackley v. Mawley*, 3 Bro. Ch. Cas. 82; *Goodrich v. Harding*, 3 Rand. 280; *Hill v. Burrow*, 3 Call, 342; *Tate v. Tally*, 3 Call, 354; *Sydnor v. Sydnor*, 2 Munf. 263; *Gresham v. Gresham*, 6 Munf. 187; *Timberlake v. Graves*, 6 Munf. 174; *Didlake v. Hooper*, Gilm. 194; *Butler's Fearne*, 474, citing *Roe v. Scott*, in a note; *Richardson v. Noyes*, 2 Mass. Rep. 56; *Butler's Fearne*, 478; *Frodick v. Cornell*, 1 Johns. Rep. 439; *Morgan v. Morgan*, 5 Day's Rep. 517, cited in 4 Com. Dig. 186, (new edition;) *Lyon v. Burtiss*, 2 Johns. Rep. 483.

Stanard, contra, referred to *Fearne*, 418, 419, (Butler's edition;) *Bryce v. Smith*, *Willes's Rep.* 1; *Sydnor v. Sydnor*, 2 Munf. 263; *Roe v. Scott*, cited in *Fearne*, 474; *Clatchey's Case*, *Dyer's Rep.* 330; *Chaddock v. Cowley*, Cro. Jac. 695; *Holmes v. Minet*, T. Raym. 452; *Wright v. Halford*, Cowp. 331; *Lillybridge v. Ady*, 1 Mass. Rep. 224; *King v. Rumball*, cited in *Fearne*, 243; *Fearne*, 476; *Ib.* 479, 485; *Forth v. Chapman*, 1 P. Wms. 667; *Tite v. Willis*, *Talbot's Cases*; *Barlow v. Salter*, 17 Ves. 479; *Doe v. Ellis*, 9 East, 362; *Tenny v. Agar*, 12 East, 253; *Romilly v. James*, 6 Taunt. 263; *Doe v. Fonnerneau*, Doug. 504; *Anderson v. Jackson*, 16 Johns. Rep. 382.

*June 11. The Judges delivered their opinions.†

JUDGE CARR.

This is an action of ejectment. The jury have found a special verdict, of which the following abstract contains the material facts in the cause. On the 3d of March, 1787, George Bell made and published his will in due form, and died in the same year. He had (as appears from the will) a son and daughter by a former wife, and five sons by the second. To the children by the first wife, he gives some trifling articles of personal property. He lends to his wife, during life or widowhood, a tract of land particularly described, and some personal property. To his son George, he gives a tract of land, he paying to his younger brothers 20l. a piece, as they arrive

253. The principle thus firmly established by a series of adjudications has become a rule of property in the construction of wills made prior to 1819, and ought not now to be questioned, the more especially as but few cases are likely to occur hereafter in which the question can arise. According to these authorities the will in this case created an estate tail in the first taker by express words; and the bequest over after the death of the daughter without heirs was an executory limitation after an indefinite failure of issue, and therefore void, and the daughters took the slaves in absolute property." But see 1 Rev. Code, ch. 90, § 26; Va. Code 1887, § 2423.

On this subject the principal case is also cited in *Broadbuss v. Turner*, 5 Rand. 308, 310, 315; *Ball v. Payne*, 6 Rand. 78; *Griffith v. Thomson*, 1 Leigh 329; *Jiggetts v. Davis*, 1 Leigh 405, 412; *Seekright v. Billups*, 4 Leigh 110, 111; *Doe v. Craigen*, 8 Leigh 453; *Callis v. Kemp*, 11 Gratt. 86; *Tinsley v. Jones*, 13 Gratt. 298; *Moore v. Brooks*, 12 Gratt. 150; *Randolph v. Wright*, 81 Va. 618.

See generally, monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 309.

†The President, absent.

at age. To his sons Nathan, Ashley and Anthony he gives the balance of his land, to be equally divided among them. To these devisees, there are no words of inheritance superadded; but it may be plainly collected from the will, that the testator meant to give them the fee. Then comes the clause on which this case depends. "I give and bequeath unto my son Pleasants the land which I lent to my wife before mentioned, containing one hundred and fifty acres, to him and his heirs, after the decease of my widow, or sooner if she marries, as before provided; and further my will is, that if either of my said sons, to whom I have bequeathed lands, should die without lawful issue, that the part allotted them be equally divided among the surviving brothers, children of my last wife."

In 1804, the widow and Pleasants sold and conveyed the land to the defendant. In 1805, Pleasants died, without marriage or issue, and the widow in 1815. The plaintiffs are the surviving brothers by the last wife. The Court below decided the matters in law arising on the verdict, 276 *to be for the defendant, and judgment was rendered accordingly; from which the appeal is taken.

The question is, what estate did P. Bell take in the land? Was it a fee simple, with an executory devise over to the surviving brothers? Or, was it an estate tail, enlarged by our statute into a fee?

Executory devisees are a mere indulgence granted to men's wills, lest the intention of the testator should be wholly defeated, and are only resorted to when the limitation can in no other way be sustained. Hence the rule laid down by Lord Hale in *Purefoy v. Rogers*, 2 Lev. 39, that a limitation, which by possibility may take effect as a contingent remainder, shall never be construed an executory devise. As executory devisees tend to a perpetuity, the policy of the law has restricted them to a reasonable time; which has been settled to be a life or lives in being, and twenty-one years after. Unless they are so limited that the event on which they depend must happen within this period, they are void in their creation. Thus, a devise to A. and his heirs, and if he die without issue living at his death, then to B. and his heirs, is an estate in fee to A. with an executory devise to B., and the devise to B. is good, because the event which determines its existence or non-existence, is B.'s death. So, if in any other way, it appear by "fair demonstration," that the testator intended to limit the dying without issue to the period established by law, the executory devise will be valid. But, a devise to A. and his heirs, and if he die without issue, to B. and his heirs, can vest no estate in B. by way of executory devise; because, coming after the estate tail in A. it may take effect as a remainder; and even if this objection did not exist, it would be void as an executory devise; because, being limited after an indefinite failure of issue, it is too remote. In England, estates tail may be destroyed by fine and recovery; with us, by statute. In either case, the remainder falls with the particular estate

which supported it. But if, instead 277 of a remainder dependent *on an estate tail, it be an executory devise after a fee simple, it cannot be affected either by the fine and recovery of the tenant, or the operation of our law. Hence the struggle so often repeated in the English Courts and ours, between the alienage, heirs or devisees of the first taker, and those who claim as executory devisees.

In our case, after giving each son a fee simple in his land, the testator says, "My will is, if either of my sons should die without lawful issue, that the part allotted them be equally divided among the surviving brothers, children of my last wife." What did he mean? Did he look to a definite or indefinite failure of issue in the first takers? It seems to me clear, that he meant that the land given to each son should be enjoyed by the family of that son, so long as any branch of it remained; and that whenever it failed, the land should go over. That he meant the issue of the first taker to enjoy the land, so long as they lasted, is directly and positively declared. Why should he fix an earlier period, than the failure of this issue, as the epoch at which the second limitation should be determined? P. Bell and his immediate family, were the first objects of his bounty; his other sons and their families, the second. Why should he fix the period of Pleasants' death, as the moment at which, if his brothers could not take his estate, they never should take? Suppose P. Bell had left a child at his death, and that child had died the day or the hour after him. Did the testator mean, in such a case, that his other sons should have no part of, or interest in, P. Bell's land? I can neither feel nor understand the motive, which could prompt a father to this. Why he should postpone the interests of his other sons to the failure of the issue of P. Bell, I can clearly see; but, I cannot perceive why time should be so important with him, as that he should say to his other sons, "though it is my will that you have the land of P. Bell if he has no child at his death, yet if he leave a child, you shall not have it, though that child die the next hour." If he had had this idea in

278 his mind, *would it not have been more natural and direct to have said, "It is my will, that if either of my sons die without issue living at his death, his part shall be equally divided among his surviving brothers?"

It is insisted, however, that express words are not necessary to tie up the failure to the death; that any words which make the intention clear are sufficient; and that those used here, leave no doubt of the testator's meaning. The words are, that the part of the son dying without issue "be equally divided among the surviving brothers, children of my last wife." Great reliance was placed on the words "surviving brothers;" but the word survivor, is not a word of limitation. Dying without issue, have been long settled as words of limitation, giving an estate tail. The question is, do these words, surviving brothers, indicate so strong an intention to tie up the failure of issue to the death

of the first taker, as to prevent the words dying without issue, from having their settled meaning and effect? There are numerous cases upon this subject. I shall not attempt to cite them all; nor to reconcile them with each other. I will state a few to shew the ground on which I rest, in thinking that the words surviving brothers have not the effect contended for.

Chadock v. Cowley, Cro. Jac. 695, decided four years after Pells v. Brown, and by three of the same Judges. The testator devised all his lands in B. to Thomas, his son, and all his lands in E. to F. his son; and added, "Item, I will that the survivor of them shall be heir to the other, if either die without issue." Held by all the Judges (absente Lea, C. J.) that it was an estate tail in Thomas.

In Hope v. Taylor, 1 Burr. 268, R. S. devised to J. W. his sister's eldest son, his house in the brook with the out buildings and 30l.; to his nephew R. T. 50l.; to his nephews C. T., R. T., W. T., 29 acres of arable and meadow land, &c.; then to W. T. his sister's son, the house in question, and gives him also 10l.; to his brother-in-law, W. T. 5l.; and declares his will

279 and meaning to be, that *if either of the persons before named die without issue lawfully begotten, then the said legacy shall be divided equally between them that are left alive. Lord Mansfield and the whole Court decided, 1st, that the word legacy comprehended the land as well as the personal estate mentioned in the will; 2d, Lord Mansfield said, the testator meant this second clause as a restraint on the first, and meant that the issue should have it; and the whole Court decided that an estate tail was given.

In Roe v. Scott & Smart, decided in C. P. 27th George 3d, 2 Fearn, 209; testator devised certain lands to his son James, to him, his heirs and assigns for ever; other lands to his son John, to hold to him, his heirs and assigns for ever; other lands to his son Thomas, to hold to him and his heirs and assigns for ever; and after charging the land of Thomas with an annuity, added, that his will and mind was, that if either of his three sons should depart this life without issue of his or their bodies, then the estate or estates of such sons should go to the survivors or survivor; and if all his said sons should happen to die without such issue, then he devised all the said premises to his four daughters, their heirs and assigns forever. Held, that the sons took estates tail. It would be difficult to distinguish this case from the one before us. They are alike in all their branches; the fee given to the three sons; then if either die without issue, his estate to the survivor or survivors. If it be objected, that the word estate here operates to carry the fee to the second taker; I will shew presently that our case has this feature also.

In Barlow v. Salter, 17 Ves. 479, the devise was in these words: "All my estate, real and personal, to my daughter, M. V. to her and her heirs, and half the navigation money for her natural life; and in case she dies without issue, all to be divided between my four nephews and nieces, N.

W. C. and E.; C's part only for life, and her part to be divided between the survivors." The bill was filed by one of the

nephews against the daughter, praying 280 *that the nephews and nieces might be declared entitled on the event of the daughter's dying without issue living at her death, and praying an account accordingly. It was admitted that there was no real estate; and this makes the case the stronger; for, it is well known that slighter words will be taken to tie up the failure to the death, in personal than in real property. The Master of the Rolls went into the consideration of the words "in case she die without issue." The Judges in some of the early cases, he said had inclined to hold these words to mean issue at the death of the person named; but, he thought that ever since the case of Beauclerk v. Dormer, a different rule had prevailed. "The Court ought not certainly to profess to adopt one of these rules, and yet to proceed as if the other was the right one; which however is done, where the meaning of the words is held to be narrowed by expressions or circumstances that do not raise any fair inference of a restrictive intention. The single circumstance in this case relied on in favour of the restrictive construction is, that one of the four persons to whom the bequest over is made, is to take a life interest in her part, which is to be divided equally among the survivors." In a further part of his opinion, he observes that the word "survivors as used here, has the same sense as to word others, as has been frequently decided." He concludes by pronouncing it an estate tail in the daughter, and dismissing the bill.

Let us come now nearer home, and examine some of the decisions of this Court. If I mistake not, we shall find that they settle this question even more conclusively than the English cases.

Carter v. Tyler, 1 Call, 143. Will made in 1759. "My will is, that my son W. C. have all my lands" (describing a particular tract,) "to him and his heirs lawfully begotten, for ever; &c. I give to my son J. C. all the remaining part of my land," &c. (describing the tract,) "to him and his heirs lawfully begotten, for ever; and if either

281 of my sons should die without issue, my will is that the whole *go to the survivor; and if they both die without issue lawfully begotten, then my will is, after my wife's death, that the lands be sold, and the monies thereon be equally divided between my daughters then living, and their heirs forever." I consider this a case deserving the utmost weight. It is the first we meet with in our books, after the passing the laws docking entails. It was decided by the unanimous opinion of the Court, consisting of Pendleton, Lyons, Carrington, Fleming, and Roane. These venerable and able men were actors in those eventful scenes, which gave birth to these laws; some of them, probably, members of the Legislature which passed them. The cause was argued with great learning and ability by the most distinguished counsel then at the bar. Mr. Call, and Mr. Washington, put forth all their strength to

prove that the limitations over were not destroyed by the statutes. The ground was taken very strongly, that they were executory devises. But the Court, in a clear, forcible, and decided opinion, delivered by their President, pronounced that the sons took estates tail, and that the limitations over were void.

Let us examine for a moment the points of resemblance between this case, and the one at bar. I think we shall find, that it contains much stronger evidence than ours, of an intention to tie up the failure of issue to the death of the sons. 1st. If one of them die without issue, the whole goes to the survivor, without any words of inheritance superadded. 2d. If both die without issue, then, after my wife's death, the lands to be sold. Here is a provision which shews that he thought the event he was contemplating, (the death of his sons without issue,) might occur in the life of their mother; strong to evince that it was not an indefinite failure of issue. But, this is not all. 3d. The lands were to be sold, and the monies thereon to be "equally divided among my daughters then living and their heirs." When living? Why, living at the death of the sons without issue, and of the mother, if she
282 *should survive them. To me this appears vastly stronger than the case at bar, to shew an intention to restrain the failure of issue to the death of the sons; and yet a full Court unanimously decided against the executory devise. This decision was made in 1797, near thirty years ago. It has never been questioned, but often referred to by the later cases as authority. If we now overrule it, who can tell how many titles, resting on the basis of this very decision, we may shake to their foundation?

The next case is that of *Hill v. Burrow*, 3 Call, 342, decided in 1803. The contest was renewed upon the old battle ground; whether it was an estate tail, or a fee with an executory devise limited upon it. The intention of the testator, and its decisive weight in the construction of wills, were strongly pressed; and *Porter v. Bradley*, *Roe v. Jeffery*, and that whole class of cases brought before the Court. They were again unanimous in their decision, that it was an estate tail. Judge Lyons has the following sound and pertinent remarks: "It is to no purpose to be arguing about the intention, unless the words will authorise a restricted construction; for, mere intention cannot prevail against a settled rule of interpretation, which has fixed an appropriate sense to particular words; because, when the sense is once imposed, they become the indicia of the testator's mind, until the contrary is shewn by countervailing expressions. It is better that it should be so too; for, the law ought to be certain; and where the rule is once laid down, it should be adhered to. Otherwise, what is called liberality at the bar, will degenerate into arbitrary discretion, and all depends upon the will of the Judge." He adds, "An infringement of the rule, instead of supporting the Legislative intention, would go directly to defeat it; and would tend, under the notion

of executory devises, to introduce that very clog to alienation, which the statute meant to abolish."

The case of *Tate v. Tally*, 3 Call, 354, followed soon after. The words of the devise were nearly the same; *but, the will was made after the Act of 1776, and this furnished to the ingenuity of counsel a ground of distinction at least plausible. Mr. Wickham pressed this point with great power. He argued, that in England estates tail were implied for the benefit of the issue: that here such implication would have exactly the contrary effect: that a devise of lands since 1776, should be placed on the same ground with personal estate; because, the first devise will now give the whole estate in lands as in personals; and the implication would disappoint the intention of the testator. The Court, however, held fast to the former decisions, pronounced it an estate tail, and that the construction must be the same since as before the statute.

Next comes the case of *Eldridge v. Fisher*, 1 Hen. & Munf. 559. Will in 1784. Devise of land and personal estate to his son and his heirs, and if he die without lawful heirs, to the grand-son of the testator. The counsel for the grand-son, in whose favor the Court below had decided, said that after the former decisions he should surrender the case, if it did not present an important distinction. Real and personal estate were devised by the same words in the same sentence. The whole Court considering the case settled, decided the estate of the first taker to be an estate tail, and reversed the judgment of the Court below.

Sydnor v. Sydnor, 2 Munf. 269. Will in 1779. Testator gave to his four sons a tract of land each, to him and his heirs for ever. "And it is my desire, that if any of my four sons should die without heirs of their bodies, that then the parts of them so dying, shall be equally divided among the survivors and their heirs." One of the sons died without issue, and devised his land to a nephew. The surviving brother sued for it; and the Court below, on a special verdict, decided the law to be for them. On the appeal, great reliance was placed on the word survivors, and the whole doctrine again gone into. The Court unanimously (*Fleming*, *Roane*, 284 *Brooke*, and *Cabell*.) considered *it a settled case; and without delivering opinions, reversed the judgment of the Court below. I consider this a case strongly in point. The only imaginable distinction between it and the case at bar, is, that there the devise is to the survivors and their heirs; in our case, to the survivors, without words of inheritance superadded. But to me, this seems a distinction without a difference. For I hold, that in this case equally as in that, the survivors were intended to take, and would take, (if they took at all) a fee simple. Because, in the commencement of his will, the testator declares his intention of disposing of his worldly goods; and we know that these words, and others of the like kind, will, in favor of intention, and to prevent a partial intestacy, be transposed to any subsequent devise in the will, and make such devise as

effectual in carrying the fee, as if words of inheritance had been used. For the reasoning and authorities on this subject, I refer to *Goodrich v. Harding*, 3 Rand. 280.

The other cases in our books on his subject, are *M'Clintick v. Manns*, 4 Munf. 328; *Tidball v. Lupton*, 1 Rand. 194; *Kendall v. Eyre*, 1 Rand. 288, and *Goodrich v. Harding*, 3 Rand. 280. These cases are in perfect harmony with the former, and present an unbroken series of decisions for the last thirty years. Surely this ought to settle the law.

As to the idea that the law of 1819, is an expression of the Legislative opinion, that the Courts have heretofore decided wrong on this subject, and furnishes us with a fair opportunity to break the toils in which former decisions have bound us, I would remark, 1. That it is not the province of the Legislature to censure the exposition which the Courts give to any law; nor ought we to impute to them, on slight ground, such usurpation; 2. That the words of the Act imply no such censure; but acknowledging the existing law to be as settled by the Courts, mean merely to change it for the future; saying that in a will or deed hereafter made, a contingent limitation depending upon the

285 *dying of a person without heirs, heirs of the body, issue, issue of the body, &c. shall be held to take effect, when such persons shall die without heir, issue, &c. living at the time of his death, or born within ten months. This law is entirely prospective. The Legislature have justly thought, that to give it an *ex post facto* effect, would be wrong. Shall the Courts then give it such operation? So far from this law furnishing a fair opportunity to overturn the settled course of decisions, I think it shews us the propriety of a different line of conduct, of leaving this subject exactly where the law has left it. The great advantage which a change of the law by the Legislature, has over a change by the Courts, (even if this could properly be done) is, that the one is a public rule, binding all alike, and looking to the future only. The other is a rule, which, as the Court makes, it may break; and which affects past, as well as future cases. For the last century or two, dying without heirs, issue, &c. has been settled to mean a general failure, not tied up to the death of the first taker. If we say now, that these decisions are all wrong, will not our successors have more right to reverse our decision, than we have to reverse one with the frost of centuries upon it? But our decision will be retrospective; for, as we do not assume the power of making, but only declaring, the law, if we say that these decisions are wrong, all the estates which have been settled, all the contracts which have been made, all the titles which rest on the foundation of their correctness, are uprooted. Nor can we see the extent of the mischief. A few cases only have come before us, for some years back; because, the law being settled, counsel would generally advise against it. But, only open the door; proclaim to the world that all which has heretofore been done is wrong; and then we shall see the wild uproar and confus-

ion among titles, which will follow. Is it not better to prevent this, by holding on in the course we have so long run? The cases which arose prior to the law of 1819, must cease after a time; and then that law settles the matter.

286 *JUDGE GREEN.

If in this case, the limitation over to the surviving brothers of *Pleasants Beil*, had been to them and their heirs, no question could have been raised, that the intention of the testator to provide for the issue of *Pleasants* indefinitely, so long as any existed; and upon the general failure of his issue, for his brothers and their heirs, would have reduced the express estate in fee given to *Pleasants*, to an estate tail, for the purpose of effectuating this general intention, which could not, upon any other construction, be carried into effect. It would be precisely the case of *Sydnor v. Sydnor*, 2 Munf. 269, over again. In that case, it would be immaterial to determine, whether the testator intended by surviving brothers, all the other brothers; a meaning sometimes given to the word survivor; or whether he intended only, such of the brothers and their heirs who survived *Pleasants*, to take. In either case, the limitation over would be a remainder after the estate tail; in the first case, vested, in the other, contingent; and in both, defeated by the operation of our statute converting estates tail into absolute estates in fee simple.

It is however insisted, that as the law was before the 7th day of October, 1776 the limitation over to the surviving brothers, without the words and their heirs, or any other words of perpetuity, gave them only life estates, upon the contingency of their surviving *Pleasants*; and as that contingency must happen within a life or lives in being, the limitation over could be supported as a good executory devise; and therefore, there is no necessity to reduce, by construction, the express estate in fee given to *Pleasants*, to an estate tail, in order to effectuate the intention of the testator. This would be true, if there was nothing to prove that the limitation over to the surviving brothers was a limitation of the fee, and if the case of *Roe v. Jeffrey* is law, of which I doubt. It may however, be ad-

mitted as law, for the purpose of this 287 case. In enquiring *whether the limitation over was of an estate in fee, I pass over the effect which the introductory clause of the will may have upon this question, and put it entirely upon the force of the Act of 1785, which took effect on the 1st day of January, 1787, and provided that "every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to be granted, conveyed or devised, by construction or operation of law." The will being made, and the testator having died in 1787, after this Act was in force, the statute is decisive, that the surviving brothers took a fee, if any estate; and *Pleasants*, therefore, an estate tail, unless we are not at

liberty to take into consideration the effect of this statute, in determining whether Pleasants took an estate tail or not. This question has an important influence in the construction of wills made since the 1st day of January, 1787, and before the 1st day of January, 1820, when the Act respecting executory limitations took effect, and ought therefore to be at once decided.

Estate tails were unknown to the common law. They were created by the statute *de donis conditionalibus*, which provided, "*voluntas donationis secundum formam in charta doni sui manifeste expressam de cætero observetur.*" In executing this law, it was the duty of the Court to ascertain from the whole will taken together, whether the intent of the testator was to provide for the issue of the first taker; and if so, without regard to the particular estates given in terms by the will, to hold that the first taker had an estate tail, if the issue could not otherwise be provided for, according to the intention of the testator. Thus, an express estate for life or in fee was converted into an estate tail, if that were necessary to effect this intent in favor of the issue. But, if not absolutely necessary

for that purpose, the state expressly given was not disturbed. This statute was in force in Virginia, from the first settlement of the country, until the revolution; was adopted by the ordinance of the convention of May, 1776, with all other British statutes in aid of the common law prior to the 4th year of James 1st, as the law of Virginia; and continued in force until December, 1792, when it was repealed with all other British statutes. The statute *de donis* was in force when the will in question was made, and when the testator died; and if no other statute had any influence on the question, the Act of 1785 must have had a decisive influence on its construction. In England, and in Virginia, before the Act of 1785 took effect, a devise to one in fee, and if he died without issue, then to another and his heirs, was construed to give to the first taker an estate tail, notwithstanding the express estate in fee given by the terms of the will; because, it was apparent that the testator's intent was to provide first for the issue of the first taker, and after that, for the second taker and his heirs; both of which intentions would be frustrated, if the first taker had a fee simple estate, since in that case the issue could claim nothing per formam doni, and the limitation over would be void, as being a fee mounted upon a fee. But, the Court did not, by construction, destroy the express estate in fee given by the will, unless there was such a necessity for the sake of effectuating the testator's intention. If, therefore, he directed the estate to go over to another upon the death of the first taker without issue then living, there did not appear so decisive an intent in favor of the remote issue of the first taker; and the limitation over could take effect, in the event provided for, as an executory devise, and the testator's intent in that respect carried into effect. The express estate in fee, therefore, was not reduced by implication to an estate tail. Upon this principle, a limitation over of

an estate for life was held to be a good executory devise, and not to affect the fee given to the first taker; and a limitation to one, without words of perpetuity, was, in effect, the same as an express limitation for life. In that case, if there were no ultimate limitation over of the fee, the heir of, or the purchaser from, the first taker, would be entitled to the estate in fee simple, after the estate for life expired.

After the 1st of January, 1787, a limitation over without any words of perpetuity or limiting a smaller estate, gave a fee; and the reason, upon which a limitation over for life was held to be good as an executory devise, no longer existed. Every reason, upon which it was thought necessary to limit the estate of the first taker to an estate tail, when the limitation over was in fee, would apply to the case arising under the statute. Can it be for a moment supposed, that if a statute like ours of 1785, was passed in England, it would not have this effect upon the construction of wills there? If it had not, the most extraordinary consequences would follow. The person to whom an estate was given after the failure of issue of the first taker, upon the argument that he was only entitled to an estate for life, having gotten the estate on that ground, would be entitled to it in fee; whereas, if he was only entitled in reality to an estate for life, the fee would remain to the heirs of the first taker, or the purchaser from him. In other cases, other consequences as absurd as this would arise. *Loddington v. Kime*, 1 Salk. 224. Thus a devise to A. who has no child, for life, and then to his issue and their heirs, if he should have any, and if he die without issue, then to B. and his heirs; A. would be entitled to an estate for life only, with remainder in fee to his issue as they came in esse, if he had any; and if not, then remainder to B. and his heirs. 3 Salk. 126. But, if the devise was, before the Act of 1785, to A. for life, and to his issue if he have any, and if he die without issue, then to B. and his heirs; A. would have an estate tail, with remainder in fee to B. In both cases it is apparent, that the testator meant to give only a life estate to A., and provide for the issue of A., as long as he had any; and then for B. and his heirs. In the first case, all those objects are effected by the estates expressly given by the testator, because the estate given to the issue of A. is a fee. But in the other, an estate for life only being given to the issue of A., the testator's object of providing for A's remote issue, would be frustrated, unless A. was held to have an estate tail; by which, all the testator's intentions would be carried into effect, except only that of limiting an estate for life to A. Suppose, after our statute of 1785, we refuse to apply the rule prescribed by it to a case like the last stated. Then the estate tail of A. raised by implication, being converted by our statutes into a fee simple, the intention of the testator, both as to the issue of A. and B., and the estate of A. would be utterly frustrated. But, apply the rule furnished by the statute, and consider the

issue of A. to be entitled to a fee simple; and the testator's intentions as to A. and the issue of A. and as to B. and his heirs, would be carried into complete effect, without defeating any part of his intentions. It is hardly possible, that any Legislative provision could have been intended to produce such consequences. Let us examine the only statutes, which can possibly be supposed to prohibit the Court from giving effect to the Act of 1785, in construing a will with a view to ascertain whether it created an estate tail or not.

The Act of October 7, 1776, only declared, that "any person who then had, or thereafter might have, an estate tail, should, from thenceforth, or from the commencement of such estate tail, stand ipso facto seised in full and absolute fee simple." The Act of October, 1785, ch. 62, provided, that "every estate which, on the 7th of October, 1776, was an estate tail, shall be deemed from that time to have been; and from thenceforward to continue, an estate in fee simple; and every estate which since hath been limited, or hereafter shall be limited, so that as the law aforesaid was, such estate would have been an estate tail, shall also be deemed to have been, and to continue, an estate in fee simple."

The expression as the law aforesaid 291 was, refers *to the law as it was before the 7th of October, 1776, when the Act converting estates tail into fee simple estates, passed. This is the literal import of the words; and so they were understood by the Legislature at the revival of 1819, in which the revised Act refers expressly to the law as it was before the 7th of October, 1776. Was it intended by this expression to refer to all the particular decisions in England and Virginia, anterior to the 7th of October, 1776, as the rules for decision in all future time, without regard to the effect which future laws might have upon the reasons, on which those decisions were founded? Or, to adopt the principles upon which those decisions were founded? The decisions before that time were founded upon the principle, that where the intent of the testator was to provide indefinitely for the issue of the first taker, and that object could not be effected without implying an estate tail in the first taker, such an estate tail must be implied, although it controlled the will of the testator in respect to the particular estates given in terms by his will. This necessity to imply an estate tail, not given in terms, arose sometimes from the existing law of primogeniture, which would defeat the intent to provide for all the issue, unless the first taker was construed to take an estate tail; sometimes from the effect of the then existing law requiring words of perpetuity to give more than an estate for life; by force of which, the immediate issue of the first taker would be limited to an estate for life, unless the first taker took an estate tail. But, when the law of primogeniture was abolished, and all the issue admitted to participate in the inheritance, and an estate in fee was allowed to be given, without words of perpetuity, by our statutes, the reason upon which the former decisions, turning on

these points, were founded, was taken away. By preserving the ancient principles, and applying them to this new state of things, the results would be different; but in both cases, conforming, as near as possible, to the main intentions of the testator to provide for the issue. When 292 the Act of 1785 was passed, the statute de donis was still in force; and by the expression as the law aforesaid was, the Legislature could not have intended to say, that an express estate tail should be construed to be an estate tail; but it was easy to foresee, that when a question arose whether an estate tail should be implied or not, it might be argued that, as an estate tail could not exist after it was implied, there could be no motive for implying it; and that, therefore, no such estate could be implied since the 7th of October, 1776; an argument repeatedly urged since, and overruled. It was to obviate this objection to implying estates tail, and for this purpose only, that the act declared that those estates which would have been fees tail as the law aforesaid was, should be deemed estates in fee simple. It was absolutely necessary to declare, that estates tail might be implied from the intent of the testator to provide for issue, in order to effect the object of the Act of 1776, which was to give to the first taker the power of providing for his issue by giving them the estate, without compelling him to do so, wherever it appeared that the testator intended to provide for the issue; a policy which might frequently be frustrated, if an estate tail could not be implied. As if a devise were to A. for life, and if he died without issue, then to B. and his heirs, the obvious intention of the testator that the issue of A. should take, would be frustrated, unless A's life estate could be enlarged to a fee tail (converted by the statute into a fee simple,) by implication: For, in no other way could they take any thing in any possible event.

This construction would have prevailed upon the statute of 1776, if the Act of 1785 had not expressly prescribed it. That Act prescribed it from excessive caution; and upon the whole, I think the rule prescribed by the Act of 1785 was, that an estate tail should be implied, whenever under our existing laws, it was necessary to do so, in order to effectuate the intention of the testator in respect to the issue; the Act 293 adopting for that purpose the reason *of the law, and not the particular cases decided before the 7th of October, 1776; and that upon the reason of the law. Pleasants Bell had, in this case, an estate tail, and not a fee, by force of the will; or, if he had an estate in fee simple by the will, the limitation over to his surviving brothers was in fee, and therefore void.

JUDGE COALTER.

This case arises on the will of George Bell, made on the 3d of March, 1787, and on which will these questions arise:

1. Whether Pleasants Bell took an estate in fee with remainder to his surviving brothers, which, by the Act of 1785, must be in fee, although no words giving a fee are in the will; and is that remainder lim-

ited on the contingency of a dying without issue at his death, so as to be good as an executory devise? Or,

2. Was it intended to give an estate tail to Picasants Bell, which would be the case if an indefinite failure of issue was intended?

It is said to be an established rule, that when a devise is to A. and his heirs, and if he die without issue, or to him generally, and if he die without issue, it is an estate tail; and that this rule does not yield except to express declarations to the contrary, or to effect some obvious intention in his mind at the time. On the other hand it is said, that the happening of the contingency need not be tied down by express words; but, if it appears from the whole will together, it is enough; that this is a good limitation, at least according to the more modern decisions in England, and at all events, would be a good limitation of a personal subject; and that however it may be, if an estate is given to one for life, and if he die without issue, as to inferring an estate tail, it is not so easily to be inferred when the first taker has an express fee by the will.

The difference between a will of real and personal property, in relation to estates tail by implication, is stated *by 294 Judge Pendleton in his clear and plain manner, in the case of Dunn v. Bray, 1 Call, 294. He says, cases have been cited to prove that in a devise of lands to one for life or in fee, and if he die without issue, remainder over, &c., this would turn the first estate into an estate tail, in order to favor the testator's intention of preferring the issue to the remainder-man; but in principle, the distinction, in case of personal property, is clear, since the implication in the case of lands to favor the intention, would be misapplied, if made use of to destroy that intention in the case of personals.

Our Act of 1776 docking entails, and the Act of 1785 reenacting that, and also dispensing with words of inheritance, introduced an entire new state of things in this State, on this subject. Lands were put precisely in the situation of personal property, not only as to the want of power to entail them, but as to the quantity of the estate taken, where no estate less than an absolute one is limited. Under this state of things it was reasonable to expect, that the Courts would have construed wills of lands and personals, made after 1776, alike. It is said, however, that not only the Acts of 1776 and 1785 themselves, but our decisions under them, have tied us down to construe wills as to real estates made since 1776, in the same manner as if estates tail could now be made; that is, that notwithstanding the essential change in the condition of testators here, we are to decide on their wills, as if made in England under their statute de donis; and that although we are thus not to permit the absence of power to make an estate tail, to weigh in the construction of wills, yet, on the other hand, we are not prohibited, either by the statute, or our decisions, from looking at the other part of the system, by which realty and personality are put on the same footing, to wit, that part of the statute, by

which an absolute estate passes, unless where a less one is limited; and therefore we are to take that part of the Act into view, though not the other. Indeed it seems to me even to be insisted on,

295 *that we shall construe a will of lands, as if the words to him and his heirs, wherever they are supplied by the statute, were actually in the will. But the presence or absence of such words in a will of personals, has a great effect on the construction, when enquiring into the intent, in relation to the time when the contingency is to happen; though it will not affect the quantity of the estate given.

If, however, the Acts themselves oblige us to adopt the course of construction insisted on, as it regards one branch of the system, I cannot perceive why they shall not extend to the whole. The law dispensing with words of inheritance, is no more law aforetime, than that destroying entails. Whether we are to consider that part of the Act of 1785, dispensing with words of inheritance, in connection with this will, is, therefore, the point now to be decided in the first place; because, if we are not, but are to consider this will in the same manner in this respect, as if it was made before the Act of 1785 went into operation, then the case of Goodrich v. Harding, and many other cases in England and here, (it seems to me at present,) seems sufficient to support this as a good executory devise. The point now under consideration, seems purposely to have been left open by at least two of the Judges in that case.

It seems to me at present, then, that if either the Acts themselves, or the decisions of this Court, bind us down to construe wills of lands, independent of the change in our condition wrought by those very laws, that we are bound throughout. The change in placing realty on a level with personality, as to the power of entailing, was no less important as applicable to construction and finding out intent, than the change as to words of inheritance; and indeed, to my mind, much more so; and being part of the very same law, if we are inhibited from viewing or weighing the effect of the one, we must be bound also as to the other. There is the same reason too, for breaking through the decisions in toto, as for doing so in part.

Indeed more so; for, looking at a 296 part only of the system *may even lead to greater errors, than shutting our eyes to the whole.

What is the law, and what have been our decisions on this subject? And how far are we to be bound, especially since the Act of 1819, to construe wills in this country, as they do wills in England? This, to me, is a momentous question, especially since the Legislative construction by the Act of 1819. Do the Acts themselves of 1776, and 1785, tie us down to decide as if we were sitting in Westminster Hall, judging of a will made in England?

It is said, (and the idea has met with the approbation of at least some of the Judges of this Court,) that the use of the words, as the law aforetime was, in the Act of 1785, as well as the phraseology of the Act of 1776, do so confine us. This idea, I hum-

bly, and with great deference think, is not well founded; and that, therefore, if we have erred in this respect, we cannot impute it to the Legislature; and consequently, if an erroneous supposition that the law imposed this duty on us, has led us into this error, it becomes a matter of serious consideration what course we ought to pursue. Were we bound by law, as it is said we were and are, to adopt and pursue this course of decision?

This leads to the enquiry, how and for what purpose, these words were introduced into the Act of 1785?

Before the statute *de donis*, all inheritances were estates in fee simple or fee conditional. Tenant of lands entailed had before this statute a fee simple conditional subsequent; and although he had issue, he had not thereby a fee simple absolute; for, if he afterwards died without issue, the donor could enter in his reverter. 1 Inst. 13. But after issue, he could aliene, so as to bar him; and as well before as after the issue, he could aliene, so as to bar his own issue. The object of the statute *de donis* was to restrain this right of alienation, which operated to the disherison of the issue of the donee and to the exclusion of the donor from the reversion; both of which was contrary to the will of the donor,

297 and against the form *of the gift. In carrying this law into effect, the Courts decided that the donee should not have a fee simple conditional as aforesaid; but, they divided the estates, and created a particular estate in the donee, and a reversion in the donor, so that the donee could not, by alienation, bar his issue or the donor as aforesaid. Thus it is, that tenant in tail is said to be by virtue of this statute. The power of alienation, however, was afterwards given by statute, if made by fine and recovery.

The Act of 1776, then, did not repeal the statute *de donis*, but only provided that any person who now hath, or hereafter may have, an estate in fee tail general or special, &c. shall, from henceforth, &c., stand seized, possessed, &c., in full and absolute fee simple, &c. as if the conveyance had been in fee, &c. The party was not thereby thrown back on his fee conditional at common law, although the statute *de donis* might be said to be virtually or substantially repealed. It was permitted, as it were, to remain in force, merely for the purpose of enabling tenant in tail to hold the fee absolute and unconditional, under this Act.

The Act of 1785, ch. 62, then takes up the subject, and declares, that "every estate in lands, &c. which, on the 7th of October, 1776, was an estate in fee tail, shall be deemed from that time to have been, and thenceforward to continue to be, an estate in fee simple; and every estate in land, which since hath been limited, or hereafter shall be limited, so that, as the law aforesaid was, such estate would have been an estate tail, shall also be deemed to have been, and to continue an estate in fee simple; and all estates which, before the said 7th day of October, 1776, by the law if it remained unaltered, would have been estates in fee tail, and which now, by

virtue of this Act, are and will be estates in fee simple, shall from that time and henceforth be discharged of the conditions annexed thereto by the common law restraining alienations before the donee shall have issue; so that the donees, or persons in whom the conditional

298 "fees vested or shall vest, had and shall have the same power over the same estates, as if they were pure and absolute fees." Then follows the clause dispensing with words of inheritance in creating a fee. It is plain to be seen by this latter part of the clause concerning estates tail, that if it had either been suggested, or there was some fear entertained, that the Act of 1776, having virtually abrogated the statute *de donis*, it might be supposed that the common law conditional fee was revived, and stood as before that statute; and the case of *Carter v. Tyler*, 1 Call, 165, is perhaps sufficient to shew that this idea is not without foundation. The words, therefore, "as the law aforesaid was," I humbly conceive, had reference to the fee tail as created by that statute, to be adjudged of as if that statute was in force. This idea is fortified by the words of this second member of the clause, which declares, that all estates which, before 1776, "by the law if it remained unaltered, would have been an estate in fee tail," &c. What law is supposed here to have been altered? Surely the statute *de donis*, and possibly the common law as to conditional fees. But if they both had not been virtually repealed by the Act of 1776, the Legislature, by this very Act of 1785, did expressly alter or abrogate them both by this second clause, so as to make estates which, by the law aforesaid, were either fee tail or fee conditional at the common law, absolute fees. For these reasons, then, those expressions were deemed necessary and proper, and not for the purpose of laying down rules for the interpretation of wills or deeds, or to bind the Court down, in its search after the intention, to decisions and reasons, which, by the very Act, were rendered inapplicable. There was not, and could not be, any wish in the Legislature, to create estates in fee tail, contrary to the will of testators, so as to convert them into fee simple estates. There never has been any hostility to those limitations for family purposes, which are to take effect within the reasonable time prescribed by law. On the contrary, the

Act of 1819 is a complete Legislative 299 *declaration, that the course of decision which has so long done violence to the wills of testators, by applying rules of decision here, which do not exist in England, (for there, where a fee tail cannot exist, their rule is as, I contend it ought to be here,) is no part of the Legislative will, but the reverse. Why has the Legislature by that Act said, that a limitation made so and so shall be good, unless it plainly appears that such was not the intention? Was it intended thereby to vest a different estate than was intended by the testator, as is done when an estate tail is converted into a fee? Surely not. It was to restore to wills their real and intended effect; to adopt the construction that no

man ought to be supposed as intending to create an estate, which cannot exist by law, unless it manifestly appears that such was the intention.

Suppose a testator should preface his will by stating that he was without counsel, and unacquainted with the technicalities of law, and of Courts; but, that he knew he could not create an estate tail, and also, that a fee would pass if he did so, and he would be thereby defeated in certain provisions which he wished to make for his children and their descendants, for family purposes, and to keep the estate in his family as long as he could, without the violation of any law; and therefore hoped that his will might be fairly construed and supported, unless it plainly appeared that he had attempted to create an estate, which the law did not authorize; and a will, such as the present, and such as this Court is in the habit of deciding on, so prefaced, was submitted to us to decide what meaning was to be put on it. Could any other be put on it, than such as the Act of Assembly of 1819 aforesaid, has prescribed? But, is not this, in fact, the appeal which every testator, since the Act of 1776 was generally known to be in force, makes to this Court?

I once heard of a Scotchman, who, having acquired a good deal of property, had occasion to leave the country; but, before doing so, made his will. Not being heard of *for a long time, probate was taken of the will, supposing him to be dead. After some fifty years, a suit, depending on the construction of the will, was argued and about to be decided. An aged stranger attended the argument and decision; after which, he arose and told the Court that whatever they might say to the contrary, when he wrote and made that will, he intended so and so; very different from what the Court had decided. Could all the testators, since the Act of 1776, thus appear before us, we would hardly believe this assembled host from the dead, in how many instances their wills had been violated. The law then has not prescribed this course of decision.

2. But how far have we bound ourselves, and what have been our decisions on this point?

As to positive decisions, there are two; Tate v. Tally, 3 Call, 354, and Smith v. Chapman, 1 Hen. & Munf. 240; the first decided in 1802, on a will made in 1777; the other, on a will made in 1790. The point was made and ably argued in both cases; Lyons, Fleming and Roane, being the Judges, with Tucker in addition, in the second.

In Tate v. Tally, Judge Roane was inclined to the opinion, that even if we construed wills of lands made since 1776, in the same manner as wills of personals, it would not have been a good limitation of personal property; but says, "he will not waste time to enquire as to that, being equally clear that it is quite immaterial whether the will was prior to 1776, or since. The Legislative construction of the Act of 1792," he says, "accords with my opinion on the subject." (I presume he means the Act of 1785, as incorporated in the Revised Code of 1792.) "It is entitled to respect,

but would not bind the Court to adopt the same construction, contrary to their own judgment, in relation to prior cases." &c.

Fleming, Judge, says, that "as well on general principles, as on the case of Hill v. Burrow, this was an estate tail in Jesse Tate, prior to the Act of 1776. The question therefore, is, whether its being made subsequent to that *Act has altered the case? And I think not; for the whole effect of that statute is, to convert estates tail into estates in fee simple; and not to alter the meaning of words, or destroy the established rules of construction." Lyons thought it a clear case of an estate tail; but said nothing on the point we are now considering. Nor do I understand Judge Fleming as pretending to say, that the Legislature had tied the Courts down to construe a will of a subject which cannot be entailed, in the same way as of one which can; and this will be entirely manifest by his opinion in Smith v. Chapman, 1 Hen. & Munf. 240, in which case, also, Judge Roane shews that his opinion in this case, which is the one usually referred to on this subject, does not contain his whole opinion. In Smith v. Chapman, he says, "Nothing is gained in favor of intention, by construing the limitation to be an estate tail; for, it is eo instanti converted into a fee simple by the general law, of which the testator could not have been ignorant," &c. The Act of 1776, he says, "cuts up by the roots the pretence of implying an estate tail," &c. In Tate v. Tally, he says, "The Court concurred in opinion with the Legislature, that in construing what was or was not an estate tail, we should have reference to former laws, and that as to the construction to be made in relation to that point, we should enquire what the law aforesaid (that is, before 1776,) was," &c. "In a case, however, where the intention of a testator is alleged, under pretext of providing for his issue, but in reality to infer an estate which will defeat them, it would seem proper to rebut that allegation by resorting to a posterior general law, without an ignorance of which, it is impossible that any such intention could have existed." This part of the opinion gives me almost every thing I contend for. The absence of a power to entail lands, according to it, is a circumstance to be weighed in this Court, when you are called on to infer an estate tail; which therefore, you ought not to do, if you can fairly avoid it, as you thereby *gain nothing in favor of intention. You can only create, in order, eo instanti, to destroy it.

Judge Fleming says, "It appears strange to me, that, so much pains have been taken to prove that the devise gave, by implication, an estate tail, which is now, and at the time of making the will had long been, unknown to our laws, that it might be magically turned into an estate in fee, in order of frustrate and defeat the plain intent of the will of the testator."

Judge Lyons said, "I shall make short work of all questions arising on the construction of wills made since the Act of 1776; so far at least, as it may be necessary to decide whether they meant to pass a fee

tail or not. I will not suppose, after that Act, that a man intended to convey an estate tail, (which the law has expressly abolished,) unless plain and unequivocal words are used, such as would, of themselves, create a fee tail, as a devise to A. and the heirs of his body, or to A. and if he die without issue," &c.

Judge Tucker, who also sat in this case, said nothing particularly on this point, and it is therefore presumable that he assented to the doctrines contended for; especially as in parts of his opinion he strongly enforces the duty of searching out and obeying the will of the testator, when that can be done; and as he also concurred with the other Judges on the main question.

It cannot therefore, be maintained, that so far as a decision of this naked question goes, it has at all been decided by this Court, not to take into consideration the inability to entail land as well as personality, in searching for intent. On the contrary, I consider this a full and decisive case of the question, according with my opinion on that subject.

Has this case been overruled? It may be said that it has; because, in many cases, we have recognized the British doctrines, whereby a difference is made between real and personal estate, in a search after intention. Admit this to be the case; what

then is the result? Here is one
303 "course of decision which accords even with the British decisions themselves, that where a subject cannot be entailed, you are not to construe a will as you would in relation to a subject that can be entailed. This course of decision accords also with the common sense of all mankind, and is expressly recognized and made a rule of property in future, by the Legislature. Here is also another course of decision by the same Court, running counter to all this; having, as I conceive, a mistaken interpretation of the Legislative will for its basis, and concerning which all that can be said is, *stare decisis*. It is now a canon of property, and if departed from, great mischief will be done. Sales have been made, titles will be broken, &c. &c.; so that a man who has purchased from me, who, according to our decisions, had a fee tail, will lose the benefit of his purchase, and future dealers will not know how to contract. We must, therefore, continue to take estates from the real owners, and give them to such dealers.

As to the first class, there are few cases, (unless indeed where a plain estate tail is given, and which, under the Act of 1819, may or may not be a safe subject of sale, according to circumstances,) in which there is not considerable doubt what will be the ultimate construction; so that most purchases of this kind are known to be hazardous; and purchasers ought also to know, that our decisions, as to this leading ground of construction, have been always questioned, and decided different ways. But, is it better to persist in error for the benefit of such purchasers, or to retrace our steps? Suppose the course of decision, now indicated by the Legislature, had taken place soon after 1787; or had been

considered as settled by the case of *Smith v. Chapman*, as it ought to have been, and persevered in since; could any one have complained? So far from it, that the Act of 1819 would have been unnecessary. As to future purchasers, they would have been as much admonished by our decision as by that Act, and would govern themselves accordingly.

304 "But, if the Legislature meant to adopt British constructions on this subject, what class of cases have they adopted; those which relate to subjects that can be entailed, and therefore may be presumed to be so intended; or those which relate to subjects that cannot be entailed, and concerning which the presumption fails? Have they adopted rules of construction drawn from cases strictly analogous, or the reverse? One is as much law aforesaid as the other. Whatever doubts may have existed, and however we may have settled this matter, the Legislature, the whole people speaking through them, have said, that the correct rule of decision is not that which had heretofore been pursued, but the reverse. It is no longer a question, which is the right, and which is the wrong rule of construction. That is decided, and has become a rule of property, by law.

The only question now remaining for us to consider, is, whether we can now throw off the wrong, and take up the right rule? If we cannot go back, cannot now re-assert and establish the doctrines laid down in *Smith v. Chapman*, how can we justify a partial departure from our course of decision, by looking to the Act dispensing with words of inheritance. Judge Roane, who laid down the rule, and is most likely to have known its extent, in *Tidball v. Lupton*, 1 Rand. 203, speaking even of the Act of descents, says, "We are not at liberty to refer to it; we are confined in our construction, both by the Acts of 1776 and 1785, and by the decisions upon them. All these have referred to the *lex temporis*, and adopted it," &c. If we break through the decisions, then, because it is reasonable to do so, as to this matter, do we not shake the foundation of those decisions, and must they not fall at the next touch? I think so; and therefore, if I touch the foundation at all, which I must do if I depart from them in any respect, because it is reasonable that I should do so, (as I think it is in this case,) then I am at once for saying that *Smith v. Chapman*, gives the law of the land on this subject. I think

the necessity of departing from those
305 decisions, in "regard to the application of this part of the Act of 1785 to the case, as well as the clear Legislative enunciation of the correct rule on this question, gives an opportunity, and indeed call, for an examination of our course on this subject, and it will be our own fault if we shall hereafter be reduced to the dilemma of deciding, that a testator who made his will on the day before the Act of 1819 was enacted, using the same words with one made on that day, nevertheless intended precisely the reverse of what the latter testator did.

But, it may be said, if all this is granted,

if this was personal estate, the limitation over would not be good; for, the remainder-man will take in fee, under the Act of 1785; and there is therefore, nothing to tie it down to a dying without issue living at the death of the first taker. We must, however, recollect, that now there is equally an absence of power to entail lands, as personals, and therefore, it equally conflicts with intention to infer that one was intended; and that the absence or presence of words of inheritance are equally unimportant, both in case of lands and personals, as to the quantity of estate really given, whilst their presence or absence equally tend to shew what the testator had in view, as to the time when a contingent event was to happen.

Compare this case, then, with that of *Dunn v. Bray*, 1 Call, 338, above mentioned. That was a devise of negroes to W. B. and his heirs forever; but, in case he should die and leave no issue, then to C. and his heirs. This was held to mean a dying without issue living at the death of the devisee. It was admitted by Judge Pendleton, that if it had been an estate tail in W. B. as was contended, the remainder would be void; since in that case, it would be to take effect on a general failure of issue. He then goes on to repel the idea of an entail, in the manner I have before shewn, and says, that Lord Talbot, in *Atkinson v. Hutcheson*, 3 P. Wms. 258, fully illustrates the distinction between the devise of an express estate tail 306 and one by "implication, as well as the natural meaning of the words, "dying without issue," to wit, at the time of the death.

It is true, that in the case before us, there is neither the word "leave," nor the word "then;" but, the devise over in that case was to C. and his heirs, which is wanting in this case; and here, it is to be divided among the surviving brothers, children of the last wife, excluding the children of brothers that may have died; which shews, in fact, that it was a dying without issue, living some one or more of the brothers, who would take as survivors. This view of the case will even bring it within that of *Pells v. Brown*, Cro. Jac. 590; for, if P. Bell had left issue at his death, and brothers also surviving, they never would have taken, although that issue had become extinct before their deaths. This would also bring it within the cases of *Porter v. Bradley*, 3 Term Rep. 143, and *Roe v. Jeffery*, 7 Term Rep. 589.

What is the principle of these cases? There is, say, a devise to A. and his heirs, but if he die without heirs, then to B. the brother of A. Now here, to die without heirs does not mean without heirs generally; because B. who was to take after A. would be his general heir, if there was none nearer. The use of the word heirs, therefore, meant the same in both instances in which that word was used, to wit, heirs of the body. This, it has always been said, is a mere matter of construction; and in such a devise, has always been so construed, as will be seen by the cases cited in *Pells v. Brown*, and

other cases. So that, in that case, it would stand as if the devise had been to A. and the heirs of his body, and in case he should die without such heirs, &c. This would make it, as it were, an express estate tail. But very different, as Lord Kenyon says, is the case of a devise to A. and his heirs, and if he die without leaving heirs of his body, then to B. and his heirs. Here is an express fee; and it is not necessary to cut it down to an estate tail, with any view to the issue, for a fee also provides for

307 them. An intention to "cut it down must, therefore, manifestly appear, as I understand the authorities, even in England; because, here is a remainder-man who is evidently an object, as well as the issue. Had the first estate been for life, then, as the issue is the primary object, the estate must be enlarged to an estate tail, or that intent would be defeated; and therefore, the remainder-man must yield to the issue, as in *Tate v. Tally*, 3 Call, 354. But, when the issue are provided for by the fee in the ancestor, and the remainder-man is also an object, which object must be defeated if you provide for the issue, otherwise than at first contemplated, viz: by changing the fee into an estate tail, you must have full warrant for so doing; that is to say, you must clearly see that an indefinite failure of issue was intended. If so, then, inasmuch as it now clearly appears that the intention was to provide for the issue, not by a fee in the ancestor, but as issue in tail, then the will is to be again construed, as if it had in the first instance been a devise to A. and the heirs of his body, and if he die without heirs of his body, &c.; that appearing now to be the meaning in which the word heirs was at first used.

But, if the subject of the devise be one of which an estate tail cannot be made, then it will require clear proof indeed, that it was intended to provide for the issue, as issue in tail, which they could not be; for, to give it this shape, is not done in order to give them any thing, and thereby advance the intent; they get nothing by it. The only effect is, to shew that the testator ignorantly created an estate which could not exist in law; and in consequence of which, his intentions in favor of the remainder-man are defeated. But, having done this, in such plain terms that no other construction can fairly be put on his words, the Court is forced, by the rules of law, to defeat his intention.

But a limitation over to survivors, as well as the absence or presence of words of inheritance, though otherwise of no avail, as before said, have affected the construction, in many cases.

308 *In *Brewer v. Opie*, 1 Call, 214, the testator gave his whole and sole estate, real and personal, to his son I. L. and in case he should die before twenty-one, or lawful heir, then his estate to be equally divided between the children of I. B. and L. O. It was held, that I. L. took a contingent fee, (though there were no express words of inheritance,) to become absolute upon either event happening; and as his dying must determine both events, the remainder was good as an executory devise.

He died without issue, and under twenty-one years.

Timberlake v. Graves, 6 Munf. 174; Gresham v. Gresham, Ib. 187, on a will dated in 1803; James v. M^cWilliams and wife, Ib. 301, and Cordle v. Cordle, Ib. 455, on a will dated in 1805, (the Reporter does not give the dates of the wills in the other cases,) are all cases of this description.

On the whole, I incline to think, that the limitation over in this case was good as an executory devise.

JUDGE CABELL concurred with JUDGES CARR and GREEN, and the judgment was affirmed.

Broaddus and Wife v. Turner.

June, 1827.

Wills—Construction—Estates Tail—Docketing.—By a will dated in 1778, the testator gave a tract of land to his two sons, to be equally divided between them, to them and their heirs forever; but in case either of his said sons should die without issue lawfully begotten, he desired that the survivor should have the whole. But if both his said sons should die without lawful issue, he desired that his land should be sold by his executors, and the money arising therefrom should be equally divided among his daughters then living, &c. This is an estate tail in the sons, which was converted into a fee simple by the Act of 1776.

This was an appeal from the Fredericksburg Chancery Court, where Fanny Turner filed her bill against Thomas Broaddus and Rebecca his wife, and a great number of *other parties, who were children of John Turner, George Turner, and Elizabeth Brock, and the heirs of Nathaniel Anderson, and William Beazley and Maria his wife.

The question arose on the will of William Watkins, dated the 25th day of September, 1778. The clause on which the controversy depends, is fully stated in the following opinion of Judge Green, as well as the relations of the parties. The question is similar in principle to that of the preceding case of Bells v. Gillespie; and the full examination in that case of the whole doctrine involved in this, will supersede the necessity of a more minute report in the present instance.

The Chancellor was of opinion, that the devise in the will of William Watkins, the elder, was good as an executory devise, and therefore the limitation over was not too remote; and he decreed accordingly. From this decree, Broaddus appealed.

Stanard, for the appellant.

Leigh, for the appellee.

June 11. The Judges delivered their opinions.†

JUDGE CARR.

I shall not pretend to travel over again in this case, the dull and tedious round of cases on the subject of estates tail and executory devises. That task has been per-

formed in Bells v. Gillespie; the authorities and reasoning in which apply directly to the case at bar. I will barely remark, that this case bears a more exact resemblance than that, to the case of Carter v. Tyler. First, the land was given to the sons in fee. Secondly, if either die without issue, the survivor was to have the whole.

310 Thirdly, if both die *without issue, the land to be sold, and the money to be divided among his daughters then living, &c. In those features, the two cases do not merely resemble each other, but are precisely the same. Sydnor v. Sydnor, 2 Munf. 263, also governs this case clearly, upon the principles explained in Bells v. Gillespie.

I am of opinion that the decree be reversed, and the bill dismissed.

JUDGE GREEN.

William Watkins, by his last will and testament, devised as follows: "Item, I give to my beloved sons John and William Watkins, the land whereon I now live, containing three hundred and fifty acres, to be divided between them;" and after specifying the dividing line, the will proceeds, "the above mentioned land I give to my above named sons, to them and their heirs for ever. But, in case either of my said sons should die without issue lawfully begotten, then it is my desire the survivor should have the whole. But, if both my said sons should die without lawful issue, then it is my desire my said land be sold by my executors to the highest bidder, and the money arising therefrom be divided among my daughters then living; and if in case any of them should be dead and leave children, then in that case, it is my desire that the children of the deceased have an equal share with those living, so that each child or their children have an equal part." The testator appointed his said two sons and John Turner his executors. The will was dated September 25, 1778, and admitted to probate at September Court, 1780. The sons entered upon their respective portions of the land. John died without issue in 1797, and devised his part of the land to his brother William in fee. William afterwards died without issue, and devised the whole of the land (except about sixty acres sold by one of the brothers) to his wife Rebecca, (who, with her second husband Broaddus,

311 *are the appellants) for life, with several remainders over. The appellee is a surviving daughter of William Watkins the elder. She filed her bill in the Chancery Court of Fredericksburg, against the purchasers of the sixty acres of land, and the devisees of William Watkins, the younger, and the children of her deceased sisters claiming under the will of William Watkins the elder, and praying for a partition according to the rights of the parties. The Court held that the limitation over to the daughters and their children, was (in the events which had happened) good as an executory devise, and decreed accordingly.

It was admitted in the argument of this case, that in determining whether, upon the true construction of the will, an estate tail was vested in the sons, converted by

*Wills—Construction—Estates Tail—Docketing.—See, citing principal case, *foot-note* to Bells v. Gillespie, 5 Rand. 273; *foot-note* to Carter v. Tyler, 1 Call 165; *foot-note* to Hill v. Burrow, 3 Call 348; Griffith v. Thomson, 1 Leigh 329; Nowlin v. Winfree, 8 Gratt. 348; Callis v. Kemp, 11 Gratt. 78, 86, and *foot-note*; Moore v. Brooks, 12 Gratt. 150; Tinsley v. Jones, 13 Gratt. 208; Randolph v. Wright, 81 Va. 618.

See further, monographic note on "Wills" appended to Hughes v. Hughes, 2 Munf. 209.

†The PRESIDENT absent.

our statute into an absolute estate in fee, the will is to receive the same construction as if the statute de donis had been in full force in Virginia, at the time of making the will, and the death of the testator; and that what would have been a remainder after an estate tail, if that statute were in force, cannot be construed into an executory devise, because the estate tail is converted into a fee simple by our statutes. Indeed, no question can possibly now be raised on those points, since the decisions of this Court in *Hill v. Burrow*, *Tate v. Tally*, *Carter v. Tyler*, and many others upon that point.

The limitation over to the executors, was a limitation of a fee simple estate, (Co. Litt. 9, b,) and would be defeated, if the sons took an estate tail; or, if the sons took a fee simple estate, was void as an executory devise, unless it was, by the terms of the will, necessarily to take effect, if at all, within the time allowed by law for the vesting of an executory devise. On the part of the appellee, it is contended that the sons took an estate in fee simple; that the limitation over to the executors was good as an executory devise; and that it was limited to take effect on the death of the sons, without issue then living, which was in good time. To prove

this, the circumstances that the
312 *limitation over was to the executors to sell and divide the money between the daughters then living, and the children of the daughters who were dead, are relied on. The terms of the will certainly do not make it a condition, that there should be no issue of the sons living at their deaths, in order to give effect to the devise over. The sons might have died leaving issue surviving them, which might have failed in the life-time of one of the executors, or of one or more of the daughters; and in that event, it was clearly the intention of the testator, that the devise over should take effect. If it was the intention that the limitation should not take effect but upon the condition, that the issue of the sons should fail in the life-time of one of the executors or of one or more of the daughters, it might be good as an executory devise; being to take effect within a life or lives in being. But, I do not think that the will is susceptible of this construction. The testator did not intend to make the limitation over depend upon the failure of issue in the life-time of the executors, to whom it was to go in fee upon the failure of issue; for, there were but three executors, two of whom were the sons, who must have been dead before the event of the failure of their issue was determined; and the testator did not intend that the interest of his daughters should depend upon the event of the other executor's dying before or after the sons, or the failure of their issue. Nor did he intend, as a condition upon which the devise was to take effect or not, that the failure of the issue of the sons should happen in the life-time of one of his daughters. He obviously mentioned one of the daughters then surviving, with the children of those that might then be dead, for the purpose of prescribing a rule for the partition of the

proceeds of the land; so that if any daughter should be then living, and others dead leaving children, the children of the deceased daughters should represent their parent, and have an equal share with the living daughters. The testator expressly declares, that this was the reason why he mentioned the living daughters and
313 "the children of any deceased daughter; "so that each child or their children have an equal part." The testator intended, that whenever the issue of his sons failed, the children of his daughters, if they were all dead, should succeed to the property, in the same proportions to which their mothers would have been entitled, if alive. It was, if the sons took a fee simple, a limitation of a fee upon a fee after an indefinite failure of the issue of the sons, and therefore void.

But, the sons had only estates tail. The ultimate limitation to the daughters in fee, upon the indefinite failure of the issue of the sons, had the effect of converting the express estate in fee simple given to them, into an estate tail, for the purpose of effecting the intent of the testator, to provide for that issue in the first place, and afterwards for his daughters and their heirs, by giving them a remainder upon the estate tail to the sons.

If, however, the ultimate limitation was to take effect, if at all, within a life or lives in being, and was therefore good as an executory devise, and had not the effect of reducing the express estate in fee simple given to the sons, to an estate tail; yet the estate, given in terms to the sons, was reduced to a fee tail, by force of the express cross-remainders in fee limited to them. In that case, the ultimate limitation, instead of an executory devise, was a contingent remainder, under the rule in *Purefoy v. Rogers*, 2 Lev. 39, that no limitation shall be construed to be an executory devise which can take effect as a contingent remainder. After giving an estate in fee to each of the sons, the will proceeds, "But, in case either of my said sons should die without issue lawfully begotten, then it is my desire the survivor should have the whole." "The whole," refers not only to the property, but to the estate given to the son who should die without issue. The will, then, has the same effect, as if the words "heirs" or "issue" followed the word "survivor;" and to the purposes

314 of this case, it *is not necessary to enquire, whether an estate tail or in fee was given to the survivor in the land devised to the sons dying without issue. Nor is it necessary to determine upon the effect of the word "survivor," whether it gave to each son a vested remainder in the land devised to the other, the word survivor being understood as other, as has frequently been done, and which I think is the true construction; or, whether each had a contingent remainder in the land devised to the other, to take effect only in case he actually survived the brother, whose estate was to go over upon the failure of his issue. For, upon either construction, whether these remainders were vested or contingent, they had the effect of reducing the estates given in the preceding clauses to

both the sons, to estates in fee tail. If the ultimate limitation to the daughters were to take effect only in case both the sons had died in the life-time of one or more of the daughters, yet there was no limitation as to the time of the failure of issue of one of the sons, which should give to the other surviving him, (if a surviving was necessary to give the other a right,) a right to the whole, and to effectuate the general intent of the testator to provide for all the issue of both sons, as long as any issue existed, and the whole to the other and his heirs or issue, if the issue of one failed. The particular intent to give to each son an estate in fee, which would frustrate the other intentions of the testator, must yield to this general intent, and the fee simple be considered as reduced to an estate tail in each of the sons. The effect of this will was to give to each of the sons an estate tail with cross-remainders between them, with remainder in fee to the daughters; and whether all these remainders were vested or contingent, is immaterial; since all of them were defeated by the statute converting the estates tail in the sons, into estates in absolute fee simple.

The decree should be reversed, and the bill dismissed.

315 *JUDGE COALTER.

The will in this case is dated in September, 1778, and it is contended, must be construed as if made before 1776. On this point I have given my opinion in the case of *Bells v. Gillespie*. But, suppose this to be so; how stands this case?

It is contended, that the testator clearly intended that this land should remain entire with his sons, or one of them, and their posterity, as long as they existed, and that if ever it went over to those in remainder, it was to go as an entire estate, as one whole: that this being the case, the interest of the sons must be so arranged, as that a part is not to pass over, unless the whole can do so also; and that to effect this, they must take estates tail in possession in their respective shares, with cross-remainders in tail, remainders to the daughters. Nothing else can prevent the possibility of its going to them in parts.

I am not clear, even admitting that if the estate went over at all, it was to go entire, that the conclusion follows the premises; though, if the other postulatium is also granted, (to wit, that the entire lands were intended to remain with the sons, or one of them, and their posterity, so long as any should remain,) it might follow that such an estate tail, as is mentioned, was intended.

By the first clause, a fee simple is created, which, if cut down to a fee tail, must be in consequence of some general or primary intent, which must be defeated unless this is done. This, it is said, is made necessary by the clause, "but, if either of my said sons should die without lawful issue, then it is my desire the survivor should have the whole;" because, this is an indefinite failure of issue, and makes it an estate tail. But, if these words can be supposed to mean, that if either should die, "living the other," then as to this part, it would not go to the survivor, unless, at the

time of the death, there was no issue. It would be the case of *Pells v. Brown*, and not be an estate tail. Why shall we say that this was not the intention? The issue, if any, of the brother so dying, is provided for by the fee to the father, who, it may well have been intended, should have the fee and sole disposition of the estate, in case he had issue at the time of his death. But, if he had no such issue, it was intended that then it should go to the survivor; not that when the issue of the one first dying should afterwards, and at any remote day, become extinct, it should then go to the survivor, if he should be alive at that time, and if not, to his issue, if any.

But, if the other proposition is true, that it was intended to go entire, it seems to me that the testator looked to, and had in his mind, the death of one leaving no issue, living the other, and who was then to take the whole; and that should he afterwards die, leaving no issue, that then the land should be sold by his executors, &c.; and although two of these were his sons, (who of course were both to be dead before such sale,) and whilst this shews some inconsistency or want of reflection, it nevertheless shews very clearly to my mind, that the testator was not thinking of events which might happen one hundred years after, but of what was to happen on the death of the surviving son. The natural meaning, and grammatical construction, too, of the words, is, a dying without issue at the time of the death; and therefore it is wonderful to me, that these substantial beacons and landmarks, (to say nothing of the consideration that estates tail cannot be created, and ought not therefore to be inferred, unless that is unavoidable,) should not be looked to, instead of supposing things that the testator evidently never thought of. What was his plain intention? To give his lands to his sons in fee simple. But, then one or both might die without issue at his death. If he had issue, the testator had nothing more to say; he might give it as he pleased, or it might descend to them, or he might sell it, provided that when he died he left issue; he is satisfied that he will take care of his own issue. But, if he have no issue at his death, then he wished it to go to his surviving brother in fee, provided he left issue at his death.

317 *But, he might also die without leaving issue, the whole having accumulated on him; and if so, then it is to be sold and divided among his daughters. If, however, it has not so accumulated; if his son who died first should leave issue, (and so the estate has, as to his part, become a fee in him,) and then his other son dies without issue at his death, the fee in him is determined, and must go to his testator's right heirs. Possibly, they may be the issue of the son who died first, or his daughters. The testator did not, and could not, intend to provide for this case, and was willing to let the law provide. But, if his sons successively die without issue at their death, he then knew precisely what was his wish, to wit, that the whole estate should enure to his daughters, and be sold, &c.

The case of *Carter v. Tyler*, was an entirely different one from this. There, the estates to the first takers were to them and the heirs of their bodies; and if they die without heirs of their bodies, &c.; so that there was no implication about it. It was a direct and express fee tail. The only question was, whether the Act of 1776 destroyed the remainder limited on this estate tail, the events having happened, on which that remainder could take effect in possession, if not destroyed.

Had this been a case of express estates tail to the first takers, and even to terminate on the death of the first taker, if he had no issue then alive, it would, I presume, be equally within the Act, as it will be if the fee is cut down to an estate tail. But, in that case, there would be no implication about it, no estate in fee to cut down; and there would be no necessity for so often reminding us, (of which perhaps I am too forgetful,) that we must construe this will, just as we would in England. But, I think that in England, the Courts would not interfere with this fee simple estate for the purpose of defeating a plain intention in favor of daughters, on the happening of events clearly within the view of the testator, and which have actually happened within a life then in being. If the King's

Bench, with Lord Kenyon at its head, 318 would not do so, *(as it seems to me they would not,) I think I may be excused for not doing so here.

Fearne, after noticing the case of *Pells v. Brown*, says, "But, here we are to attend to the distinction between the first limitation being in fee, and its being only in tail. In the first case, the limitation over on a dying without issue, living A., was good as an executory devise; for, the whole fee being first limited to a person in esse, there was no considering the subsequent limitation as a remainder;" that is, as I understand, you must be satisfied that an indefinite failure of issue was intended; that it was intended to provide for them as issue in tail, instead of children of an ancestor having a fee, before you can change the nature of that express fee that is created. But he says, if the first limitation had been in tail only, then the subsequent devise might have been considered as a contingent remainder depending on that estate tail, and as limited to take effect only in case that estate tail determined in the life of A.; that is, in case the first devisee in tail died, without issue, in A's lifetime.

So, in *Porter v. Bradley and Roe v. Jeffery*, when the first estate is in fee, it is said, the question is whether, from the whole context of the will, we can collect, that when an estate is given to A. and his heirs, but if he die without issue, then over, the testator meant "without issue living at the death" of the first taker. The rule was settled in *Pells v. Brown*, and has never since been questioned.

If Lord Kenyon was hard to convince that it was right, even in England, to construe the same words as to realty, different from what they ought to be construed as to personality, though one could be entailed, and the other not, I think he would

have been harder to convince had he been sitting here, where neither can be entailed.

I am, therefore, for affirming the decree.

JUDGE CABELL concurred with the two first Judges, and the decree was reversed and the bill dismissed.

319 *Robertson and Others v. Archer, Adm'or, &c.

June, 1827.

Practice—Reliance on Executor's Account—Effect.*—

The rule that where a party relies on an account furnished by the other party, and claims the benefit of credits, he is bound to take it all together and admit the debits also, unless he can surcharge and falsify it by proofs, is not applicable to an executor's account, nor to any case where there is a trust or confidence.

Executor—Suits against Legatees for Advances—Lapse of Time—Effect.*— A suit by an executor against the legatees for advances made to the estate beyond the assets, will not be entertained after a great length of time has elapsed since the qualification of the executor, and the estate has been distributed with the consent of the executor.

William S. Archer, administrator of John Archer of Amelia, deceased, filed his bill in the Chancery Court of Richmond, against James Robertson and others, children and legatees of John Archer of Chesterfield, deceased, and the descendants of such of the children of the said John Archer as were dead. The bill was filed on the 30th day of October, 1816; and set forth, that John Archer of Amelia, deceased, was appointed by John Archer of Chesterfield his executor: that the former undertook the execution of the will, and made sundry payments and advances, by which the estate became considerably indebted to him: that the legatees possessed themselves of all the estate and effects of the said John Archer of Chesterfield, without the assent of the executor, and without having executed refunding bonds to him: that the executorial accounts were referred, by agreement between the parties, to an accountant, who found a considerable balance to be due to John Archer of Amelia, the intestate of the complainant; but, as this account was taken without judicial authority, the complainant had no power to establish it: that several suits are pending against the estate, by which large sums will probably be recovered against the complainant. He therefore prays for an account of the administration of John Archer of Amelia, deceased, upon the estate of John Archer of Chesterfield, deceased: that he may recover what is due to him from that estate; and that he be made safe against the claims now hanging over him.

320 *The answer of John Archer, one of the defendants, denies that the legatees took possession of the estate of their testator without the assent of John Archer, the executor, and asserts that the estate was divided by a decree of the County Court of Chesterfield; which decree also directed a settlement of the executor's account of administration; but, that he neglected to do so, from the date of the decree in November, 1802, to the day of his death: that the defendant never did consent that the accounts

*See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

The principal cases cited in *Gallego v. Atty. Gen.*, 8 Leigh 489; *Archer v. Archer*, 8 Gratt. 544, 546.

should be settled by the person stated in the bill, or that he had any notice of the proceedings in that settlement, till he was informed of the account long after it was stated: that the account so stated was entirely *ex parte*, as respects him; and that the executor repeatedly neglected and refused to come to a settlement, &c.

The answers of the other defendants are to the same effect.

The accounts were referred to a commissioner, to state and settle the same, and the plaintiff was directed to render an account of his intestate's administration of the estate of John Archer of Chesterfield.

The commissioner reported a balance due to the complainant of \$3061 13.

The defendants excepted to the account stated by the commissioner, inasmuch as it dispensed with vouchers to establish the items of debit in the said account. The grounds of this exception are fully stated in the opinion which follows.

The Chancellor confirmed the report of the commissioner, and decreed that the defendants should pay their proportions of the sum reported to be due.

The defendants appealed.

Leigh and Stanard, for the appellants, contended, 1. That the commissioner was wrong in allowing the charges in the administration account, without any evidence to support them. They admitted the
321 general rule, "that if the defendants rely upon the credits of the account, they ought to admit the debits. But, all the authorities which lay down this rule, relate only to the simple case of debtor and creditor; not to the case of executors or trustees. 1 Phill. Evid. 84; Wagner v. Gray, 2 Hen. & Munf. 603; Jones v. Jones, 4 Hen. & Munf. 447; Freeland's adm'r v. Cocke's ex'or, 3 Munf. 352. The case of Cavendish v. Fleming, 3 Munf. 198, does not contradict this principle. An executor differs from a man acting for himself, because he is bound by law to keep the account on both sides. 1 Rev. Code, 379, 380. The persons interested are often infants, who are unable to produce evidence against the executor. The case of an executor and of one acting *sui juris* are materially different. It is the duty of an executor to shew, not only that money has been paid, but that it is paid properly. This latter cannot be shewn by the account alone. There is no inventory in this case, which is positively required by law, and by which the persons interested might know what property came to his hands.

2. The Court of Chancery ought not to have sustained this bill, because of the long delay, and implied admissions of John Archer of Amelia. Bolling v. Bolling, 5 Munf. 334; Hercy v. Dinwoody, 4 Bro. Ch. Cas. 257. In Jones v. Fitzgerald, 1 Munf. 150, a neglect of seven years was sufficient to exclude interest. Here interest is charged for a much longer time.

Johnson, for the appellee.

The rule of evidence which requires an account to be taken altogether, if a part is relied on, is a rule of universal operation, and is founded on that well known principle of justice, that you are not to take a

garbled statement of the evidence. The reason applies to an executor, as well as any one else. A merchant who keeps the account on both sides, if his credits are relied on, is entitled to consider
322 *his debits as admitted. An inventory would be of no importance in this case, because it is only of the original estate which came to the executor's hands, not of the increase or profits. An executor is chosen by the testator himself, and renders his account upon oath. Cavendish v. Fleming, 3 Munf. 198, and M'Call v. Peachy, 3 Munf. 298, prove, that an executor is not chargeable with credits, unless it is proved that they were received. This principle is not contradicted by the case of Beckwith v. Butler, 1 Wash. 224. Freeland v. Cocke, 3 Munf. 352, is strongly analogous to this case.

June 12. JUDGE COALTER delivered the opinion of the Court.*

This is a suit by the appellee, as administrator of John Archer of Amelia, who was executor of John Archer of Chesterfield, against the appellants, charging that his intestate was largely in advance to the estate, and that suits were brought against him in his life-time, and which were still pending against the appellee as his representative, to recover large sums as due from the estate; that the appellants are legatees of the said John Archer of Chesterfield, and had illegally and without the consent of the executor, possessed themselves of the whole of the assets, without giving refunding bonds according to law, &c. The object of the bill is, to have a decree against the appellants for the monies so advanced by the executor beyond what he had received, and to have refunding bonds, in case future debts should be established.

It appears from the answers and documents in the cause, that about twelve years after the executor had qualified and undertaken his trust, the appellant Robertson and his wife, in right of his wife, exhibited their bill in Chesterfield County Court, against the executor for a settlement
323 *of the executorial account, and for their one-fifth part of the slaves and other personal property, after specific legacies, and which they claimed under the will. To this bill, no answer could ever be obtained, though various conditional decrees were made. Finally, another of the daughters married, and she with her husband, and also the other appellants (then under age,) were made parties plaintiffs; and in 1802, about 18 years after qualification of the executor, a decree is entered by consent appointing commissioners to allot to the plaintiffs severally their one-fifth part as aforesaid; and Duncan Rose was appointed to state and settle the executorial account. He states that he gave notice to the executor to attend him, but he did not do so; nor did he make any reply on the subject.

In 1804, the commissioners report that they had made allotment, which is confirmed, and the executor directed to deliver over the property so allotted, on the par-

*The PRESIDENT and JUDGE CABELL, absent.

ties, or some one for them, giving bond to indemnify him against debts thereafter coming against the estate. This bond, the appellants, in their answer, say, was never demanded of them. The suit still went on; and different sets of commissioners were appointed to settle the executorial account, some of whom, it appears, gave notice to the executor to appear with his accounts and vouchers; but this he never did. The last of those orders is made in July, 1810, about twenty-six years after the qualification of the executor; but, from that time until his death, (which happened about the year 1811, or 1812,) no account was rendered. This suit was instituted and the bill filed in 1816, to which the answers were filed in 1817; and in 1819, (about 35 years after the qualification of the executor,) the accounts are referred to a commissioner. He reports, that the appellee produced the books of his intestate, containing his administration accounts, acknowledged to be in his own hand-writing; but, not having vouchers for all the debts, he insisted that those accounts were either to be taken as

correct throughout, or that he had a
324 right to throw off from *the credits, a sum equal to the debits which were not vouched for; or, he proposed to the appellants, that the commissioner should make out his account of debits from the vouchers, and allow all credits which the appellants could establish by evidence. The appellant John Archer, however, who attended the settlement, stated that from the lapse of time, he could not establish credits, so as to change the accounts in their favour, from what they appeared on the books; and the commissioner, therefore, proceeded to state the accounts from those books, merely correcting some errors apparent upon their face, and reported a balance of principal and interest as due to the executor, of \$3061 13.

The appellants excepted to this report in toto, alleging that the principle so established by the commissioner, was illegal as applicable to administration accounts.

Two questions present themselves; the first, arising on the report of the commissioner, and the exception thereto; the second, whether, after such a lapse of time, and under all the circumstances aforesaid, it was competent for the appellee to call for a settlement of the executorial accounts, so as to charge the appellants for advances made by the executor, beyond assets received; or for any other purpose, except to have refunding bonds executed, as directed by the decree of the County Court, so as to place the estate, as to the debts now claimed from it, in the same situation, as it would have stood, had such bonds been originally given?

We are of opinion, as to the first point, that the rule, that where a party relies on an account furnished by the other party, and claims the benefit of the credits, he is bound to take it altogether and admit the debits also, unless he can surcharge and falsify it by proofs, is not applicable to an account furnished by an executor. Where there is no trust or confidence, neither party is bound by any legal obligation to furnish the other with charges against

himself, since each can and ought to preserve the evidences of his charges against the other; and the account rendered
325 by *either must be taken as the confession of the party, and as such, on the general principles of evidence, must not be garbled, but taken altogether, except so far as it may be disproved. But as to executors, they are under a moral and equitable, and indeed a legal obligation, from the very nature of their undertakings, to furnish those to whom they are accountable, the means of charging them to the full extent of their liabilities; *White v. Lady Lincoln*, 8 Ves. 363; for, those having a right to claim an account have no other perfect means of getting this information.

The decree is, therefore, erroneous in not sustaining the exception to the commissioner's report, in this particular.

As to the second question, we are of opinion, that after so great a lapse of time, and particularly in a case accompanied with the other circumstances above stated, it might be of mischievous tendency to sustain a suit like the present, except for the purpose of procuring refunding bonds against legatees, who had so long ago received their share of the estate, and consequently had no right to suppose that they were in debt to the estate; unless indeed, it was the wish of such legatees to have an account taken.

But, if we are further of opinion, that as the appellants did not revive or renew their suit, but permitted the matter to rest for four or five years after the death of the executor, the most certain way of obtaining justice in this case is, to consider all matters between the executor and the legatees, so far as relates to actual receipts and disbursements by the executor, up to the time of his death, as finally closed: that the appellants ought, respectively, to have been decreed to execute bonds with good security to the appellee, to indemnify the estate of his intestate against all future demands coming against the estate of the testator John Archer, so far as the value of the estate respectively received by them; so as to place the parties in the situation they would have been in, had such bond been given when the property was received; and that the bill, for every other purpose, be dismissed; and that each party pay their own costs in the said Court of Chancery.

326 *Rees v. Conococheagus Bank.

June, 1827.

Corporations—Suits by—Necessary Allegations.*—In a suit brought by a corporation, it is not necessary to aver in the declaration that it is a corporation duly constituted, or that it is authorised by law to sue in its corporate name: but, these questions

***Suits by Corporations—Proof of Incorporation.**—In a suit by or against a corporation, at common law, while it was not necessary to aver in the declaration that the plaintiff or defendant was a corporation. It was necessary to prove that fact whenever that fact was put in issue by proper plea, and it was held that the general issue put such fact in issue. To this effect, the principal case is cited in *Jackson v. Bank of Marietta*, 9 Leigh 245; *Gillet v. American Stove, etc. Co.*, 29 Gratt. 568; *Hart v. Baltimore, etc. R. Co.*, 6 W. Va. 347, 350; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 537; *Central Land Co. v. Calhoun*, 16 W. Va. 375; *Greenbrier Lumber Co. v. Ward*, 30 W.

may be put in issue by the defendant, or raised upon the trial of the general issue.

Negotiable Paper—Blank Indorsement.—A blank endorsement of a note is sufficient to vest a title in the holder, though it be not filled up before the judgment.

Judgment by Default—Entry of—Writing for Payment of Money.—A judgment by default, for want of appearance, founded on an instrument of writing for the payment of money, on which an endorsement of a credit is made by the plaintiff himself, ought to be entered subject to such credit; or, if the plaintiff refuses to take the judgment in that way, a writ of enquiry should be awarded.

Clerical Error.—What shall be deemed a clerical error?

The President and Directors of the Conococheague Bank, assignees of Jesse Payne, who was assignee of Henry Payne, brought an action of debt in the county court of Berkeley, against David Rees, on a promissory note, executed by the latter to the said Henry Payne, negotiable and payable at the Conococheague Bank. The note was for \$1899. It was endorsed in blank by Henry Payne, and afterwards, in the same manner, by Jesse Payne; and protested for non-payment. On the back of the protest there is this endorsement: "\$550 has been received, at sundry times, on account of the within note. July 19th, 1819."

The defendant having failed to appear, judgment by default was rendered against him and his appearance bail, for \$1899 with interest thereon from the 4th day of March, 1819, until paid, and the costs, &c. An execution issued, and a forthcoming bond was taken. On the back of the execution, this endorsement was made by the plaintiff's attorney: "The plaintiff will receive, in part of this execution, the check of Joseph Sexton upon the Conococheague Bank."

(Signed) "P. C. Pendleton."

Judgment was rendered on the forthcoming bond for \$2,039 47, with interest from the 29th of November, 1819, till paid, and the costs.

327 *A supersedeas was awarded by the Superior Court of Berkeley to the judgment below, which was affirmed.

Va. 48. 3 S. E. Rep. 230; State v. Dry Fock R. Co., 50 W. Va. 255, 40 S. E. Rep. 447. But see Va. Code, 1887, § 3280. And see further, monographic note on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

Negotiable Paper—Indorsement—Note for Payment of Money.—Before the statute was changed to its present form, a negotiable note was not, as to the endorser, a writing for the payment of money, although so as to the drawer, because the undertaking of the indorser is not for the payment of money absolutely, but it is a collateral contract to pay it under certain circumstances. Commercial Union Ass'n Co. v. Everhart, 88 Va. 956, 14 S. E. Rep. 836.

Same—Credit on—Judgment by Default—Writ of Inquiry.—Where a judgment by default for want of appearance is founded on an instrument of writing for payment of money, on which an indorsement of a credit is made by the plaintiff himself, the judgment should be entered subject to such credit; or, if the plaintiff refuses that, a writ of inquiry should be awarded. Elb v. Pindall, 5 Leigh 117, 118, citing principal case. To the same effect, see principal case cited in James River, etc., Co. v. Lee, 16 Gratt. 428.

See the principal case also cited in Brewis v. Lawson, 76 Va. 44; Brummel v. Enders, 18 Gratt. 899.

Inquiry of Damages.—An order of inquiry of damages, where it is necessary, is confined to cases where the defendant has not appeared and pleaded. Where an issue is made by the pleadings, and it is tried by a jury, then the jury, at the same time that they try the issue, assess the damages, so that in such case no writ of inquiry is necessary. This is the usual and immemorial practice. George Campbell Co. v. Angus, 91 Va. 443, 22 S. E. Rep. 107, citing principal case as authority.

From this judgment the defendant appealed.

Stanard, for the appellant, made three objections to the judgment of the Court below:

1. That "President and Directors" is not a sufficient description of the plaintiffs, if they sue in their natural or personal character; and no right for them to sue in a corporate character, is shewn, or can be intended.

2. That the endorsement being and continuing in blank, no right is shewn to be in the plaintiffs to demand the contents of the note. 12 Mod. 244; Clark v. Pigot, 1 Salk. 126; Lambert v. Pack, Ib. 128; Lucas v. Haynes, Ib. 130; Bull. N. P. 275.

3. That the original judgment should have been for no more than the residue of the amount of the note, after deducting the credit endorsed, and that all the proceedings subsequent to the original judgment are erroneous by reason of the errors imputable to it. Bates v. Johnson, (not reported.)

Johnson, for the appellee.

The objection to the description of the plaintiffs is not sound. It does not appear, that they sue as a corporation; for, the name by which they sue may be the name of an individual, as far as can be discovered from the pleadings. But, if it be the name of a corporation, it is not necessary to state in the declaration how they got that name. The defendant should put that matter in issue. Bank of Marietta v. Pindall, 2 Rand. 465; Dutch East India Company v. Henriquez, 1 Stra. 612. After judgment by default, it is too late to make those objections.

As to the blank endorsements, they give a right to the holder to fill them up and bring suit; because an assignment need not be in writing, and the bringing 328 the suit *and producing the note is complete evidence of the assignment, and of the assent of the holder to consider it as such. Ritchie & Wales v. Moore, 5 Munf. 388.

The credit which is contended for, is not endorsed on the note. It is not signed by any body. It was open to controversy, and therefore, the Clerk could not take notice of it; and the County Court, if any, was the proper tribunal to have corrected it, not the Appellate Court. Richards, qui tam v. Brown, Doug. 114; Short v. Coffin, 5 Burr. 2730; Green v. Bennett, 1 Term Rep. 782; Bent v. Patton, 1 Rand. 25; Humphreys v. West, 3 Rand. 516.

June 13. JUDGE GREEN delivered his opinion.*

This case comes up by supersedeas to a judgment by default for want of appearance, which was made final in the office without the execution of a writ of enquiry. The suit was in the name of the President and Directors of the Conococheague Bank, assignees of Jesse Payne, who was assignee of H. Payne, upon a promissory note dated at Williamsport, payable and negotiable at the Conococheague Bank. The declaration alleges, that it was made and assigned in succession by J. Payne and H. Payne at the Conococheague Bank, with

*The PRESIDENT absent.

a scilicet laying the venue in Berkeley county, where the action was brought. The judgment was entered against the defendant Rees (the drawer of the note) and the bail for his appearance.

Several objections were made in the argument of the cause to this judgment. First, that there is no averment in the declaration, that the Conococheague Bank is a corporation duly constituted, or that "the President and Directors of the Conococheague Bank" are authorized by law to sue in that name. Secondly, that the endorsements being in blank and not yet filled up, vested no title in the
329 *plaintiffs. And thirdly, that the judgment was given without regard to a credit endorsed upon the protest filed with the note.

As to the two first objections, I do not think they are well founded. A blank endorsement does not per se transfer a title, but is an authority to the holder, either to hold it as the agent of the endorser, or to claim it as his own by assignment, at his election, without any further act to be done by the assignor. The blank endorsement is conclusive proof of the assent of the endorser to transfer the note to the holder, if he elects to take it as a transfer. The assent and election of the holder to treat the endorsement as a transfer, is proved as well by suing upon it in his own name, as by writing over it an assignment to himself; and it is the assent of both parties to the transfer, which perfects it, and not the form in which that assent is evidenced. The possibility that the note might be withdrawn and again put in circulation, has no influence upon the question. The defendant could not thereby be injured; for, even if it were commercial paper, being past due, the new holder would take it subject to all objections.

It was decided in the Case of the Bank of Marietta v. Pindall, 2 Rand. 465, that a foreign corporation may sue in our Courts upon a contract with them, valid according to the laws of the country in which the contract was made; unless it was contrary to the policy of our laws; and that the making a note in Virginia to be negotiated at a foreign bank is not liable to this objection.

Whether the Bank of Conococheague is an incorporated bank or not, or whether they have a legal right to sue in the name of the "President and Directors" only, are questions which might have been put in issue by the defendant, or raised upon the trial of the general issue. No averments as to those subjects were necessary in the declaration. In order to maintain their action, it would have been necessary to prove, if the defendant had appeared and
330 pleaded, that they were incorporated, and legally empowered to *make the contract under which they claim, and to sue in the manner in which this suit is brought. If they failed to shew that they were incorporated, their action could not be maintained. For, it is contrary to the act of 1805, re-enacted in 1819, Rev. Code, ch. 207, sec. 2, to circulate any note payable to bearer or any other person, emitted by any banking company not having a

charter, whether that company exists in Virginia or elsewhere. If such an unchartered company existing in a foreign country could, by the laws of the country, contract and sue in the names of their agents, it would be contrary to the policy of our laws for our citizens to procure their notes, to be there discounted; since it would tend to violate the law, by encouraging the circulation of their notes here. That private corporations may sue, without alleging their charter of incorporation, although the Courts cannot ex officio take notice whether they are or are not incorporated; and that the question whether they are a legal corporation or not, and have a right to sue in the name used;—are proper to be put in issue by the defendant's plea, or enquired into upon the general issue, appears from the Case of The Mayor and Burgesses of Lynn Regis, 10 Co. Rep. 120; in which the declaration did not aver the existence of the corporation, but upon the trial of the general issue, their charter was produced, and the only question in the cause thereupon arose, whether the bond and the suit brought upon it were in the proper legal name of the corporation.

The third objection is, I think, well taken. A final judgment, when no plea is filed, may be rendered in the office at rules, for principal and interest, when the action is founded upon any instrument in writing for the payment of an ascertained sum of money. But, if the plaintiff, by any paper filed by himself, shews that the defendant is entitled to a credit, the judgment ought either to be entered subject to such credit, or if the plaintiff refuses to take a judgment in that way, a writ of enquiry should be awarded. In this case,

if it be doubtful whether the defendant is entitled
331 *to the credit endorsed on the protest filed with the note, it was sufficient prima facie evidence to prevent a judgment from being given for the whole sum, without a writ of enquiry.

It is objected, that this error cannot be taken advantage of here, because being a clerical error, it might and ought to have been corrected on motion in the Court below. If this be so, the plaintiff as well as the defendant had a right to have it corrected, and it was as much his fault as that of the defendant, that it was not; and not being corrected, the judgment is erroneous. Indeed, the plaintiff might have cured the error by releasing the amount of the credit endorsed upon the protest, if he admitted it to be a credit. But he obviously contests this, by his endorsement on the execution that Mr. Sexton's check would be received in part payment to the amount of \$548 25, the amount of the credit on the protest, deducting \$1 75, which was the cost of the protest; which they intended to secure in this way, as it was not embraced in the judgment.

The judgment should be reversed, and the proceedings since the common order set aside, and the cause remanded, with directions to send it to the rules, to be there further proceeded in, and a writ of enquiry awarded.

The other Judges concurred, and judgment was entered accordingly.

332 *Turner v. Scott and Others.

June, 1837.

Injunctions—**Dissolution**—**Filing of Answer**.—Where an injunction is awarded until the answer comes in, the injunction is not dissolved by the coming in of the answer, but is a subsisting injunction until it is dissolved by the subsequent order of the Chancellor.

Same—**Same**—**Revival by Appeal**.—A dissolved injunction is revived by an appeal taken by the plaintiff in the Court of Chancery; and it is improper in the appellee to take out an execution, so long as the appeal is depending.

Contempt—Jurisdiction.—Quere, whether the party offending should be punished by the Court of Appeals, or the Court of Chancery?

This was an appeal from the Chancery Court of Fredericksburg.

Turner and others filed a bill against Scott and others, to restrain the defendants from proceeding on two judgments at law obtained by one of the defendants. The Chancellor awarded the injunction until the answer comes in. Afterwards, the answer was filed; and the Chancellor, on motion, dissolved the injunction, and the plaintiffs appealed.

The defendants issued an execution on the judgments which had been enjoined, under the idea that the injunction had ceased to operate by the very terms of the order itself.

Johnson, for the appellants, moved the Court for an attachment against the appellees, for proceeding to take out an execution under these circumstances; and contending that it was not regular to grant an injunction till the answer comes in; and that the Court of Chancery must, in all cases, make an order before an injunction can be dissolved.

Stanard, for the appellee.

June 13. The Court pronounced the following opinion:§

The Court is of opinion, that the injunction was not dissolved by the coming in of the answer, but was a subsisting 333 *injunction until it was dissolved by the subsequent order of the Chancellor: that the injunction was revived by the appeal allowed by this Court; and that it was improper in the appellees to proceed to execute the judgment at law, so long as the appeal is still depending in this Court, &c.; and that the appellee, John Scott, having reasonable notice of this order, do shew cause on, &c., why an attachment should not be awarded against him for his contempt in issuing, or causing to be issued, an execution on the judgment enjoined, after notice of this appeal and serv-

***Injunctions**.—See monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

†**Same**—**Dissolution**—**Revival by Appeal**.—To the point that a dissolved injunction is revived by an appeal taken by the plaintiff in the court of chancery, and that it is improper in the appellee to take out an execution so long as the appeal is pending, the principal is cited in *Epes v. Dudley*, 4 Leigh 150; *Jeter v. Langhorne*, 5 Gratt. 199, 206 (at this last page. JUDGE ALLEN discusses the above set out decision of the principal case and says it was not necessary. In the principal case to decide, and that the court did not decide that the injunction was revived by the appeal.)

‡**Contempt—Jurisdiction**.—In *State v. Horners*, 42 W. Va. 415, 26 S. E. Rep. 270, it was held that the court awarding the injunction, not the supreme court, has jurisdiction of a proceeding for contempt for its violation. See principal case cited therein. See further, monographic note on "Contempts" appended to *Wells v. Com.*, 21 Gratt. 600.

§The President, absent.

ice of the writ of supersedeas. But, as this Court entertains some doubt, whether such improper conduct should be punished by this Court or the Court of Chancery, from which the appeal was prayed, the said John Scott, on shewing cause, will not be precluded on this point.

Whitworth & Yancey v. Adams.

June, 1827.

Accommodation Paper—Sale of—Usury.—A note is made and endorsed for the accommodation of the payee, and afterwards put into the hands of a broker by the payee, to be sold in the market. It is purchased of the broker by a third person, who has no knowledge that it is accommodation paper, or for whose benefit it is sold. This transaction is not usurious. The principle of the Case of *Taylor & Co. v. Bruce*, Gilm. 42, confirmed.

Notes—Intermediate Indorsement Usurious—Effect on Holder.—An intermediate indorsement of a valid note, subsequent to that of the payee for an

[**Accommodation Paper—Sale of—Usury**.—In *Brummel v. Enders*, 18 Gratt. 394, it is said, "The case of *Whitworth v. Adams*, 5 Rand. 333, must be considered as settling the law of Virginia on the subject of usury in the purchase and sale of negotiable paper. It was the decision of a majority of a full court, after a most thorough discussion and examination of the subject by each of the judges. Though contrary to decisions in many, if not most of the states, it was in accordance with the decision of two judges in a court of three in *Taylor v. Bruce*, Gilm. 42, and for more than forty years it has been acquiesced in by the legislature, and been regarded by the courts and the community as establishing the law. I shall not, therefore, enter into any discussion of the principles involved in that case. Indeed, the authority of that case has not been questioned in the argument." Again, in *Danville v. Southerlin*, 20 Gratt. 579, it is said, "There is no doubt, whatever, that the owner of a note has the right to sell it for the most he can get; as he would have the right to sell any goods or wares he owned. But, on the other hand, it is quite as certain that no one has a right to make his own note and sell that for what he can get; for this, while in appearance the sale of a note, is, in fact, the giving a note for money. It is a lending and a borrowing, and nothing else. It is said in *Whitworth v. Adams*, 5 Rand. 333: 'If A, wishing to raise money, were to make his note payable to B, and then go to B and offer to sell it to him; and B, supposing that a man might lawfully sell his own note, were to give the money for it, verily believing he was purchasing a note, and not lending his money on the security of a note this would unquestionably be a loan; on the ground that he had intentionally done that which the law makes a loan. And this intention would, if the note were taken at a high discount, be a corrupt intent sufficient to vacate and contract.' This principle of law is in conformity with leading adjudicated cases, and is recognized universally by the elementary writers. *Parson's Mercantile Law* 266; *Brummel v. Enders*, 18 Gratt. 373; *Brockenbrough v. Spindle*, 17 Gratt. 43." And in *Gordon v. Dooley*, 10 Fed. Cas. 785, the court citing as its authority the principal case, *Hansbrough v. Baylor*, 2 Munf. 34, and *Taylor v. Bruce*, Gilm. 42, lays down the rule that a man may purchase bonds or negotiable paper in the market at any discount whether they were manufactured for sale or not, and not be guilty of usury. Furthermore, in *Moseley v. Brown*, 76 Va. 481, on the authority of the principal case, it was held that where the maker of notes endorsed them in blank and put them in the hands of a broker for sale on the maker's account, and the notes are purchased by one who is ignorant of the purpose for which they are made, at a greater discount than legal interest, the transaction is not usurious. To the same effect the principal case is cited with approval in *Bank v. Cowan*, 8 Leigh 22; *Hoghead v. Baylor*, 16 Gratt. 105; *Brummel v. Enders*, 18 Gratt. 388, 395, 405, 406, 407; *Gimmi v. Cullen*, 20 Gratt. 447, 456; *Bank of Radford v. Kirby*, 100 Va. 504, 42 S. E. Rep. 305, and distinguished in *Bailey v. Hill*, 77 Va. 497. See further, monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622; monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

***Same—Must Be Negotiated to Bona Fide Holder**.—It is agreed on all hands that an accommodation note is not available as a security for money, until it is issued or negotiated to some real holder for valuable consideration. *May v. Boisseau*, 8 Leigh 193, citing principal case as its authority. To the same

usurious consideration as between endorser and endorsee, will not vitiate the note in the hands of a subsequent bona fide holder without notice of such usury.

Same.—Endorsement—Usury.—A note, valid in its inception, is afterwards endorsed by a party to whom it has regularly come, to a third person, at a greater discount than legal interest; such transaction is usurious.

This was an appeal from the Superior Court of Law for the town of Petersburg.

Robert C. Adams, endorsee of Wilson & Orr, brought an action of debt against Whitworth & Yancey, on a promissory note, negotiable, &c., executed by the defendants to Wilson & Orr, purporting to be for value received, and endorsed by them to the plaintiff.

334 *The defendants pleaded Nil Debet, and several pleas of usury; and the plaintiff replied generally, on which issue was joined.

On the trial, the jury found a special verdict, the substance of which is fully stated in the following opinions.

The defendants filed a bill of exceptions to the opinion of the Court, stating, that on the trial of the issue, joined on the plea of the statute of usury, the defendants offered the evidence of George N. Belches, a broker in Petersburg, who proved that he sold to a citizen of Petersburg the note in the declaration mentioned, for John Wilson, at the rate of three per cent. per month, for money belonging to the said citizen of Petersburg, without any questions being put, or information given him by the said broker. Whereupon, the defendants, by their counsel, put the following question to the said Belches: Was the citizen, to whom you sold and delivered the said note, in the habit of purchasing and advancing money for such notes, at such a discount of 3½ per cent.? To which question, the plaintiff's counsel objected, and moved the Court to exclude it, as tending to draw unlawful information from the witness, in relation to a person who was named to the jury, but was not a party to this suit, and whose general conduct could not be the subject of this investigation. The Court sanctioned the objection, and the question was not permitted to be put; to which opinion, the defendant excepted.

A motion was also made by the defendants, to instruct the jury, that a broker who sells the negotiable note of any person, endorsed by the payee or payees, is the agent of the purchaser of such note, as well as of the payee or payees who sell it. This instruction was refused by the Court; to which opinion, the defendants excepted.

The Court gave judgment for the plaintiff on the special verdict, and the defendants appealed.

The case was submitted without argument.

335 *June 5. The Judges delivered their opinions.

JUDGE CARR.

This is an action of assumpsit, by the

effect, the principal case is cited in *Bank of the United States v. Jackson*, 9 Leigh 236; *Douglass v. Scott*, 8 Leigh 44; *May v. Boisseau*, 8 Leigh 205; *Brummel v. Enders*, 18 Gratt. 887, 888.

See principal case cited in *Martin v. Lindsay*, 1 Leigh 511; *Brummel v. Enders*, 18 Gratt. 888.

holder of a negotiable note against the maker. It was a note made for the accommodation of the payees, who endorsed it in blank, and gave it to a broker to raise money on. He sold it to Johnson at a discount of 3 per cent. a month. The statute of usury has been pleaded in various forms, and a special verdict found, which will be considered hereafter.

It has been a good deal the fashion of late, to decry the policy and justice of our laws, regulating the rate of interest. These considerations, I know, do not belong to us. It is our duty to give to every law an honest and manly support, whatever may be our opinion of its wisdom. It may be permitted to observe, however, that if the experience of ages, and the general opinion of mankind, deserve weight in legislation, their voice is in favor of usury laws. They have prevailed in all civilized countries, and in all time. Their object too is a humane one. In *Brown v. Morris*, Cowp. Rep. 792, Lord Mansfield says, "These statutes were made to protect needy and necessitous persons from the oppression of usurers and moneyed men, who are eager to take advantage of the distress of others; while they, on the other hand, from the pressure of their distress, are ready to come to any terms; and with their eyes open, not only break the law, but complete their ruin." In *Lowe v. Waller*, Doug. 736, the same Judge says, "The statute of usury was made to protect those who act with their eyes open;—to protect them against themselves. Upon this principle, it makes it penal for a man to take more than the fixed rate of interest; it being well known, that the borrower, in distress, would agree to any terms."

336 *The early statutes against usury attempted to put it down, by legislating in detail against the various forms, which it from time to time assumed; and it is curious to trace the progress of the contest between the law, constantly attacking, and the usurer, ever ready with some new device to elude and baffle the pursuit. Sometimes a colourable risque was added to the loan, or it was disguised under the form of a post obit or bottomry bond; sometimes, what was called dry exchange. The borrower drew a bill on a fictitious person, supposed to reside abroad. The bill was never sent abroad, but protested for non-payment, and the borrower charged with exchange, re-exchange, and other expenses beyond legal interest. Sometimes stock was lent, or money in the funds, to be returned by the borrower at a future day, till which time he is charged with interest for more than the market price of the stock. Sometimes, by advancing money on a pretended partnership; by which means the lender gets exorbitant interest, under the pretext of partnership profits. Sometimes, by giving the loan the shape of the purchase of a life-annuity. Sometimes, by obtaining a beneficial lease, in consideration of a loan of money. Sometimes, by discounting notes and bills of exchange, under the cloak of a purchase and sale. These are a few of the thousand devices resorted to, for evasion of the usury laws. The Legis-

lature, in their later statutes, giving up the vain pursuit of usury in its particular forms, and striking at the root of the evil, have forbidden the taking exorbitant interest directly or indirectly; thus throwing upon the ministers of the law, the duty of detecting and defeating every attempted evasion of it. Well may these ministers exclaim, *quo teneam vultus mutantem Protea nodo?* Yet are they bound to pursue this Proteus through all his changing forms; and the law has given them ample powers.

In *Barton's Case*, 5 Co. Rep. 70, it is said, "If in truth, the contract be usurious, against the statute, no colours nor shews of words will serve, but the party
337 may shew it, and *shall not be concluded or estopped by any deed or any other matter whatsoever, for the statute gives averment in such case."

In *Floyer v. Edwards*, Cowp. 112, Lord Mansfield says, "The statute of 12th Anne, prohibits any body from taking, any how, on the loan of money, above 5 per cent. (6 with us) for forbearance of payment; and all contracts for any loan of money, goods, merchandise, &c. bearing interest above 5 per cent., with an agreement for principal and interest, are null and void. It depends principally upon the contract's being a loan, and the statute uses the words directly or indirectly. Therefore, in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction. The view of the parties must be ascertained to satisfy the Court that there is a loan and borrowing; and that the substance was, to borrow on the one part, and lend on the other; and where the real truth is a loan of money, the writ of man cannot find a shift to take it out of the statute. If the substance be a loan of money, nothing will protect the taking more than 5 per cent.; and though the statute mention only for 'loan of monies, wares, merchandise, or other commodities,' yet any other contrivance, if the substance of it be a loan, will come under the word indirectly."

Again, in *Lowe v. Waller*, Doug. 736, Lord Mansfield says, "Before the statute of Henry 8th, all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries. This gave rise to many shifts and devices to evade the law. One, which was then most common, was provided against by that statute; but, the prohibition being confined to that particular sort of transaction, usurers were thereby put upon other contrivances; and experience taught the Legislature, in more modern statutes, not to particularize specific modes of usury, because that only led to evasion; but to enact generally, that no shift should enable a man to take more than legal interest upon a loan. Therefore, the only question
* 338 "in all cases like the present is, what is the real substance of the transaction, not what is the colour and form."

The correctness of these views I have never seen or heard doubted; and surely they tell us, that the usury laws are not to be construed strictly like penal statutes; but liberally, with a view to advance the

remedy, and suppress the mischief. Every transaction is to be stripped of the covering, which ingenuity has thrown around it, and exposed in its nakedness. In this spirit, let us look at the special verdict before us, and see what was the real substance of the transaction.

Wilson & Orr, and Whitworth & Adams, were two mercantile houses, doing business in Petersburg. On the 10th of September, 1817, Wilson, the acting partner of his house, applied to Belches, a broker of the town, to know whether he could raise money for him; who answered, "yes, on good paper." On the evening of the same day, Wilson sent a verbal message to Belches, to enquire whether the names of Whitworth & Yancey would do; but Belches not being at home, did not receive the message. On the 11th of September, Whitworth & Yancey, for accommodation merely, made the note in question to Wilson & Orr, being a negotiable note in due form, purporting to be for value received, which was endorsed by Wilson & Orr in blank, and on the day of its date delivered by Wilson to Belches, without stating what was the consideration, or why it was made, but requesting him to get the money for it. Accordingly, Belches, as broker, sold the note to Johnson, a citizen of Petersburg, at 3 per cent. a month discount, but did not communicate to him any thing about the note, or the intention of the persons, or the names of the owners; and said nothing on the subject, except that he offered the note for sale; and without further conversation, it was purchased by Johnson, with his own (and not the broker's) money, which he advanced at the said discount, without any questions asked, or
339 information *given. To my mind, these facts clearly prove, that "the real truth of the matter," "the substance of the transaction," between these parties, was a loan. A cover indeed is attempted, by assuming the form of a sale, and interposing the broker as a shield. But, it is a cobweb covering, too thin for disguise; a shield too weak for protection.

That the object of Wilson & Orr was a loan, the advance of money now for money to be paid in 60 days, is expressly proved, first, by their application to the broker to know if he could raise money for them; secondly, by delivering the note to him, with a request that he would get the money for it. Get the money how? Why, in the way uniformly practised with such paper, by discounting it at usury. Can we doubt this for an instant? Do not the whole *res gestæ* proclaim it? Do we hear of any restriction on the broker? No! He was to raise the money. No doubt he understood the phrase. "Twas his vocation." He went instantly and discounted the note at the rate of 36 per cent. a year; and we hear no complaint of his having exceeded his powers. And can we suppose that Johnson was ignorant of all this; that he took it for a note which Wilson & Orr had received of Whitworth & Yancey in the ordinary course of business, and which they meant bona fide to sell out and out? (Not that I think such ignorance would protect him;) but can we possibly suppose it? I

cannot. The facts found, the whole port and bearing of the broker and the buyer, proclaim to my understanding the buyer's knowledge of the real transaction, just as distinctly as if it had been found in so many words. It is expressly found that Belches sold the note as broker. This negatives at once the idea that Johnson could have dealt with him as owner. A broker is the factor of another; the agent of him for whom he is doing business at the time. Dealing with him in this character, if Johnson did not ask for whom he was acting, this wilful and designed omis-

340 sion charges him as strongly *with the fact and its consequences, as if it had been fully declared to him; and in truth, proves to my mind his knowledge of it. The broker offered the note for sale, the buyer took it, and paid his money without a question asked, or a word of explanation. Of this cautious silence of the parties, it may be truly said, qui tacet clamat. It speaks most emphatically to my mind. Who ever heard of a sale conducted in this way, where there was no consciousness of guilt, no apprehension of danger from the law, but all was fair and above board? In such cases, the seller fearlessly proclaims the title and circumstances of the property; and he who is about to vest his money in it, is eager to search out every fact connected with or bearing upon it. But here, conscious that they were doing a deed which the law would reprobate, and that their safety depended on concealment, we see them, in the very birth of the transaction, cautiously stifling the evidence, and preparing, by anticipation, the defence on which they now rely. They acted perfectly in concert. I ask no better proof that there was a secret understanding between them. In a special verdict, the jury need not find the usury. They find the facts, and the law infers the usury. *Roberts v. Tremayne*, Cro. Jac. 507; *Chesterfield v. Jansen*, 2 Ves. 147; *Gibson v. Fristoe*, 2 Call, 62; *Marsh v. Martindale*, 3 Bos. & Pull. 153. The finding proves to me, that the note was made and endorsed to raise money at usury, and that Johnson purchased with notice of these facts. If my understanding of the verdict be correct, the conclusion of law is inevitable, that the note was void in its inception. *Young v. Wright*, 1 Camp. 141; *Comyn on Usury*, 172; 15 Johns. Rep. 44, 355.

But, if I should be wrong in this, there are two other grounds, on which, it seems to me, that the appellants must succeed.

1. This being accommodation paper, was never an available negotiable note, until it was discounted by Johnson; and that discount being at a premium higher 341 than the legal *rate, the note was usurious and void; and this, though Johnson did not know that it was accommodation paper.

2. Though the note should be considered perfect and available as between Wilson & Orr, and Whitworth & Yancey, yet as the transaction by which it passed from the payees to Johnson, was a discount beyond legal interest, and so usurious, no subsequent holder could maintain an action on it.

As to the first: That a note, usurious in its creation, is void, into whose hands soever it may pass, is agreed on all sides. It is equally well settled, that if A. execute his note or draw his bill of exchange, and B. take these of him or his known agent, at a discount beyond the legal rate, it is just as much usury, as if B. had first advanced the money, and then taken the bill or note to secure it. The shift of a pretended sale is not suffered to protect such a transaction for a moment. The acts of the parties speak, and this language is much more worthy of trust than words. There must be two parties to every contract. I may draw any number of promissory notes, payable to A., B., C., &c. and finish them all in due form. While I keep them in my desk or my pocket, they impose no obligation; they are waste paper merely. So, if I agree to purchase property for which I am to give \$1000, and bond with three or four sureties is required, I execute my bonds, and get my friends to sign as sureties; this is still a one-sided, imperfect transaction. The bond as yet binds nobody; there is no contract; it is the delivery which gives it life. Suppose, instead of a bond, the vendor preferred to take a promissory note with A., B. and C. as sureties. I could execute the note payable to A. and get him B. and C. to endorse it. This would make them, in truth, security for me, just as effectually, as if they had joined me in executing the bond. Or, suppose the obligation took the form of a bill of exchange. I might draw on A. payable to my own order; he would accept; then I would endorse it; and B. and C. would endorse after me. Still 342 the note or bill, *while in my hands, would be mere waste paper. A., B. and C. to be sure, had agreed to become my sureties, and had assigned the instrument in such a way, as to put it in my power to bind them: but they could only be bound when I became bound, and that could only be, when I delivered the note or bill, upon a real transaction. If I never did this, though the time for which the note purported to run had elapsed, no one of the parties to it could sustain any action on it, against another. It had never received the animating touch, and was still a lifeless body. So, if I wish to raise money at usury, a little caution must be used; a decent cloak. I get a friend to lend me his credit; he executes a note to me for \$1000, payable in 3 months, which I endorse. While I hold this paper, it is nothing; it imposes no obligation on my friend; it is a mere preparation which I am making to get money. When I part with it, then I give it being, and stamp its character, by the nature of the contract I make. If I discount it beyond the legal rate, whether by myself or agent, it is usury. The note is usurious in its inception, and void.

To prove that the bill or note dates its existence from the first real transaction, I will first cite some English Cases. In *Arden v. Watkins*, 3 East, 317, reconsidered in *Wills v. Freeman*, 12 East, 656, A. having committed a secret act of bankruptcy, prevailed on B., for his accommodation, to accept a bill of exchange, which

A. drew on him, payable to his own order. This bill A. indorsed to C. for a valuable consideration, and without knowledge of the act of bankruptcy committed by A., C. the endorsee sued B. the acceptor. It was contended for the defendant, that the property of the bill was in the assignees of the bankrupt, as his act of bankruptcy overreached the endorsement. But the Court held, that the bill being accepted for accommodation of A. he had no property in it, nor right of action as against the acceptor; and therefore, that none could pass from him to his assignees; but, that

343 *the endorsee for value might well maintain an action against the acceptor. This I consider a decision, that the bill, while in the hands of A. was waste paper, and only received its existence as a bill, by the endorsement for value.

In *Wallace v. Hardacre*, 1 Camp. 45, the same point is decided upon the same reasoning. But, the case most strong and decisive, on this subject, is *Downs v. Richardson*, 5 Barn. and Alderson, 657, and 7th Com. Law Rep. 227, decided in 1822. Three persons, Rains, Lacklan and Thompson, joined as drawer, acceptor and first endorser, in making an accommodation bill. The bill was properly stamped in the first instance; but afterwards, and before it was passed away for value, the date was changed from the 6th to the 16th of March. The acceptor agreed to this change; but afterwards becoming bankrupt, his assignees set up the defence, that the change of date made the bill a new one; and rendered another stamp necessary. Abbot, C. J. says, "The difficulty arises from the act of Parliament, which requires that every bill of exchange shall have a stamp. The question then is, whether this alteration made it a new bill? Now undoubtedly, when an accommodation bill has the names of the different parties written upon it, it is, in some sense of the word, a bill of exchange; but it is utterly unavailable as a security for money, until it is issued to some real holder for a valuable consideration. It seems to me, on the facts of this case, that this was an accommodation bill, in the strictest sense of the word; and that the principal parties to it had no right of action inter se. This being the nature of the instrument, it follows that until it was negotiated, it was an unavailable instrument; and that it first became a bill of exchange, when it was issued to Howell for a valuable consideration." Bayley, J. "The question arises as to the provisions of the Stamp Act. Now, if an alteration be made before a bill is issued, a fresh stamp is not necessary. Then, when is a bill issued?

I am of opinion, that it is issued as soon 344 as there is some person *who can make a valid claim upon it; but, if it remains in the hands of the original drawer, even with names upon it, under such circumstances as that he cannot have any legal claim upon those persons, the bill is not issued. Here it was clearly an accommodation bill drawn by Rains upon Thompson, and endorsed by Lacklan, and those parties could not have a valid claim upon it inter se. It was, I think, not issued, until the 10th of April, when it was passed to How-

ard; but at that time, the alteration was made." Holroyd and Best were of the same opinion. The latter says, "Here, at the time when the alteration was made, the bill was a perfect bill in form, but it did not constitute a valid contract between the parties. A bond is, in form, a perfect instrument, before delivery; but still an alteration made before delivery, will not vitiate it." This is a very strong authority, when we consider how exceedingly strict the Courts in England are, in looking to, and preventing evasions of, the revenue laws.

Bowman v. Nichol, 5 Term Rep. 537; *Cardwell v. Martin*, 9 East's Rep. 190; *Bathe v. Taylor*, 15 East, 412, shew, that after a bill of exchange is once perfected, the slightest alteration in it, even though all parties consent, will render it void, unless there be a fresh stamp.

I will also refer to the Cases in New York on this point. The commercial habits of that State have rendered them perfectly familiar with the subject. It is every day before their Courts; and their decisions seem to me to deserve all the weight which can be derived from learning, talents and diligent investigation, both in the bar and bench.

Jones v. Hake, 2 Johns. Cas. 60, A. made a note payable to B., which was endorsed by B. and C. for accommodation of A., and sent by him to E., a money broker, to raise money. E. returned the note, saying he could not get the money with the names then on it, but if D. were added, he could get it at 2 per cent. a month. A. then got D's name, and returned it to E., who advanced the money on the note, deduct-

345 ing 2 per cent. a month. In "an action against the first endorser by G., it was ruled at *Nisi Prius*, that the note was usurious and void. The jury, however, gave a verdict for the plaintiff, and there was a motion for a new trial. Radcliffe, J. said, "If the contract be viewed in its true light, it was a contract made through the agency of the broker, between A. on the one part, and in the lender on the other, who took the note as his security. The lender was, in fact, the first holder of the note, for the value given, whatever that may have been. If, then, we admit no shift or device to evade the statute, and look through the forms under which the parties intended to cover the loan, it appears to me that there can be no doubt that the contract and the note are void." Kent and Benson concurred. Lansing and Lewis against the new trial.

Wilkie v. Roosevelt, 3 Johns. Cas. 66. A. made a note payable to B., who endorsed it for A's accommodation, who passed it to C., to raise money on, by discounting in the market. C. discounted the note at 3½ per cent. a month, and applied the proceeds to the payment of monies lent by him to A.; and afterwards, in the course of his business, passed the note to D., who sued B., the endorser. Held, that though B. had endorsed, yet as this was for A's accommodation, the note passed immediately from A. to C.; and that the transaction was, in its inception, usurious, and void.

Mann v. The Commission Company, 15

Johns. Rep. 44. Herman Ruggles drew a bill of exchange, in favor of Oliver Ruggles or order, on Darling, the agent of the defendants. The bill was accepted by Darling, and endorsed by O. Ruggles. The plaintiff was the holder of the bill. It appeared in evidence, that O. Ruggles had given the note to a broker to raise money on, and that it had been sold to the plaintiff, at a discount beyond the legal rate. Two points were made in the cause. The second was, that there was usury in the sale of the bill. Spencer, J. delivered the opinion of the Court. He said

346 "that there had been considerable doubt in the minds of some of the Judges, principally with respect to the part which O. Ruggles had played, whether he had a real interest, and could, after the acceptance of the bill, have maintained a suit upon it. "This (he remarks) appears to the Court the true test in distinguishing between a case, where the discount of a bill at a higher premium than the legal rate of interest, will render the transaction legal, by considering it the purchase of a bill already perfect and available to the party holding it, and where it will be illegal as an usurious loan of money." He then goes on to state it as settled law, that a bill, free from usury in its creation, and available to the holder, may be sold at a discount greater than the legal rate, without usury, and assigns the reason. "And I take it (he adds) to be equally clear, that if a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties, whose names are on it, can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious, and the bill would be void."

Bennett v. Smith, 15 Johns. Rep. 355. A. applied to B. to lend him money. B. refused, but said he would buy good notes at a discount of 21 per cent. A few days after, A. brought B. several notes executed by the defendants to A., which B. bought at a discount of 21 per cent., not knowing at the time but that the notes were given to A. in the ordinary course of business. The fact was, that they were executed to A. by the defendants (as a loan of their names) to be sold to B. at the discount he had offered. The Judge charged the jury, that if they believed the witnesses, the transaction was usurious, and the notes void, under the statute: that it was immaterial whether B. knew the manner in which A. obtained the notes; he took them at his peril, and though he may have supposed them to "have been given in

347 the ordinary course of business, they were nevertheless void. The plaintiff was non-suited; and upon a motion to set the non-suit aside, on the ground that there was no usury, the Court overruled the motion, as a clear matter; Vann Ness, J. saying to the counsel, "The case of Mann v. The Commission Company is decisively against you upon this point. We decided, that a note made for the purpose of being discounted at an usurious interest, and en-

dorsed for the accommodation of the maker, was void in its original formation."

Powell v. Waters, 17 Johns. Rep. 176. Wood made a promissory note, which Waters endorsed for Wood's accommodation. It was made to be discounted at the Newburg Bank, and for this purpose was delivered to Smith, who also endorsed for Wood's accommodation. Smith applied to the Bank, who refused to discount. He then called on one of the firm of J. & T. Powell, who discounted the note, being informed of the purpose for which it was made. The note on which the suit was brought, was a second note made by Wood, and endorsed by Waters, for the purpose of taking up the former. Waters did not know, when he endorsed the second note, that the first had been discounted by Powell & Co., and not by the Newburg Bank; and he supposed that the second note would go to that Bank to take up the former. The second note was discounted by Powell & Co., and the first taken up with the proceeds. On this second note, Powell & Co. brought assumpsit against Waters. There were several minor questions; but the important one was, as to the usury in discounting the note. A verdict was taken for the plaintiffs, subject to the opinion of the Court on the case stated. Spencer, C. J. delivered the opinion of the Court. He considered it of no importance that the note was intended to be discounted at the Bank, and was in fact discounted by Powell & Co. It was made to raise money, and such discount did not increase or alter the responsibility of the endorser. On the

348 question of usury, he says, "It may be urged that the purchase of the note by the plaintiffs at such a discount, as would amount to usury in case the note was originally intended to be sold to them, is not, under the circumstances, usurious, and in fact, that it was the mere purchase of a note at a less sum than its face. The case of Mann v. The Commission Company settles this point. It is there said, that if a bill or note be made for the purpose of raising money, and is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it, as between themselves, can maintain a suit on the bill at maturity, provided it had not been discounted, that then such discounting would be usurious and the bill void. In the present case, the note was discounted for the accommodation of Wood, and it was not an available paper in the hands of either the payee or endorser, until it had been negotiated to the plaintiffs; and the transaction, therefore, would be usurious, if the plaintiffs purchased the note at a less sum than its nominal amount, deducting the interest for the time the note had to run." A new trial was awarded.

These cases are all in point, and, I think, settled on clear grounds of law and reason. The last is a much stronger case than the one at bar. It is clear that Wood made the note and Waters endorsed it, with the intention of discounting it at the bank, and of course, at the legal rate. But yet, as the contract which gave it being as an available note, was a discount at a pre-

mium higher than the legal rate, it was usurious, and the note void. In our case, the note was made and endorsed for the express purpose of raising money at usury; and Wilson & Orr, through the broker Belches, sold it to Johnson, at a discount of 36 per cent. a year. If a shift so gross and palpable as this be suffered to pass as an innocent transaction, then indeed I should be inclined to think it best to repeal at once the statute against usury. Such a step would, at least, give fair notice to our citizens, of the ground they occupied.

349 *I said that the transaction would be usurious, and the note void, though Johnson did not know that it was accommodation paper. I am met here by the objection, that there must be a corrupt agreement to constitute usury; and that there could be no such agreement, without the concurrence of two minds, in the commission of some act in violation of the law. This seems to have been the consideration which principally weighed in Taylor v. Bruce, Gilm. 42. I have, therefore, felt myself bound to examine this point, with my best attention.

In the first place, it does appear to me that there is much good sense and soundness in the construction of the statute, contended for by the counsel in Taylor v. Bruce, and used also by counsel in a later case in New York, 2 Cowan's Rep. 740, to wit, that there is a material distinction between that part of the statute, which avoids notes, assurances, &c. for usury, and that which subjects a party to the pains and penalties of the law. The first declares that no one shall take directly or indirectly, for loan of money, &c. more than 6 per cent. and all bonds, assurances, &c. by which a higher interest is reserved or taken, shall be void. The second enacts, that if any one shall, by corrupt bargain, loan, exchange, shift, &c. receive more than 6 per cent. he shall forfeit double, &c. In the first clause, no corrupt bargain is made necessary to that avoidance of assurances. In the second, it is expressly required to constitute the offence. If we had to pass upon this subject for the first time, I think we should feel little difficulty in pronouncing, that there was a substantial difference between them. Even in England, where under the influence of the statute of Hen. 8th, the corrupt agreement is said to be necessary to constitute usury, in both its branches; there is in fact a marked distinction between avoiding a note, &c. and subjecting a party to the penalties of the act. For instance, in Barnett v. Tompkins, Skinn. Rep. 348, the wife of the plaintiff used to lend money, to be paid by the week. She lent to the defendant 350 ant 20l. to be paid by *20 shillings a week, and 1s. 6d. per week for interest. The husband sued on this bond. Lord Ch. J. Holt ruled, that it was an usurious contract, and that though it was not sufficient to charge the husband criminaliter, it was sufficient to discharge the bond civiliter.

Again. As to the corrupt intent, although it be necessary in England to lay it in the pleadings, they seem to have dispensed with any proof of an actual corrupt

intent, by substituting for it a legal corrupt intent, saying that wherever any act is done, which shall be considered a violation of the statute, it shall be taken to be corruptly done, though the party had not the least idea, that he was offending against the law. They make a distinction very properly in this respect, between a mistake of fact, and a mistake of law. Thus, a bond is meant to be taken for the proper sum, and the scrivener mistakes it, and puts down a larger sum. This shall not avoid the obligation, or make the contract usurious. The most authoritative decision on this subject in England, and one which is there considered as having settled the law, is the case of Marsh v. Martindale, 3 Bos. & Pull. 154. The opinion of the Court is delivered by Lord Alvanley, C. J. and is elaborate and able. The jury had expressly found, (after stating the facts) that they believed the plaintiff Marsh did not think he was acting contrary to law. In the course of his opinion Lord Alvanley says, "I stated to the jury, that if a man agree to take more than 5 per cent. for the forbearance of money, the law declares such an agreement corrupt within the statute of Anne, whether the party thought at the time, that he was acting contrary to the statute or not; and though the jury have found that Sir Charles Marsh did not think he was acting contrary to law, there is nothing in that finding to prevent us from examining the transaction, and declaring it to be corrupt, if it appear to us to be so in point of law, without sending the case back to a jury to find the corruption."

And accordingly the transaction was 351 declared usurious, and the *bond void. This is the construction of equity, as well as law.

Bernard v. Young, 17 Ves. 44. A case was brought before Sir William Grant, involving the question of usury. He discusses the subject with his usual clearness, and concludes thus; "Therefore, though it was not probably so intended, this is an usurious contract." 'These opinions seem to me to be founded in sound reason; and without such construction, it would be impossible to enforce the statute.

The Courts of Massachusetts and New York have, I find, acted upon this as a settled principle. Thus, in The Bank of Maine v. Butts, 9 Mass. Rep. 49, usury was relied on as a defence to a claim of the Bank, on notes discounted. The mode of discounting pursued was this: Notes payable at 63 days were discounted at the legal rate; but a week before the expiration of the time, the borrower was obliged to procure a new loan of the Bank; thus paying for that week interest both on the original and the renewed loan. The Judge who tried the cause, instructed the jury, that this was not usury, as there was no corrupt intent, the Bank believing that they had a right to calculate in this way. On exceptions to this opinion, the Court decided that the Judge had misdirected the jury. They say, "It is probable, that in this case, there was no intentional deviation on the part of the Bank, but a mistake of their right. This, however, is a consideration which must not influence our decision. The mis-

take was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rate of interest was proved; but a voluntary departure from that rate. An excess of interest was intentionally taken, upon a mistaken supposition that Banks were privileged in this respect, to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement, for ignorance of the law will not excuse."

352 *New York Firemen Insurance Company v. Ely, 2 Cow. Rep. 678. The plaintiffs had discounted a note for the defendant. In a suit on the note the defence was usury. It came out in evidence, that the company, in their calculations upon discounting notes, were in the practice of taking 90 days as a quarter of a year, 60 days as a sixth, and 30 days as a twelfth; thus making the year to consist of 360 days, and gaining five days to the Bank. It was admitted that this was the general rule of the Banks of the State, and that the plaintiffs, in following this rule, had no idea of violating the law. But, the Court decided that the transaction was usurious, and the notes void, Southerland J. says, "There can be no usury without an intention to take a greater rate of interest than 7 per cent. (6 with us,) but it is not necessary to the offence that there should be an actual intention to violate the statute. It may be committed by one who never heard of the statute. Whether the party intended to take more than 7 per cent., is a question of fact for the jury. If it be found that he did, it is an invariable inference of law, that it was taken in pursuance of a corrupt agreement which consummates the offence. The intent of the parties is a legal inference from established facts. In a special verdict, it is not necessary that the jury should find that the agreement was corrupt. They find the facts and circumstances, from which the law infers either that it was or was not corrupt." See also *The Bank of Utica v. Wager*, 2 Cow. Rep. 712, where the same points were raised, and settled in the same way, after arguments (of the bar) among the very ablest I have ever seen.

These cases shew, that there may be a legal intention, as contradistinguished from an actual intention, a corrupt agreement in law where there was no corruption in fact, as there may be fraud in law involving no moral turpitude. These legal conclusions are correct in the main, though there may be individual exceptions. They have been found necessary for the protection of the community, and

353 *the execution of the laws, and cannot be safely departed from. Having thus shewn, first, that to discount a note given for accommodation, at a higher rate than 6 per cent., is a violation of the statute and usurious; and secondly, that every agreement in violation of the statute is per se a corrupt agreement; I think the conclusion follows, that Johnson, who purchased the note at a discount of 36 per cent. per annum, (which note received its existence by the transaction) has violated the law, and stands convicted of the corrupt agreement, though he did not know the note to be accommodation paper. It is

supposed (in *Taylor v. Bruce*,) to be absurd and impossible, that when a man has purchased two notes, under precisely the same circumstances, the one shall turn out to be a fair and legal transaction, and the other an usurious and illegal transaction. The seeming absurdity results from considering actual corruption, moral turpitude, a necessary ingredient in the composition of usury civiliter, instead of that legal corruption, of which I have shewn the necessity from reason, and the existence, from authority. The hardship is not greater than where a man purchasing in the market two available, perfect notes, under the same circumstances, shall find one turn out to be a good note, given for a valuable consideration, and the other tainted in its origin with usury or gaming. The notes, in either case, have no earmark; they bear no brand on their forehead. These, therefore, are the risks and hazards of the trade, and must be encountered by those who follow it. But these traders know (none so well!) that there is a great mass of accommodation paper made and thrown into the market, to raise money at usury. They know (or if not, ignorance of the law excuses no man) that it is usury to buy these, at a discount beyond 6 per cent. Let them, therefore, make such inquiries as will satisfy them; or, if there be any doubt, let them avoid the traffic, or be content with the legal discount.

354 *Surely this cannot be requiring too much, in a class of cases, to which (as I think) the rule caveat emptor most appropriately and emphatically applies. Even if this restriction should narrow a little the range of this trade, is it not better, than, by freeing it from all restraint, to open a door for the evasion of the statute, so wide, that all who wish it, every necessitous borrower and grasping usurer, may enter at it?

If it be objected, that the contract between the broker and Johnson was not usurious, because a note may be sold in the market for less than its face, without committing usury, I answer, that it is very true, provided it be a real, bona fide, fair sale out and out of a note, perfect and available before such sale. But, between such a sale and the transaction here, there is a broad and marked distinction. If the holder of a note transfer it without endorsing it, the transaction is prima facie a sale; and if it be a real sale, and not a cover to evade the statute, the contract will be valid, though the discount be greater than the legal rate. But if the holder, when he parts with the note, endorses it, it becomes substantially a mere security for money borrowed. Upon a sale without endorsement, the seller enters into no engagement to re-pay the purchase money, nor is he liable in any event, if he has committed no fraud. In such a sale there can be no usury. But when he endorses the note, he binds himself absolutely, that the whole amount of it (the sum he receives, as well as the discount) shall be re-paid to the endorsee or holder; and being thus bound to pay money in future, for money advanced, if the discount be beyond the legal rate, is it not equally

usury, whether the obligation to pay be incurred by an original note, or an endorsement? The difference between the discounting a bill, when the holder endorses, and the sale of a bill without endorsement, is very strongly and clearly laid down by the whole Court in *Feun v. Harrison*, 3 Term Rep. 757. It would be a waste of time to refer to all the cases which

shew, that where the note is endorsed
355 and discounted at a rate beyond the legal interest, it is usury. The Books, both English and American, are full of them. *Rich v. Topping*, 1 Esp. Rep. 176; *Beard v. Akerman*, 5 Esp. 119; *Jones v. Brook*, 4 Taunt 464; *Parr v. Eliason*, 1 East, 92, are a few of the English Cases. Those from New-York, before referred to, prove the same thing. *Loyd v. Keitch*, 2 Con. Rep. 192; *Churchill v. Suter*, 4 Mass. Rep. 162. This last was a case agreed, and the facts almost exactly like ours. *Parsons* says, "If a sale under these circumstances is not to be considered usurious, it is not easy to conceive what sale is within the statute."

The second ground, on which I think the appellants must succeed, is, that the note (even supposing it perfect and available as between maker and endorser) was passed by *Wilson & Orr*, through the broker, to *Johnson*, at an usurious discount: that by this usury, the endorsement of *Wilson & Orr*, the payees, was rendered void; and no one holding could claim under it. The statute declares all usurious contracts "utterly void." Now, that contract which is utterly void, can produce no effect, can operate nothing, and is, in truth, as if it had never been. If the endorsement of *Wilson & Orr* transferred their interest in the note to the buyer, could it possibly be said to be "utterly void?" What more could it do than pass the title, if it had been valid? Is it not a contradiction in terms, to say that a void endorsement passes the title? In the case of *Barnard v. Young*, 17 Ves. 44, *Keighly* executed a deed assigning 8,500l. of East India stock to *Young*. *Keighly* afterwards became a bankrupt, and his assignees filed their bill, praying that the defendant might produce the deed, and charging that it was illegal and void, as being founded on an usurious contract. *Sir William Grant* says, "It was objected that *Young's* assignment was void, as being usurious; and if it is usurious, the consequence must follow, that it is wholly void. The party, in whose favor an usurious contract has been executed, cannot

356 not make "use of it for any purpose whatever." The endorsement of the payees being utterly void, the property of the note remained in them. If the endorsement of the payees had been valid, and any subsequent endorsement void, the holder might still have sued on the note; for, he might strike out all the intermediate endorsements, and claim under the endorsement of the payees. But, every subsequent holder must claim through the payees; and when their endorsement is void, no holder can maintain a suit. I know that in *Daniel v. Cartony*, 1 Esp. Rep. 275, and *Parr v. Eliason*, 1 East's Rep. 92, Lord Kenyon overruled a defence of

this kind; deciding, that usury in any intermediate transaction respecting a note, can never make it void in the hands of a bona fide endorsee, where there was no usury in the original transaction. But, I consider these decisions overruled by a case before Lord Ellenborough in 1816, where he decided, that if the payee has endorsed the note on usurious terms, such endorsement will be void; and that, therefore, a subsequent holder cannot claim through such endorsement. For the reasons I have given, I am clearly of opinion, that this is the better law. The case I refer to is *Lows v. Mazaredo*, 1 Starkie, 385, more fully reported in *Comyn on Usury*, 175. M. being indebted to L., the latter drew a bill of exchange on M., payable at two months, to his own order. M. accepted. L. took the bill to a broker, who discounted it at an usurious rate. L. endorsed it in blank. The broker passed it without endorsement to A., who passed it to the plaintiffs. They sued M., the acceptor, and the defence was usury in the contract of the payee. The plaintiffs (at *Nisi Prius* before Lord Ellenborough) relied on the case of *Parr v. Eliason*. Lord Ellenborough, after observing that that case had been doubted, allowed the plaintiffs to take a verdict, with liberty to the defendants to move to enter a non-suit. Upon this rule, the case was well argued for the plaintiffs. The Court stopped the counsel on the other side. Lord Ellenborough observed, "that the bill

357 "having been stained by the payee with usury, could never be effective until it was cleansed. Had it been called in by the payee and re-published, it might have received an effect de novo. But tainted as it was, every one must take it subject to its vice. It was impossible to reject one part of an endorsement, and retain another part; but, that it would be necessary, either to receive or repudiate the whole unsound matter." His Lordship added, that he had turned the case of *Parr v. Eliason* in his mind, with great doubt, and that having been of counsel in that case, he remembered that at the time of its decision, there was great conflict of opinion on the subject. The rest of the Judges concurred; Mr. Justice Bayly remarking, that "as every endorsement was considered in law as a new drawing, the plaintiffs must necessarily claim under this new drawing, which was usurious." The rule for a non-suit was made absolute. This is a much stronger case than ours, in this respect, that the bill was given for a full and valuable consideration, and was perfectly available between the payee and acceptor; whereas here, the note was made to raise money at usury, and was mere waste paper, till the usurious discount gave it being. See the case of *Chapman v. Black*, 2 Mau. & Selwyn, 589, decided in 1819, where discussing the question whether usury in the endorsement of the payee disabled any subsequent holder from claiming through him, C. J. Abbott, delivering the opinion of the Court, says, "The case of *Lows v. Mazaredo* being subsequent to *Parr v. Eliason* and *Daniel v. Cartony*, must, in our opinion, be taken as furnishing the rule of law upon the subject; more espe-

cially, as the law has since been altered by a statute,* passed probably in consequence of the decision of that very case."

358 *The case of *Hansborough v. Baylor* is objected; but the differences between that and this case, both as to the circumstances and the subject of the contract are so striking, that the one can never be considered as governing the other. These differences I will not now stop to point out.

Upon the whole, I am clear that the facts found, prove the note usurious in its inception, and void: that if not void in its inception, the endorsement of the payees was usurious and void; and that on both grounds, the judgment of the Court below must be reversed, and a judgment entered for the appellants.

JUDGE GREEN.

This is an action of debt by R. C. Adams endorsee of Wilson & Orr against Whitworth & Yancey, in which the jury found a special verdict, that the negotiable note on which the suit was brought, was drawn by the defendants without consideration, payable to Wilson & Orr, who endorsed it in blank, and delivered it to Belches a broker, and requested him to get the money for it; without stating what was the consideration, and why it was made; Wilson, the acting partner of Wilson & Orr, having the evening before asked the broker whether he could raise money for him, to which the broker replied, "yes on good paper;" and Wilson afterwards having, on the same evening, sent a message to the broker, which he did not receive, to know whether the names of Whitworth & Yancey would do. That the said Belches, as broker, took the note, and sold it to Wm. R. Johnson, at a discount of 3 per cent. per month, without communicating any thing to Johnson about the same, as to the intention of the parties, or the names of the proprietors of the note; and said nothing upon the subject, except that he offered the note for sale, and without further conversation the note was purchased as aforesaid; and that the money paid for the note, was Johnson's and not the broker's money.

359 *Upon this verdict, the Superior Court gave judgment for the plaintiff.

The defence was, that the note and the transfer of it by Wilson & Orr were both void for usury; and the questions which arise are, whether the note itself was, in the words of the statute, "made for the payment of money lent, on which a higher rate of interest was reserved than is allowed by the statute," or in other words, was it usurious in its inception, or to use the phrase of Lord Kenyon, in its concoction? And whether, if not void for usury in its inception, the contract by which it was transferred to Johnson, was usurious and void; and if so, whether the drawers of the note (the defendants) can

avail themselves of the fact, that the transfer was void, as against the plaintiff, a subsequent bona fide holder of the note?

Before proceeding to examine the effect of the facts found in this particular case, it will be useful to advert to some of the general principles settled in relation to questions of usury.

The statutes of usury are said by several of the English Judges to be penal statutes, and consequently, to be construed strictly. This declaration is remarkable, inasmuch as the statute, 13 Eliz. ch. 8, sec. 7, directs, that the statute 37 Hen. 8, ch. 9, enacted against usury, should be construed largely and strongly against the party offending by way of device directly or indirectly. However this may be in England, our statute having no such provision as that of Elizabeth, is certainly penal; and the general rule is, that penal statutes are to be construed strictly. This rule is, however, liable to exceptions in cases of statutes intended to prevent a general mischief, or to promote the public good; as the statute of frauds, which is highly penal in England, *Twyne's Case*, Co. Rep.; and when it applies, it means nothing more than that a penal statute shall not be extended by equity, to persons or things, not expressly provided for by its terms. It ought, however, even when construed strictly, to be carried into
360 *effect according to its true intent and meaning, 9 Vin. Abr. 521, pl. 97.

This is a rule for the construction of the terms only of the statute, and, it seems to me, can have no sort of influence upon the enquiry as to the truth of the fact alleged as coming within these terms. In enquiring into the fact, whether a transaction was a loan or a sale, the weight and effect of the evidence cannot be impaired or increased by the consideration that the statute is to be construed strictly or liberally. No construction of the statute can have even the least tendency to prove or disprove the fact alleged.

The statute of Hen. 8, which governs, and has in some measure given a construction to all the subsequent statutes of England upon the subject of usury, expressly requires, in order to constitute usury, that there should be a corrupt intent; and this must, therefore, be alleged in pleading the statutes. Our statute, on the contrary, whilst it in terms requires a corrupt intent, in order to subject the parties to the penalty prescribed by the act, declares all bonds, &c. void, if made for the payment of money lent, on which a higher interest is reserved than the law allows, without requiring a corrupt intent on the part of the lender. This distinction between the English statutes and ours has no practical effect upon any question of usury. In England, the allegation of a corrupt intention is mere form of pleading. It is an inference of law from the fact of the intentional taking or securing more than legal interest; and is inferred by the Court, either from the facts found by a jury, or agreed by the parties, or alleged in pleading and admitted by demurrer. *Roberts v. Tremayne*, Cro. James, 507; *Gibson v. Fristoe*, 1 Call,

*Note.—The statute here referred to, is 58th Geo. 3d. ch. 98, which provides, that no bill of exchange or promissory note, though given for an usurious consideration, shall be void in the hands of an endorsee for value, unless, at the time of his discounting or paying the consideration of the same, he had actual notice of usury.—Note in Original Edition.

62; Marsh v. Martindale, 3 Bos. & Pull. 153; Reynolds v. Clayton, Mod. 397—2, and 15 pl. 8, S. C. and so conclusive is this inference of law, that if the jury find facts shewing that the party intentionally took or received more than legal interest, the Court will infer the fact of corrupt intention, against the expressed opinion
361 of the jury, that "the party did not think he was acting contrary to law;" as was the finding in Marsh v. Martindale.

It was said in Price v. Campbell, 2 Call, 110, that in order to constitute usury, there must be a corrupt intent on the part of both the contracting parties. In that case, Braxton purchased bonds of Campbell, and in payment drew bills of exchange on several persons in Great Britain, with whom he had no correspondence, and which he knew would not be paid; and that consequently, he would be liable to pay in damages and costs, largely more than legal interest. His object was obviously to raise funds by this expedient. It did not satisfactorily appear, though there was strong reason to suspect, that Campbell was privy to Braxton's views. The Court held, that inasmuch as there was no agreement between the parties that the bill should not be paid in Great Britain, but should be paid in Virginia, with damages after protest, that Braxton might have provided funds in Great Britain, to take up the bill, and so have avoided the liability to pay the damages, it was not an usurious transaction, as it would have been, if there had been such an agreement. Nothing could deprive him of this right to avoid the payment of a sum exceeding legal interest, but such an agreement, which could not exist without his concurrence. The Court were, therefore, right in declaring, in that case, that to constitute usury, both parties must have concurred in such corrupt agreement; and the rule is applicable to most cases; for, there are few cases in which a party can be bound by any contract without his express assent. But, cases may occur, in which a party, who has no intention to make a contract to pay more than legal interest, may be bound by such a contract, unless he can avoid it by the plea of usury; and the true rule is, that any transaction in which the lender reserves intentionally more than legal interest, is void, for that cause only, even if the borrower does not concur in that intent; and this proposition was sufficient for the decision of Price v. Campbell. The statute, in terms, prohibits the taking,
362 *not the giving, or giving and taking, or contracting to give and take, more than legal interest; and avoids assurances made for the payment of money lent, on which illegal interest is reserved or taken, not contracted to be received or given. The literal terms of the statute apply exclusively to the lender, and do not require the concurrence of the borrower in the illegal intent. If the security for money lent, is, by mistake of the scrivener, made to secure a greater interest than is legal, and the lender parts with his money without a knowledge of the mistake, there being no corrupt or illegal intention on

his part, the security is valid, and cannot be impeached at law. Nevison v. Whitley, Cro. Car. 501; Booth v. Cook, Freeman, 264; Rush v. Buckingham, 2 Vent. 83; Glassford v. Laming, 1 Campb. 149. But, if the lender discovered the mistake, before he parted with his money, and with this knowledge, had proceeded and advanced his money, with intent to avail himself of the mistake, this fraudulent and corrupt intent would be usury, and avoid the security. This is the opinion of Mr. Ord, in his Treatise of Usury, and is, I think, well founded; although there is no express adjudication on the point. In such a case, the borrower would be no party to a corrupt agreement.

In the case of Powell v. Waters, 17 Johns. 176, the defendant executed his note, endorsed by another for his accommodation, with intent to procure it to be discounted at bank at a legal rate of discount, and delivered it to an agent for that purpose. The bank refusing to discount it, the agent, without the knowledge or consent of the drawer or payee, endorsed it himself, and procured it to be discounted at more than legal interest, by one who knew the facts; and in a suit against the drawer, the note was held to be void for usury.

In Ackland v. Pearce, 2 Campb. 599, a bill drawn and accepted for the accommodation of the acceptor, without any knowledge on the part of the drawer, that it was agreed, or intended to be discounted on
363 usurious terms, was held, "in a suit by the person discounting it against the drawer, to be void for usury; and in Young v. Wright, 1 Campb. 139, there was the same decision in a similar case. In all these cases, the defendant was not a party to the illegal agreement, unless the person to whom the bill was entrusted, being his agent, the contract was to be considered as a contract made by the party through his agent; in which case, both parties concurred in the illegal intention; which is, I think, the legal effect of such a transaction, as will be hereafter more particularly noticed.

In respect to the intent which constitutes usury, I think it is the intentionally taking or receiving, under any circumstances, more than legal interest, on the part of the lender or creditor, with or without the concurrence of the borrower; and that this intent is an inference of law, which may be made by the Court from the facts submitted to it by the verdict, agreement of the parties, or demurrer to pleadings.

The only remaining ingredient necessary to constitute usury, is that the illegal interest shall be taken or reserved upon a loan, or for forbearance. Amongst the infinite variety of shifts to evade the statute, nothing has been more common than to give to a loan the appearance of a contract of hazard or of a sale, neither of which fall within the statute. Whether the transaction is a loan or a contract of hazard or a sale, depends entirely upon the real intent of the parties to the contract. This is also in many cases an inference of law, to be made by the Court from the facts ascertained by the pleadings, or by a special verdict, but may, in all cases, be deter-

mined by the jury, and in some cases, can only be determined by them, as in the case of *Hamilt v. Yea*, 1 Bos. & Pull. 144. A banker having discounted largely for the defendant, paid him the money by bills on London, and upon the transaction, made a profit beyond legal interest. But, whether this profit was allowed to him as extra interest, or as a compensation for the hazard and trouble of remittance, could not
364 be inferred from *the mere fact of the allowance being made; and the jury only could determine to which of these considerations to refer the allowance. But, that there are cases, in which the inference that a contract in the form of a contract of hazard or sale, was really a contract of loan or forbearance, may be made by the Court from the facts alleged in the pleadings, or found by the jury, is proved by a series of unquestioned authorities, which were cited in *Stribbling v. The Bank*, ante, 132.

The first enquiry, upon the finding of the jury in this case, is, whether the note was, in the words of the statute, "an assurance made for the payment of money lent, on which a higher interest is reserved than is allowed by law;" and to ascertain this, we are to consider, not the form or colour, but the real substance of the transaction. The note was not made as an assurance for the payment of money to any one, until it was discounted by Johnson. Neither Wilson & Orr nor Belches could have claimed any thing on this note against the drawers. It was not made with that intent; but, with intent that it should be a security to any other person, who might discount it, not as a security only for the money advanced by him, but for the nominal amount of the note. If a note made for valuable consideration may be sold at any discount, (a question which will be hereafter examined) it is because it is an assurance for the payment of a subsisting debt. The debt is the subject of sale and purchase. Here, however, there being no subsisting debt, and no assurance for the payment of a debt, which Johnson could purchase when he advanced his money, it was not a purchase, but a loan, upon the security of the parties to the note; and then, for the first time, the note was made for the security of the money lent, to be paid at the end of 60 days, with interest at 36 per cent. per annum; that being the rate at which the note was discounted. Johnson intended to lend his money at this usurious interest, and not to buy a note. A man wanting money at a distance, has a motive to buy a bill of
365 *exchange payable there. But, when he advances his money upon a note payable at a place where he resides, and where the parties to the note reside, and takes the engagement of the party to whom he advances the money, to re-pay it with legal or usurious interest, his only possible intent is to lend his money for the sake of the interest, and to hold the party borrowing bound for the re-payment. This is, in truth, to purchase the note of the man to whom the money is advanced; and is, in its nature, a loan, no matter by what name it may be called. This con-

clusion could not be doubted, if Johnson had had full notice of the facts, that the note was made without consideration, for the purpose of raising money for the accommodation of Wilson & Orr, and that Belches was acting as their agent in disposing of it. It was held in *Taylor v. Bruce*, by two judges against one, that under such circumstances, the purchaser of the note, at a discount greater than legal interest, was not guilty of usury, if he was not privy to the facts in relation to the making of the note, and the agency of the broker. This opinion proceeded upon the idea, that as to the purchaser without notice, the note, no matter under what circumstances it was made or discounted, was a bill of exchange, and that the law merchant attaching upon it, the bill imported a consideration not to be questioned in the hands of such a purchaser; and that an endorsement in blank was equivalent to an order to pay to the bearer; and the purchaser might therefore deal with the agent of the party to the note, not as agent, but as owner. These rules are unquestionably true in general; and if applicable to such a case as this, would preclude any enquiry as to the fact of usury in the making or negotiating of the note. It would have that effect, by suppressing the evidence as to the consideration, and of the agency of the broker in disposing of it. The cases of securities avoided by statute, for usury and gaming, are exceptions, and, I believe, the only exception to these rules. When a bill of exchange is impeached on the
366 ground of usury in its inception or *negotiation, the transaction must be tested by the principles of the common law, and not by those of the law merchant; and if, upon common law principles, the security is void for usury, then it has no existence as a negotiable security, and the law merchant cannot attach to it. If it could, the effect would be to shut out all enquiry as to the consideration, and as to the agency of the person with whom the purchaser dealt for one of the parties to the note. By the law merchant, a bona fide holder of a bill endorsed in blank, may acquire a valid title from a person having himself no title, and even from one who stole the bill. But upon common law principles, no man can transfer more right than he has; and whoever deals with an agent having no title, even without notice of his agency, and with a belief that he is dealing with him as principal, in effect deals with the real principal, and acquires the title or not, according as the agent has disposed of the property, according to his authority or not. As in the case of a factor, who having authority to sell only, cannot make a valid pledge of the property of the principal, even to a person dealing with him under the belief that he is the owner; and in the case of a sale by a factor, who acts in his own name as principal, and when the purchaser has no reason to suspect that he is acting as an agent, the principal can maintain an action against the purchaser. So in this case, the law merchant not having any effect in the enquiry whether the transaction was or was not usurious, Johnson dealt with

Wilson & Orr by their agent Belches, although he might not know that he was dealing with an agent, and so purchased the note endorsed by them from them, at a discount of 3 per cent. per month. When Johnson so purchased from Wilson & Orr, upon common law principles, he acquired no pre-existing right of action against Whitworth & Yancey, as Wilson & Orr had none; and the effect of the whole transaction was, that he advanced to Wilson & Orr a sum of money, and took their engagement with that of Whitworth &

367 Yancey, to re-pay the "money at the place where it was lent, with more than legal interest; and thus, whether he knew or did not know, that the note was without consideration, or that Belches was an agent, or believed that he was acting for himself, his whole object was to advance his money on this security, and upon these terms; and this is the act of reserving illegal interest intentionally, which constitutes usury. If he had discounted the note at a legal rate, then as there could have been no imputation of usury, the note would have had the effect of a bill of exchange, the law merchant would have attached to it, and the consideration and fact of Belches' agency could not have been enquired into.

These principles are fully established by judicial decisions in England, and in some of our sister States.

Thus, where the transaction is impeached, on the ground of usury, and the sale has been made by an agent or broker, for one of the parties to the bill, and the agent or broker endorses the bill without an agreement to that effect, and thus emphatically represents himself as owner; or if he does not endorse it; in either case, the purchaser is held to have purchased from the principal, whether he knew or did not know, that the person with whom he dealt acted as agent. This has operated sometimes to save the transaction from the imputation of usury, when the purchaser gave a full consideration for the bill, which would be void if the agent was considered as dealing as principal; and always to condemn the transaction as usurious, where the dealing with the agent was such, as would have made it usurious, if it had been with the principal.

The cases of *Dogwell v. Wylie*, 2 Campb. 33; *Jones v. Davidson*, 1 Holt, 256, and *Young v. Wright*, 1 Campb. 139, seem to me to have proceeded on these principles altogether. In the first of these cases, the action was by the endorsee against the acceptors of a bill. A broker swore that he had repeatedly discounted bills for the defendants, with his own money, at half per cent. more than legal interest; the last of

368 which becoming due, and the defendants "not being able to take it up, and the broker no longer having money himself, he offered to get two other bills discounted, (one of which was the bill sued on) for the same commission he received before; and accordingly, the defendants accepted two bills for this purpose, which the broker got discounted at legal interest, but paid no part of the money to the defendants. And he swore that the

commission which he was to have for getting the last bills discounted, was intended as commission for his trouble as a broker, (which was largely more than the legal commission,) and not as interest for the loan of money. Lord Ellenborough held, as did the Court, upon a rule to set aside the verdict, that this was not usury, because the bill was not discounted by Rimmer (the broker) with his own money, and he acted in the transaction as a broker, and since the party who advanced the money received no more than legal interest.

The case of *Jones v. Davidson* was this. The bill was drawn by Richards on Davidson, accepted by him, and endorsed by Richards. Davidson applied to Duckworth to raise him some money upon his bill. The bill in question was accordingly drawn, which Duckworth promised to get discounted for 30 shillings, which was greatly more than the legal allowance for brokerage. The bill was delivered to Duckworth with this understanding, that he should get it discounted, giving the value of the bill (minus the 30 shillings which he was to take out of it) to the defendant. Duckworth's name was not on the bill at this time, but he carried it to Shore, who discounted it at legal interest, but required Duckworth to endorse it, which he did. Gibbs, C. J. held, that if Duckworth was by the original agreement to have been a party to the bill, and to discount it either with his own or another person's money, receiving thereout 30 shillings as so much of rebate from the principal sum, it would be an usurious contract; but if it were a mere agreement between the parties, that

the bill should go out in its full security to the "world, and that Duckworth (who does not appear to have been an original party) should receive 30 shillings as a compensation for getting it discounted, it would not then be usury; although Duckworth, when he procured the money from Shore, endorsed it over to him, and became a party by the endorsement.

The case of *Young v. Wright* was this: Assumpsit by Young against Thomas Wright, on a bill drawn by him on Charles Wright, and endorsed by the defendant, by B. Tenant, and by P. Young. King testified, that he had long been in the habit of discounting bills for Charles Wright the acceptor, at first at the rate of 5 per cent. per annum, afterwards at 40 per cent. per annum: that he had agreed to get the bill in question discounted for him, on these terms; and accordingly got it discounted by a Mr. Reeves, who gave for it some checks which were never paid, and goods, which, when sold, produced only 50l., this being the whole sum which C. Wright had received upon it. The counsel contended, that the bill was good in the hands of a bona fide holder for valuable consideration, because the supposed usury had been committed between King and Reeves, third persons no parties to the bill. There was no usury, therefore, in its original formation, but only in negotiating it; by which the present plaintiff could not be at all affected. Lord Ellenborough however held, that if the witness was believed, there must be a verdict for the defendant.

"According to the evidence given at the time the bill was drawn, there was a corrupt agreement, that it should be discounted at usurious interest, by which it was vitiated, into whatever hand it should afterwards come." This opinion of Lord Ellenborough was pointed to the argument of counsel. At that time, according to Lord Kenyon's doctrine in *Parr v. Eliason*, a bill good in its inception was considered as available to a bona fide holder, notwithstanding any usury in its negotiation by the payee; and there seems to have been

an unsettled notion, that a bill was
370 not void "in its inception, unless it was made for the purpose of being discounted at usurious interest; as is intimated by *Le Blanc in Ackland v. Pearce*. The first point has been overruled in *Lowe v. Mazaredo*, in which it was held, that although the bill is not vitiated by usury in its first negotiation, yet that the holder can derive no title to it by such a transfer; and the second point never had any foundation in any judicial decision, and is directly repudiated by the leading case of *Lowe v. Waller*. Lord Ellenborough's observation, that there was a corrupt agreement, when the bill was drawn, that it should be discounted at usurious interest, was a direct answer to the argument of the counsel, taking into consideration that it was actually discounted at usurious interest. Without that, it would have been no answer. If *Reeves* had discounted the bill at legal interest, Lord Ellenborough, who shortly after decided the case of *Dogwell v. Wylie*, would have held, as in the latter case, so in this, that King, not having discounted or agreed to discount the bill with his own money, and not being by contract a party to the bill by discounting it himself, and for his own benefit, the party discounting it having received no more than legal interest, there was no usury in the case; whether King retained to himself, for his services in getting the bill discounted, the 40 per cent., or as in the case of *Jones v. Davidson*, the whole money. These transactions between the principal and agent, could not affect a party dealing fairly with the principal through the agent. It is impossible that Lord Ellenborough should have perceived any real difference between the expression in the case of *Young v. Wright*, "agreed to get the bill discounted for him at 40 per cent. per annum discount," and that in *Dogwell v. Wylie*, "he offered to get two other bills discounted upon the same commission he had before" (which was clearly usurious when the party discounted the bill himself;) and the expression used in *Jones v. Davidson*, "with this understanding,

that he should get it discounted, giv-
371 ing the value of the bill," *minus the 30 shillings he was to take out of it. All these expressions plainly import an agreement, not that the broker should purchase the bills, and pay agreed sums at all events, as parties, but that they should get the bills discounted for the parties, as their agents. If in the cases of *Dogwell v. Wylie* and *Jones v. Davidson*, the bills had been discounted at more than legal interest, (the opinion of Lord Ellenborough lay-

ing stress upon the fact, that the discount had been at legal interest,) I cannot doubt that the transactions would have been held to be usurious; although in the last, the broker, without any previous agreement to that effect with the parties to the bill, acted so decisively as a principal, and not as an agent, as to endorse the bill himself. I think all these cases clearly go upon the principle, that in enquiring whether a transaction in the form of a bill of exchange is usurious or not, the law merchant has not the slightest effect, that not attaching upon the transaction until it is ascertained, by the principles of the common law, whether it be a bill of exchange or not; that according to the common law, a party dealing with an agent deals with the principal, whether he knows it or not; and that, whether the rule benefits or injures him.

I observe too, that in *Young v. Wright*, the purchaser is not suggested to have had any knowledge, either of the original purpose for which the bill was drawn, or that King was acting as the agent of Wright. Why could he not, therefore, deal with King as owner, in which case, if the bill had been given for consideration, and assigned to King for value, King not endorsing it, the purchase might have been made on any terms, without usury? As I have before said, if the purchaser had given full value, the bill would have been good, notwithstanding the original purpose of the parties in making it; and giving less than its value allowing a discount of legal interest, the contract was usurious on that account, and not on account of the purpose for which the bill was drawn.

372 *It is not necessary, in order to avoid a bill of exchange on the ground of usury, if the first real negotiation of it be at a discount greater than legal interest, that there should be an agreement either between the parties to the bill, or between them or either of them and another, that the bill shall be discounted on usurious terms; although there is a dictum to that effect by *Le Blanc, J.* in *Ackland v. Pearce*, 2 Campb. 599. In the leading case of *Lowe v. Waller*, Doug. 736, no such previous agreement or intent appeared. All that appeared was, that the bill was accepted for the accommodation of the drawer, who transferred it on usurious terms; and in *Ackland v. Pearce*, the drawer, the defendant, did not know that the object of the acceptor was to discount the bill at usurious interest. And in *Powell v. Waters*, it was held that a negotiable note was void for usury, which had been made and endorsed for the purpose of being discounted at the bank at legal interest, and which was discounted at more than legal interest, at the instance of the agent of the drawer, for whose accommodation it was drawn and endorsed, and that, without the knowledge of the drawer or endorser. Nor is it necessary, in order to avoid a note for usury, in consequence of its being discounted at more than legal interest in its first negotiation, that the purchaser should know that it was without consideration, or made for the purpose of being discounted at more than legal inter-

est. The purchaser does not appear to have had any knowledge of such facts in the case of *Young v. Wright*, 1 Campb. 139. This precise question was presented in the most imposing form, it being the only point in the cause, and presented as a naked question by a bill of exceptions, in the case of *Bennett v. Smith and Philips*, 15 Johns. Rep. 355, in which it was held, that an accommodation note, intended by the parties to be discounted by the person who afterwards discounted it, at a discount greater than legal interest, was void in the hands of a subsequent bona fide holder, although the person first discounting
373 it did not know, that *it was an accommodation note, or intended to be discounted, and made for that purpose; and the same doctrine was affirmed, though not directly applicable to the case of *Powell v. Waters*, 17 Johns. 176.

Upon principle and authority, therefore, I conclude that this note being, in its first negotiation, which alone made it a security for money, discounted at an interest of 3 per cent. per month, was void in its inception for usury, and cannot be the foundation of an action, even in the hands of a bona fide subsequent holder.

If, however, the note could be considered as valid in its inception, as between the drawer and payee, then any person claiming as endorsee against the drawer must shew, that a valid transfer has been made by the payee, without which he cannot possibly have a legal title to the debt due by the note; and if the plaintiff has not a legal title, it will be a good defence to shew that fact. If the transfer be void to all intents and purposes for usury, the title no more passes by it, than it would by the endorsement of a married woman, to whom a bill was given, or by a bankrupt after his bankruptcy, or by a person to whom the bill was not given, although of the same name. *Conner v. Martin*, 1 Str. 516; *Philisbock and Wife v. Pluckwell*, 2 Mau. & Selw. 393; *Batteson v. Goodwin*, 12 Mo. 50; *Meade v. Young*, 4 Term Rep. 28. The case of an infant endorsee is not an exception to this rule; his contract not being void, but voidable at his election only. So indispensable is it to prove a valid transfer by the payee, that it was required to prove this endorsement in the case of a bill accepted after it was endorsed. *Smith v. Chester*, 1 Term Rep. 655. And in enquiring whether the transfer of a bill is void for usury, it is to be determined by the rules of the common law, and not of the law merchant, for the reasons before stated.

The necessity of proving, on the part of the plaintiff, in a suit against the drawer or acceptor, a valid endorsement by the payee, so as to transfer to him the
374 legal title, has *never been questioned, except by Lord Kenyon in *Daniel v. Cartony*, 1 Esp. N. P. Cas. 274, and by the judgment pronounced by Lord Kenyon for the Court in *Parr v. Eliason*, 1 East, 92; in both these cases, the holder of a bill accepted for value, transferred it at an usurious discount. In the first case, the bill came to the hands of a bona fide holder, who sued the acceptor; in the second

case, the bill passed into the hands of the assignees of the purchaser, and the endorser brought an action of trover for the bill against them. And in both cases, Lord Kenyon argued that the bill, being good in its inception, could not become void by any subsequent usurious transaction in the negotiating it; and that a bona fide holder could not be affected by such subsequent usury. It was unquestionably true, that the bill itself was not vitiated by the usury in the transfer of it; and the acceptor was still liable to pay it. That was not the question in either case. The true questions were, whether the plaintiff was entitled to recover as endorsee in the first case, or the defendant to retain the bill in the second case; both of which turned upon the enquiry, not whether the bill was valid, but who was entitled to it; in short, whether the legal title passed by a void contract of assignment. This question was otherwise decided in the case of *Lowes v. Mazaredo*, reported in *Starkie*, 385, and better reported in *Comyn on Usury*, 175. In that case, the bill was accepted for full value. The payee transferred it at a discount exceeding legal interest and the usual commission for brokerage; and it passed through several hands, one of whom gave full value for the bill. The holder sued the acceptor; and it was held, that the first endorsement being void for usury, no subsequent holder could maintain an action upon it against the acceptor.

If, then, the transfer of the note in this case by *Wilson & Orr* was usurious, the action cannot be maintained by the plaintiff, although a bona fide holder, even if the note were valid, as if given for full and valuable consideration. The cases of

Daniel v. Cartony and *Parr v. Eliason*
375 son *admit, and that of *Lowes v. Mazaredo*, adjudged, that to discount a valid note at more than the legal interest, and the ordinary exchange and commission, when that is allowable, was usurious; and the English books abound with cases to the same effect. If one gives his own bill, in consideration of a sum of money advanced for a greater amount than the sum advanced and legal interest, this is clearly an usurious contract. Every endorser of negotiable paper is the drawer of a new bill, and liable to the payment of the whole amount of the bill or note, immediately upon the non-payment, protest and notice. This is the legal effect of his endorsement; and he would be bound to the performance of this contract, whenever he has endorsed for value, however inadequate, with an agreement and intent to transfer the note or bill absolutely, for the sole use of the endorsee; unless he was discharged upon the plea of usury. There are many cases when, as between the endorser and his immediate endorsee, the consideration of the endorsement may be enquired into; as, if there were no consideration, and the assignment only for the accommodation of the endorser; or, where there was a fraud in the assignment which went to the whole consideration; or, where the consideration has failed in whole or in part, and the compensation lies in estimate, not in damages; or, where the bill or note, although as-

signed in full to the assignee in form, was not in fact transferred to him wholly for his own benefit. As if it were agreed that he should hold it as a security for money due or advanced to an amount less than the bill or note; in which case, upon the non-payment of the bill, the holder could only resort to the endorser for the amount intended to be secured to him; or, if he proceeded against the drawer or acceptor of the note or bill, he would recover the whole amount, and be trustee for the endorser for all beyond what was sufficient to pay his claim; but this, only in cases where it was clear that the endorser was entitled to claim indemnity or satisfaction from the defendant.

376 *But, all these cases are wholly different from an absolute transfer for an inadequate consideration, for the use of the assignee. In that case, the contract of the endorser is to pay the whole amount of the bill; and he is, in effect, engaging to pay the full amount for the consideration received. If he was only bound to re-pay the actual consideration received, there could be no case in which the transfer of a bill for money advanced to a less amount than the nominal amount of the bill, after discounting the legal interest, and ordinary exchange and commission (where that is allowable) could be usurious on that account only. Yet, such transactions have been held to be usurious in innumerable instances. A careless note of a *Nisi Prius* decision of Lord Kenyon has given occasion to the opinion, that an endorser was bound for no more than he received; and that proposition was once adopted as law in New-York. The Courts of that State have, however, virtually renounced that proposition, in the decision of the cases before referred to; in which they held, that to discount a note at more than the rate of legal interest, was usury, even where the purchaser knew it to be an accommodation note. If they had adhered to the construction given to the case of *Whiffin v. Roberts*, 1 Esp. N. P. Cas. 261, they must have held, that the discount was a valid transaction, and the holder of the note only entitled to claim against the drawer the amount which he paid for the note.

The case of *Whiffin v. Roberts* was this: Roberts drew a bill in favor of Ould for 86l. payable in three months. The bill was for the accommodation of the drawer; and the plaintiff, who gave 29l. for it, knew that fact. Lord Kenyon said, that "when a bill of exchange is given for money really due, or is drawn in the regular course of business, the endorsee, although he has not given the endorser the full amount of the bill, yet may recover the whole, and be holder of the overplus above the sum he really paid to the use of the endorser. But, when the bill is an accommodation one, and that known to the endorsee, and he *pays but part of the amount, he can only recover the amount actually paid for the bill." The suit in this case was against the drawer. I am satisfied, that in this case Lord Kenyon proceeded upon the fact probably proved in the cause, that the bill was not sold out

and out to the plaintiff; but was only pledged as a security for the money advanced. The enormous disparity between the sums, (29l. given for 86l. at 3 months,) leads to this conclusion; and his allusion to the cases, in which the holder may be trustee for the endorser for a part of the bill, fortifies this conjecture. The case of a deposit or transfer of a bill for the security of money advanced upon its credit, and not for its absolute purchase, is the only case in which the holder can be trustee for the endorser for a part of the bill, unless he as re-paid to the holder, on account of the bill, a part of its amount. If this bill was, by the contract between the endorser and endorsee, transferred absolutely for his own use to the latter, who knew it to be given for the purpose of raising money for the drawer, it would have been a palpable case of usury, according to all the decisions in England and the United States; and the holder could have recovered nothing.

There is a marked distinction between the effect of an assignment of a bond and of a negotiable note or bill of exchange. In the case of a bond, it is at law a valid security for its amount, even as between the parties, although there is no consideration for it. It is, therefore, a subsisting security before it is transferred. A negotiable note or bill of exchange, on the contrary, is not a valid or subsisting security as between the parties, if it be not made upon consideration; and acquires validity only from its first negotiation. The assignor of a bond is in no event liable to re-pay any thing more than the consideration which he received; and that not by force of the contract of assignment, but upon the general principle, that the consideration of the contract having failed, he is bound to restore what he has received.

These differences shew the grounds upon which the assignment of a bond for a consideration less than its nominal amount, deducting legal interest, is held not to be usurious, whether the bond be given for value or not; whilst a negotiable note or bill of exchange, if not given for value, and first discounted at more than legal interest, or a transfer of such a note or bill given for value, upon such terms, is usurious. A negotiable security may be purchased at any discount. If the endorsement by the payee be valid, (as it must be, if not made on an usurious or gaming consideration,) any holder may transfer it without assignment at any discount; and not being, in any event, liable to pay the amount of the bill, it is a sale of the debt, and if not shewn to be a shift to evade the statute of usury, would be unexceptionable. But, if he endorses the bill, and thereby binds himself to pay the whole amount of it at maturity, and that for a consideration in money received by him, not equal to the amount of the bill, deducting the legal interest for the time it has to run, the transaction is a loan *prima facie*. For, unless other circumstances appear, disclosing some other motive for advancing money for the bill, it is necessarily to be imputed to an intention to advance the money to the endorser, upon his own

engagement and the engagement of others to repay it, with the profit at a future day; and only with a view to the receipt of the principal and profit beyond legal interest. This is, in its essence, nothing but a loan at more than legal interest.

But there may be cases, in which a discount greater than legal interest may be considered as a sale, although the seller endorses; as if the seller wants money at one place for a bill payable at another. A discount at a rate greater than legal interest, by the difference in exchange, would be a sale *prima facie*, and could not be impeached on the ground of usury, unless the discount was greater than could be fairly attributed to that circumstance; in which case, it would be considered as a shift for evading the statute; and private

bankers are, in England, allowed
379 *to retain, beyond the legal discount, a commission according to the usage of trade, as a compensation for the trouble and expense of remittances, and other expenses and trouble attending such transactions. But, if more is retained for commissions than is reasonable according to the custom of trade, this too degenerates into a shift to evade the statute. *Hamitt v. Yea*, 1 Bos. & Pull. 144; *Castairs v. Stein*, 4 Mau. & Selw. 194.

No circumstance appears in this case, to give the transaction the appearance of a sale. The parties who procured the money from Johnson, received the money, and were to re-pay it at the same place. There was, therefore, no exchange; nor was there any expense of remittance, or any other expense or trouble, possibly to be encountered by Johnson in the collection of the money, other than that which is incident to every other loan of money, and which the law considers as compensated by the gain of 6 per cent. interest. There was nothing to justify a discount at a cent more than legal interest; much less, a discount at the rate of 36 per cent. per annum. I need not repeat what I have already said, to prove that the contract, by which the note was transferred to Johnson, was a contract between him and Wilson & Orr, and has the same legal effect as if it had been made between them in person, without the intervention of a broker. And if so, even if the note was originally made for full value, the transfer would be void, and the plaintiff could have no title.

The doctrine which I assert, would induce those who were about to discount a promissory note or bill of exchange, to enquire whether the party offering it to him is owner or agent, and in general he would be informed truly. But, if not, the party falsely affirming himself to be the owner, would be responsible for the injury done by his falsehood. The doctrine of *Taylor v. Bruce*, on the contrary, affords a strong inducement to the parties to such a transaction, to shut their eyes upon the truth,

no matter how strongly the circumstances are calculated to excite *
380 suspicion. Thus, in this case, a professional broker offers a note for discount, at the rate of 36 per cent. per annum; and the note is discounted at that rate, without any questions asked, or in-

formation given. This transaction, on its face, shows almost to a certainty, that this broker, and this dealer in notes had come to an understanding, that whenever the broker offered a note made for raising money upon usurious terms, he should give no information, and the dealer should ask no questions; and this, with the sole view of sheltering the dealer, under the rule laid down in *Taylor v. Bruce*. Nor would the principles I assert, prevent any holder of a note given for value, from commanding funds, by disposing of it at a discount greater than legal interest, without the imputation of usury, by transferring it without his endorsement, or by endorsing it specially without any recourse to him.

JUDGE COALTER.

As several important questions on the subject of usury are supposed to arise in this case, it is to be regretted that we are obliged to decide them, unaided by the bar.

1. One question, which is said to arise, is this: If an accommodation note, payable at bank, is endorsed in blank by the payee, and handed by him to his agent for sale, and it is sold at a greater rate of discount than legal interest, without endorsement by the agent, and it is afterwards passed bona fide and for full value, by the purchaser to the plaintiff, also without endorsement, and without knowledge in the first purchaser, that he from whom he purchased was agent of the payee; is the note usurious and void in the hands of the innocent holder?

2. Another question is this; whether, if, for want of such knowledge, the note is to be taken as one given in the ordinary course of business, and the seller the real owner, yet as he paid the payee only the money he received as aforesaid, this endorsement by the payee is to be

381 *considered an usurious transfer of the note to the purchaser; and if so, whether any right or title passed to the bona fide holder under him, so as to enable him to maintain his suit against the maker?

3. The other question is, whether the facts found by the jury in this case, are sufficient to enable the Court to say, that Johnson the purchaser, knew that the note was for the accommodation of the payees, and that Belches was their broker and agent in the sale; or whether the jury must not find those facts positively, one way or the other?

These notes, standing under the act, as foreign bills of exchange, as it regards their negotiable quality, the two first questions involve the law of usury in relation to such securities.

In regard to questions of usury generally, some doubts have lately been suggested, whether there is not a difference in the effect of our statutes and those of Great Britain? That is to say, whether, under our statutes, the security may not be void, so that the debt may be forfeited civiliter when, if the unlawful gain had been received, it might not be a corrupt receiving, so as to subject the party criminaliter to the penalties of the statute? It seems to me, that on the existence or non-exist-

ence of this difference, much of the weight of the argument in support of the two first propositions must depend.

In the country which gave us birth, to which we at one time belonged, and from which, therefore, we have taken most of our civil institutions, and the common law of which is now our law, various statutes are found on this subject.

The first was that of 37 Hen. 8, ch. 9, by which it was declared, that no person, by any way of any corrupt bargain, loan, exchange, cheivance, shift or interest, of any wares, or by any other deceitful way, shall take in gain for one year, &c., above 10l. in the hundred; and if any person shall do any thing contrary to this statute, he shall forfeit the treble value, and 382 shall suffer imprisonment, &c.; "one moiety of the forfeiture to the King, and the other to the informer.

This was purely a penal statute, creating an offence, and punishing it criminaliter.

By the statute if 13 Eliz. ch. 8, all bonds and assurances for payment of money lent, or covenant to be performed, upon any usury in any thing, against the act of 37 Hen. 8, ch. 9, upon which there shall be taken above the rate of 10l. for the hundred for one year, shall be void. This statute, having forfeited the debt, reduces the penalty of the statute of Hen. 8, as I understand, "to so much as shall be reserved by way of usury above the principal," to be recovered as by the said statute.

By the 21 Jac. 1, ch. 17, the rate of interest was reduced to 8l. per cent.; and any contract directly or indirectly to take more, to be void, and the party guilty to forfeit treble the value of the money or other thing lent.

The statute of 12 Car. 2, ch. 13, altered the rate to 6 per cent., retaining nearly the same words; and that of 12 Ann. ch. 16, as also nearly in the same words, but changing the rate to 5 per cent.

In the case of *Chesterfield and others, ex'ors of Spencer, v. Jansen*, 1 Atk. 339, it is laid down, "that nothing is legally usurious but what is prohibited by the statutes; and that the material ones are those of 37 Hen. 8, ch. 9; 13 Eliz. ch. 16 and 21 Jac. 1; and that that of 12 Ann. ch. 16, varies in nothing from the former acts, but in reducing the rate of interest. For, in the penal clauses, all the words of the statute of Hen. 8. are taken in; so that the cases determined on the first of these statutes, are looked upon as authorities upon all the subsequent statutes." Thus we see that the statute of Hen. 8, was purely penal, and did not affect the contract. That of Eliz. avoided the contract in all cases of usury against the statute of Hen. 8. So that, thus far, it clearly required the same evidence of an usurious contract, under which unlawful interest was received, to convict under the statute of Hen. 8.

383 *As to subsequent British statutes, all the authorities agree, that they differ not from these, except in reducing, from time to time, the rate of interest, and perhaps, in introducing words of greater latitude as to the contracts to be avoided, and so as to extend to all shifts and contrivances to evade the laws. In England,

therefore, no such idea has ever existed, as that there should be any difference in construction, or the evidence necessary to support the defence or prosecution, between the clause forfeiting the debt, and thereby, civiliter, (if I may use the expression) inflicting a punishment to that extent, and that imposing the penalty of treble the value for receiving the unlawful interest. In this respect, as I understand, it has always been held there as a penal statute throughout.

These statutes, owing, I presume, partly to their inaptitude to the condition of a new Colony, and partly to their penal sanctions, were not in force here; and we had no laws against usury, until the Colonial Legislature enacted them. 1 Black. Com. 108.

The first was that of 1730, 4 Stat. at Large, 294. It is much like the statute of 12 Car. 2, ch. 13; and in the Revision of 1733, it is noted in the margin as that statute.

There is another statute in 1734, which, amongst other things, provides for a discovery of usury by bill in equity, &c. Ibid. 395.

Thus it appears, that in this, as in many others respects, the Colonial Government pursued the course of legislation of the mother country; and consequently, we have always looked to their decisions on similar laws, as safe guides in this, as in all like cases.

I understand, until it has been lately questioned as to this country, that in England as well as here, whenever a party has received what is alleged to be usurious gain, if he could not be punished under what is called the penal part of the statute, the contract would not be considered as void, and vice versa. This I take to have been hitherto considered as settled law,

384 as a general rule; that is, as "applicable to the transactions of the original parties to the contract. The case of the debt being forfeited in the hands of an innocent holder of an usurious note, or of such holder receiving the money and not incurring the penalties, cannot be called exceptions to this rule; nor, I presume, is the case of a wife, who, without the knowledge, combination with, or contract of the husband, lends money at usury, and he receives or sues for it. Nor is the case of an agent taking such security, the principal giving no authority, and knowing nothing of the transaction.

Cases have been cited, where a man's ignorance of the law, and his belief that he was not acting contrary to it, would not avail him in a civil suit. But, that would no more avail him in defence of a criminal prosecution, than in repelling the defence of usury to a suit on the bond. Ignorance of law is no excuse; he has done the act which is contrary to law; his mind concurred in that, and he must abide the consequences. If it is usury for one purpose, it must be for every purpose of the act.

The argument, by which it is said, that one situated as in the case supposed, only runs the risque every man does, in taking an assignment, bona fide, of a security which turns out to be usurious and void,

can only have its origin and support in this novel idea. How is this? The act done, and that by the party himself, is voluntary, and is the very act of usury complained of. It may, however, be perfectly innocent and legal, and so far as the party knew, was so. It is only unlawful and void, by reason of the acts of others, of which the supposed usury was ignorant, and as to which he may have been grossly misinformed and deceived. But his security is void. Those who deceived him and knew the facts, but concealed them, have got his money, and he has no recourse on them. If the debt in this case is forfeited under the act, it is a very different case, indeed, from that of him who is the assignee of an usurious security. He has his recourse against his assignor, and cannot be punished for

385 the usury, as the other can, *according to my views, if he committed the usury; and surely no one else did, if he did not.

But it is said, that when he purchased, he knew that he was giving less than the face of the note deducting legal interest, and therefore, he must risque the consequences. If it turns out to be a note for value, or in the usual course of business, as he believes it is, the purchase will be lawful and valid; otherwise, if it is for accommodation, he forfeits his money; or if he receives it, even although he knew nothing of this fact, he is guilty of usury, and forfeits double the amount of the debt. This would operate like an *ex post facto* law; and a construction resulting in such consequences, it seems to me, cannot be correct.

It is furthermore said, that such accommodation note must be usurious and void, because it had no legal existence as an available security, until it was delivered to the purchaser, on the sale. Thus coming into existence on a discount at more than legal interest, it is unlike a note for value, which is valid and available the moment it is executed; and it is, therefore, concocted in usury, notwithstanding it is a genuine note, and according to its face and attending circumstances, an available note in the hands of the holder who offered it for sale as his own property. This again, if usury, and punishable as such, must be a hard case; and the question is, whether the law will bear such construction?

An ordinary note or bond may be purchased at a greater discount than legal interest, without imputations of usury, although such bond or note be given for accommodation, the purchaser being ignorant of that fact. *Gibson v. Fristoe*, &c. 1 Call, 62; *Price*, &c. v. *Campbell*, 2 Call, 110; *Brown v. Brent*, 1 Hen. & Munf. 4; *Skipwith v. Gibson & Jefferson*, 4 Hen. & Munf. 490; *Hansbrough v. Baylor*, 2 Munf. 36. Why shall not this also be usury? Because, say our decisions on this point, there must be a loan or forbearance, and that on a contract between parties having a mutual intention to borrow and
386 lend, &c. *But such bond or note, as last above mentioned, was only available when transferred; and unless it be on

some supposition, that negotiable notes are more capable of being abused for purposes of usury, I am not able to distinguish between the two classes of cases; whilst, to attach the risque above insisted on, to the purchase of negotiable paper, is to say at once, that none, whether for value or accommodation, shall be sold for less than the face, with legal interest. This, it seems to me, would be more in the nature of legislation, than a decision according to laws and principles now understood. Indeed, it seems to me, that an accommodation note of the kind in question, is more than an available paper or security, before its negotiation, than an ordinary note given for accommodation; and therefore, that the principle insisted on would apply more strongly to the latter. Independently of any question of usury, the consideration of an ordinary note can be shewn at law, which is not the case with a bill of exchange. Even illegality of consideration, unlawful gaming and usury excepted, is no defence to a suit on a bill.

An ordinary note or bond, not delivered if lost, or stolen, is not the deed or note of the party, and can avail no one. Far otherwise is the law of bills of exchange. So soon as they are endorsed in blank by the payee, and whilst in his or the maker's hands, for accommodation, they have, to certain purposes, a species of existence; for, if lost or stolen, they are good in the hands of a bona fide holder. In the hands of the maker or payee, they may or may not be available, according as they are or are not for accommodation; and a party purchasing from either of these, at a greater discount than legal interest, will be more or less subject to the charge of usury. But, when it has been passed off by the payee to a third person, for the express purpose of sale, it would seem strange that a sale by such person, because he was entrusted to sell, should not avail, but he usury, when a sale by the thief would pass the title. In the one case too, the payee would

387 *receive his money, in the other he would receive no money at all; and yet the maker and endorsee are both liable to a fair and bona fide holder under the thief. If the holder and agent loses it, or it is stolen from him, and it passes into the hands of a bona fide holder, it is also good, though the payee gets nothing for it. It seems strange to me, therefore, that this should be law, and that yet, when it is voluntarily passed off by that agent, with the full consent of the payee, as the property of the holder, in a way which would be perfectly legal, if it was, what every bill on its face imports, on valuable consideration, it shall be void for usury.

In the case of a stolen note, it is certainly not an available security to any one engaged in, or cognizant of, the felony; and it only becomes so, when it is transferred to one ignorant of the felony; but, the felon is certainly not the agent of the payee.

To make it necessary, then, for the purchaser of a bill to enquire whether the holder is agent of the payee, and to subject him to all the disabilities and penalties of an usurer, in case he does not, or is misled

and deceived in the matter, will essentially charge, as it seems to me the nature of those securities. In analogous cases in England, as where it was held that the transfer of a bill, after a secret act of bankruptcy, was void, and gave no title to the holder, the decision was soon found to have this effect, and was remedied by statute; as I believe was also done, when the effect of the decision, which avoided the transfer by the payee of a bill for value, if discounted at a rate greater than legal interest, was discovered. But, this point will be more fully considered hereafter. This too, would be to reverse the general and sound principle of law and justice, that whenever one of two persons must suffer by the act of a third, he who has enabled that third person to occasion the loss, must sustain it himself. There may be a dozen names on the bill or note; all for the accommodation of the maker or payee, or even for some one of the

388 *endorsees, or for the holder who never endorses; and yet, according to the argument, it is usury with the person accommodated, whoever he may be, although the holder had the absolute legal title, as to all the world, so far as they are ignorant of his agency; and when he parts with the possession, the legal title passes, and enures to any one who, bona fide, gets possession.

If the party purchasing had no reason to believe the note or bill was not the property of the holder, which is the case now under consideration, and the only true one by which to test this question, and he is to forfeit his money, it must be because he is not innocent. If he is, if he stands as the innocent holder or transferee of an usurious security, then he is not the usurer, subject to the penalties of the act; but may get clear of them, under the idea that there is a difference between what is denominated the civil and penal clauses of the act. Unless this doctrine, then, can be maintained, there is a case of usury without an usurious lender.

In the case before us, the holder and seller did not endorse. This is considered in law, as evidence of a sale out and out. He is not responsible to the purchaser, and on this ground also, that purchaser does not stand as an ordinary purchaser of a security, void for usury; nor was the transfer, as between these parties, usurious.

It has been held in New York, and is supposed there to be the doctrine in England, that a slave even by the payee, whose endorsement is necessary to make the paper negotiable at a greater discount than legal interest, is not, per se, usurious. I strongly incline to think, that this decision is correct. As between the payee and his immediate endorsee, the liability is no greater than in the case of an assignment of an ordinary note. It may go no farther; and if the money is not paid by the maker or drawee, the holder can only recover from his immediate endorser, the sum he paid for the note or bill. The payee offers to sell out and out, to the purchaser, at the rate agreed on; but he is
389 told, "you *must endorse, or I cannot pass off the note;" he does so,

but with the express understanding, written or parol, that the purchaser will indemnify him for his endorsement; and though he thus makes himself liable to all the world but the purchaser, for the full amount, it is, as between them, a simple endorsement for the accommodation of the purchaser.

On general principles, then, it seems to me, the law cannot be as contended for in the first proposition. On authority, also, I feel myself sustained, with the exception of some cases from New York.

The case of *Baylor v. Hansbrough*, especially if I have been successful in showing that the scienter is as necessary in cases of bills of exchange, as in ordinary notes and bonds executed for accommodation, is a direct authority in point.

The case of *Taylor v. Bruce*, which was by a divided Court, consisting of three Judges only, cannot be considered as binding authority here, when the question is again presented for consideration. I have again weighed, with all my feeble powers, the arguments of bench and bar in that case, as well as the very able arguments of my brethren in this; but without experiencing that conviction of my error, which perhaps they ought to produce.

In the case of *Ackland v. Pearce*, 2 Campb. 599, the note was made and fabricated after an application for a discount was made, and the note then offered, refused, and the usurious rate agreed on.

So in *Young v. Wright*, 1 Campb. 139, the agreement was, with the broker, who had been in the habit of discounting for the party at 40 per cent. to have that bill discounted at that rate. But the jury did not believe the witness, and so found for the plaintiff.

The late case of the *King v. Ridge*, seems to have settled the doctrine in England, in conformity with the opinions of the majority of the Court in *Taylor v. Bruce*. There, the drawer himself sent the bill, which had

390 been drawn in his own favor, and accepted and endorsed by him *alone, into market, by one who was known to the person who discounted it to be the mere agent of the drawer in the negotiation. This person too had been in the habit of discounting such bills or notes for the drawer. It was held to be a negotiation with the drawer himself, and the same thing as if he had, on an usurious loan, given his note for the money, with the acceptor as his surety.

I have carefully examined the cases from New York, and especially that of *Bennet v. Smith*, 15 Johns. 355; in which alone, the question was made, whether it was necessary to prove that the person discounting knew the notes were for accommodation, and made for the purpose of raising money. In most, if not all, of the other cases, such knowledge appeared as a part of the case; and in that case, the jury might well have found the knowledge; for, the application was for a loan, not to sell notes. The party said he would not lend, but would buy notes, and they were afterwards made to the precise amount agreed. and the lender spoke of the transaction afterwards as a loan. Judges are more easily led away in establishing

principles, when the case before them is one where, in fact, the principle can work no injury, than when it is applied to a case, where its hardship and injustice manifestly appears. Besides, the Courts there had, in other cases, laid down the general doctrine, that accommodation notes had no existence until negotiated for value; and that if that negotiation was at a rate greater than legal interest, it was usurious; a proposition undoubtedly true, if, as appeared in those cases, the fact of accommodation was known, and it was also known that the party accommodated was, in person, or by known agent, the party with whom the treaty was. The error was in considering this as a general proposition, without exception; and that it was enough to prove the note to be for accommodation, and to raise money, without further proof of a corrupt loan.

But even in New York, I understand this doctrine is not yet fully settled; nor can it be correct, as it seems to

391 *me, unless their statute contains different provisions in relation to the avoidance of the security, and the punishment of the offence. Even then, it would be a harsh construction, I think, to subject the party to the loss of his money, for a transaction, which, if the note was what it purports to be, would be legal and valid, according to their own decisions, even if the note was taken from the payee in person.

I must, therefore, be excused for not following the course of decision there, even if it is considered the settled law of that State.

The second proposition presents this question; whether, if a note is made in the ordinary course of business, and is available between the maker and payee, there being no usury between them, but is endorsed and transferred by the payee on an usurious consideration, and afterwards gets into the hands of a bona fide holder for value, this intermediate usury shall destroy the right in the holder to recover on this note against the maker?

The proposition is founded, as I understand, on this argument; that although, as to subsequent endorsements after that of the payee, usury in them shall present no bar, because you can erase them, and claim to stand at once as the endorsee of the payee, and so this intermediate usury shall not affect the right to recover; yet as you must claim under the payee, and cannot do without his endorsement, that endorsement is void for the usury, and no more title passed thereby, than if it had been forged: that the bill still remains the property of the payee, who could maintain trover therefor, he having still the legal title to the note and its avails; and consequently, that the maker can refuse payment, in fact is bound to refuse payment, if he has notice, as much as he would be, if he had notice of a forged endorsement; and that consequently, the bona fide holder, although he has paid full value, cannot recover.

In the first place, I am not satisfied that this question arises in this case. Here

the note did not pass from the
392 *payee to the party who advanced his money, unless indeed, the other point is against me; and if it is, this point does not arise in the case; for, according to it, the note itself would be void for usury. The note passed from the payee to Belches. He had the legal title; and it is not pretended, that there was usury between him and the payee. If there was, that again would avoid the note itself for usury, and this question would not arise. Belches was his mere agent, and there was no contract between them, except that he would faithfully perform his agency. He lent no money, and incurred no penalty. Had he even endorsed, it would only have been for accommodation. His principal must have indemnified him. Had he endorsed, the usury would have been between the purchaser and him, and could not have been also between the purchaser and payee, and it is not perceived, how the purchaser can be held as negotiating with the payee, in the one case, when he would not in the other.

If it be said, that he must be considered as negotiating the note with the payee, because there is no other name on it, yet that is repelled by the fact that, in reality, he got it from another, and again, as above said, if it can be considered a purchase from the payee, the note itself is void, not the contract of transfer.

But, as it is supposed that the question does arise, it becomes my duty to examine it.

The decisions in England have been directly in opposition to each other. The Court of King's Bench, in the case of *Parr v. Eliason*, 1 East. 92, Lord Kenyon on the bench (about the year 1800,) deciding in favor of the holder; and the same Court (about the year 1816,) Lord Ellenborough, who had argued the other case when at the bar, being on the bench and deciding otherwise.

The effects of this last decision, on the negotiable quality of commercial paper, was soon felt; and the Legislature, as before remarked, were obliged to interpose.

393 *If this last decision be a sound exposition of the statute of usury, then ours contains the same defect which theirs did; but it will not be for this Court, but the Legislature, to remedy the evil. But my opinion is, that the law is not defective; but that the decision of *Parr v. Eliason*, is the sound interpretation of the act.

Lord Kenyon, in that case, said, there was nothing in the point, and it might be attended with serious consequences, if it should be supposed that the Court entertained any doubt about it. The commerce of the country subsists on paper credit. If this action could not be maintained, no man could take even a Bank of England post note, payable to order; for, however legal in its inception, if the payee passed it on usury, it is now contended that it would be void in the hands of an innocent holder. When the bill itself is usurious, it is void by the statute; and the construction has gone far enough in saying, it shall be void in the

hands of an innocent holder without notice. No case has gone the length now contended for; nor do the words of the statute require it. Here the bill was fair and legal in its concoction; and therefore, no advantage can be taken of what happened afterwards, against bona fide holders.

The case of *Lowe v. Mazaredo*, (the best report of which, that I have seen, is in *Comyn on Usury*, 175,) is that in which the contrary decision took place; in which Lord Ellenborough said, the bill having been stained by the payee with usury, could never be effective until it was cleansed. Had it been called in by the payee, and republished, it might have received an effect *de novo*; but tainted as it was, every one must take it subject to its vice. It was impossible to reject one part of an endorsement, and retain another part; but it would be necessary either to receive or repudiate the whole unsound matter. He added, that he had turned the case of *Parr v. Eliason* in his mind with great doubt; and having been counsel in that case, remembered, that at the time of its decision,

394 *there was great conflict of opinion on the subject. That, however, he says, was an action of trover, and the holder of the bill would be entitled to the beneficial consequences arising out of the paper, to recover which trover was the proper form of action. Mr. Justice Bailey said, that as every endorsement was considered in law a new drawing, the plaintiffs must necessarily claim under this new drawing, which was usurious. The plaintiffs must here be considered as the substitute of *Bloxam*; by which, however, they would not suffer, because it was competent for them to recover against *Ambrose*, and *Ambrose* against *Bloxam*. The other Judges intimated a like opinion.

It seems to me, that the question was decided in this last case, without due regard, either to the true meaning of the statute, or to the nature of bills of exchange. A note endorsed in blank, is properly likened to one payable to bearer; and in *Peacock v. Rhodes*, Doug. 614, Lord Mansfield says, there is no difference between them. Both go by delivery, and possession proves property, &c. It seems to me, that the question does not depend so much on the title passing from the payee, who has endorsed in blank, as on the legal fiction, if I may so term it, by which the holder may claim on the ground of payment of value by him to the payee, and which enables him to strike out all other endorsements, even such as may be in full, and fill up the assignment to himself from the payee. That it does not depend on the title passing from the payee, at the time he parts with possession, is evinced by the cases of lost or stolen notes so endorsed, in which surely no title passed; if possible less so, than when voluntarily delivered on an usurious consideration. But in fact, the moment he voluntarily parted with the possession, the legal title did pass. The holder might have given the note to a friend, and he might have parted with it for full value, and the purchaser could recover. If not for full value, still this is usury only with a subsequent holder, and if

both had endorsed, their names would be struck out.

395 *But in truth, is not this using one contract, which is usurious, to avoid or evade the performance of another contract, which is not usurious, though that assurance has been voluntarily sent into the world by the owner, who has thus parted with his legal title, and now seeks to visit the sin of another on an innocent holder, who has given full value for the paper, on the faith that it was legally and properly issued? It would be a different matter, under the law, if the payee had been sued on this new drawing, as his endorsement is called. Here would be a contract which was corrupt and unlawful; and we would be forced to apply the law in his favor, even against the innocent. This, as Lord Kenyon says, is as far as the law goes, and far enough too.

But, when we bring this case to the touchstone of common honesty between man and man, how does it stand? The payee has voluntarily parted with a note endorsed by him in blank, and which is an invitation to all the world to negotiate it. It passes through various hands without farther endorsement, not even by the usurer himself, so as to make him responsible to any one, unless perhaps, to him he sold it to. The last holder certainly has no recourse against any one whose name is not on it; and if the one from whom he got it was as innocent and ignorant as himself, and did not endorse, he will not be answerable as I understand to be settled law. *Chitty on Bills*, 117, 118. He has advanced his money to the full value of the note; the debt is justly due from the maker, who cannot resist the payment to some one; and the question is, to whom ought it to be paid, according to the principles of common honesty? Is it to be paid to the payee, because usury to the amount even of one dollar has been practised on him, and who will thus receive the money twice, or to the bona fide holder? If to the payee, then I say this is swindling, and that under the sanction of a Court of Justice, and worse than the most grinding usury. It is, moreover, to throw the forfeiture of the debt, not on the usurer,

396 *as the law throws it; but, on the innocent holder of the note. This, as Lord Kenyon says, is neither within the letter nor sound construction of the statute. Suppose a man sells or gives his horse to another at an usurious premium for a loan, and he is sold by the usurer to one bona fide; can he recover the horse from the innocent holder because he was passed off on an usurious consideration, and also recover his value from the usurer? If this can be done, it will be a more profitable business than usury itself, whilst it will be carried on without risque. But, determine that the innocent holder shall recover from the maker, and let the payee recover the usurious gain from the usurer, and then justice will be done to all, and injustice to none. Neither the spirit nor letter of the statute, in my humble opinion, will justify us in going further. Would a Court of Equity, with all the parties before it, come to this conclusion? If

it would, as it seems to me it certainly would, can it be a sound construction of the statute, to vacate at law what equity ought to enforce, if the parties were before that forum, in a suit by the holder to recover the money, and in which suit usury could as well be pleaded as at law.

As to the third and last head of enquiry; if knowledge in Johnson, that the note was for accommodation, and that Belches was the mere agent of the sellers, must be proved and found, does the verdict sufficiently find that fact, or can the Court infer these facts from those found?

This knowledge is a matter of fact, as it seems to me, on which the jury alone were competent to decide. They alone could draw the inferences from the circumstances before them. But the verdict, so far from finding that Johnson knew the facts aforesaid, seems to negative even knowledge in the broker himself, that the note was for accommodation. The finding on this point is, "that it was handed to him, without stating what was the consideration, or why it was made, with a request to get money for it." So also, instead of finding

397 that Johnson knew "of the agency, it is found, that he, Belches, did not communicate any thing about the agency, or the intentions of the persons, or the names of the proprietors of the note; and said nothing on the subject, except to offer the note for sale. We cannot, therefore, it seems to me, infer, that because the jury also find, that Belches, as broker, took the note and sold it to Johnson, they intended to find that he sold it in the known character of broker of the payee. Such a fact, opposed as it is by the other findings, should not have been left to mere inference. Had they been satisfied as to these facts, it is hardly to be presumed that they would have found a special verdict. It is more probable, that they intended to submit the questions of law which have been above discussed; and particularly whether, as it was a clear case of usury, supposing Johnson cognizant of the facts, is it so, although there is not sufficient proof of the scienter in him, because it is in proof that the note was made for accommodation, and intended to raise money on?

But if it was intended merely to find circumstances, and to refer it to the Court to infer the facts, it seems to me they were imposing a duty on the Court, which exclusively belonged to themselves. Thus in *Lowe v. Waller*, Doug. 736, if goods are given in part, above their value, it is the province of the jury to decide, whether the difference is so great, that it is apparent they were taken only as a cover. So, whether the expense and trouble is colourable or bona fide, the culpable intention must always be left open to the jury, whilst the Court are to decide as to the legality of the transaction. Comyn on Usury, 97, 98, 99, 157, 158, 120, 121. In the case of *Douglas v. M'Chesney*, 2 Rand. 109, although the circumstances were strong, and though that was a case in Chancery, in what the Court might have determined as to the facts, yet it was considered most proper to refer them back to a jury to draw the inferences.

398 *The verdict seems to find evidence rather than fact, and if we say Johnson had notice, we only say what we think the jury might have said on that evidence. In the case of *King v. Ridge*, it was not considered the province of the Court, to decide as to the fact of notice, but as to the law arising on that fact.

I think there was no error as to the matter stated in the bill of exceptions, and on the whole, am for affirming the judgment.

JUDGE CABELL.

This was an action by Adams, as endorsee of Wilson & Orr v. Whitworth & Yancey, on a negotiable note.

The declaration claimed, as the debt due and detained, the sum of \$954 03, with interest thereon from the 13th Nov. 1817, till paid; which said sum of \$954 03, was composed of the sum of \$950, the amount of the note, and the sum of \$4 03 the cost and charges of protest.

The defence was usury.

The facts of the case are found by a special verdict, which states, "that the promissory note, in the declaration mentioned, was made by Whitworth & Yancey, on the 11th September, 1817, without any consideration having been given, or paid to them by Wilson & Orr for the note; but that the note is in due and usual form, purporting to be for value received, and was duly endorsed in blank, by the said Wilson & Orr: that on the evening of the 10th September, John Wilson, acting partner of Wilson & Orr, sent a verbal message to G. N. Belches, a broker in Petersburg, to know whether the names of Whitworth & Yancey would do, he the said Wilson having, on the same day, asked the said Belches, if he could raise money for him; 'yes, on good paper:' but, the said Belches not being at home, the message was not received by him. That on the said 11th September, the

399 said Wilson delivered the said note to the said Belches, without *stating what was the consideration, or why it was made, and requested him to get the money for it; that accordingly the said Belches, as broker, took the said note and sold the same to W. R. Johnson, at the rate of 3 per cent. a month discount; which discount exceeded the rate of six per cent. per annum; but, that the said Belches did not communicate to the person to whom he sold the said note, any thing about the same, or the intention of the persons, or the names of the proprietors of the note, and said nothing upon the subject, except that he offered the note for sale; and without farther conversation, the note was purchased as aforesaid. We find that the money paid for the note at the said discount of 3 per cent. per month, was not the money of the said broker, but of the said Johnson, who advanced the money for the said note, at the said discount, without any questions being asked, or information being given by the broker. And if upon these facts, the law be that the said note is usurious or void in law, then we find for the defendant, but otherwise we find for the plaintiff the debt in the declaration mentioned, viz. \$954 03, with interest from the 13th Nov. 1817, till paid, and assess the damage to one cent."

The Superior Court, being of opinion that the law was for the plaintiff, gave judgment for \$954 03, the debt in the declaration mentioned, with interest from the 13th November, 1817, till paid, and one cent damage, and the costs: from which judgment an appeal was taken to this Court.

Before we enter on the consideration of the question directly presented by this verdict, it may be useful to enquire, whether there be any material difference between the English statutes and ours, on the subject of usury? If there be no difference, we may, in expounding our statutes, avail ourselves of the decisions of the English Courts, in expounding theirs.

The most important English statutes on the subject of usury, are those of the 37th Hen. 8, ch. 9; 5th and 6th Edward 400 *6, ch. 20; 13th Eliz. ch. 8; 21st Jas. 1, ch. 17; 12th Chs. 2, ch. 13; 12th Ann. ch. 16, and 58th Geo. 3, ch. 93. All these statutes, except the last, are to be found in the Appendix to Comyn on Usury; all of them except the last two, are also to be found in Plowden on Usury; and the last, as also the statute of Ann. may be found in the last American Edition of Chitty on Bills.

The statute of Henry the 8th, contained no provision for vacating usurious contracts; it denounced and punished the taking and receiving more than 10 per cent. interest. It declared "that no person or persons, &c. by way or means of any corrupt bargain, loan, exchange, chivance, shift, interest of any wares, merchandizes or other thing or things whatsoever, or by any other corrupt or deceitful way or means, or by any covin, engine or deceitful way or conveyance, shall have, receive, accept or take, in lucre or gain, for the forbearing or giving day of payment of one whole year, of and for his or their money or other thing, that shall be due for the same wares, merchandizes or other thing or things, above the sum of ten pounds in the hundred, and so after that rate, &c. and no more or greater gain or sum thereupon to be had, upon the pain and forfeiture hereafter in this act mentioned and contained." A subsequent section declares that "if any person or persons, &c. shall do any act, &c. contrary to the tenor, form and effect of this statute, &c. every offender, &c. shall forfeit and lose, for every such offence, the treble value, &c."

The statute of 5th and 6th of Ed. 6th, ch. 20, repealed that of Henry 8th, and prohibited the lending of any sum or sums of money, "for any manner of usury, increase, lucre, gain or interest, to be had, received or hoped for, over and above the sum so lent, &c. upon pain of forfeiture of the value, as well of the sum, &c. so lent, &c. as also of the usury, increase, lucre, gain or interest."

The statute of 13th Eliz. ch. 8, reciting the beneficial effects of that of Henry 8th, and the evils of that of Ed. 6th, repealed the latter act, and revived that of Henry 401 *8th, by declaring "that the said late act, made in the said 37th year of King Henry 8th, &c. shall be revived and stand in full force, strength and effect."

But, as the provisions of the act of Henry 8th, went no farther than to denounce and punish the taking and receiving of more than ten per cent. interest, and was thought to be insufficient for the effectual suppression of usury, the statute of Elizabeth introduced a new provision, in addition to those of Henry 8th, in the following words: "that all bonds, contracts, assurances, collateral or other, to be made for payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury in lending or doing of any thing against the said act now revived, upon or by which loan or doing, there shall be reserved or taken, above the rate of ten pounds for the hundred for one year, shall be utterly void."

In the 21st year of James the 1st, it was deemed advisable to reduce the rate of interest from 10 to 8 per cent. That was accomplished by the act of 21st of James 1st, ch. 17, which re-enacted, and reduced into one act, the several provisions of the acts of Elizabeth and of Henry 8th, by declaring, "that no person, &c. from and after the 24th of June, which shall be in the year 1625, upon any contract to be made after the said 24th June, 1625, shall take, directly or indirectly, for loan of any monies, wares, &c. above the value of 8l. for the forbearance of 100l. for one year, and so after that rate, &c. And that all bonds, contracts and assurances whatsoever, made after the time aforesaid, for payment of any principal or money to be lent, &c. upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 8l. in the hundred as aforesaid, shall be utterly void. And that all and every person and persons whatsoever, which shall, after the time aforesaid, upon any contract to be made after the said 24th day of June, which shall be in the year of our Lord 1625, take, accept and receive, by way or means of any corrupt bargain, loan, exchange, chev- 402 isance, shift or *interest of any wares, &c. or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money, &c. above the sum of 8l. for the forbearing of 100l. for a year, and so after that rate, &c. shall forfeit and lose for every such offence, the treble value of the monies, wares, &c. so lent, &c."

It would be a waste of time to give extracts from the statutes of 12th Chs. 2, ch. 13, and 12th Ann. ch. 16; which last is now generally known in England as the "Statute of Usury." It is sufficient to say, that they are almost literal copies throughout from the statute of James, and certainly do not differ from it in any substantial respect; except that the statute of Charles reduced the rate of interest to 6 per cent., and that of Ann. to 5 per cent.

The statute of 58 George 3d, ch. 93, provides, that "no bill of exchange or promissory note, thereafter drawn or made, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an endorsee for valuable consideration, unless

such endorsees had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract."

The first statute in our own Code, against usury, is the act which passed in the year 1730, (4 Stat. at Large, p. 294.) I here copy its provisions, so far as they are applicable to the case under consideration, that it may be seen how exactly it follows the English statute of usury. It declares, "that no person or persons whatsoever, from and after the 29th day of September, in the year of our Lord 1730, upon any contract to be made after the said 29th day of September, shall take, directly or indirectly, for loan of any monies, wares, &c. above the value of 6l. for the forbearance of 100l. for one year; and so after that rate, &c. And that all bonds, contracts and assurances whatsoever, made after the time aforesaid, for the payment of

403 any principal *or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of six pounds to the hundred as aforesaid, shall be utterly void. And that all and every person and persons whatsoever, which, after the time aforesaid, upon any contract to be made after the said 29th day of September, shall take, accept and receive, by way or means of any corrupt bargain, loan, exchange, chevisance, shift or interest of any monies, wares, &c., or by any deceitful way or means, or by any covin, device or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of or for their money or other thing, above the sum of 6l. for the forbearance of 100l. for a year, and so after that rate, &c. shall forfeit and lose for every such offence the double value, &c." And this is substantially our present statute of usury. Revised Code, 373.

It will thus be seen, that there is not the slightest substantial difference between our statute of usury and that of England; except as to the rate of interest; and except also that the person taking or receiving unlawful interest, forfeits, by our law, only the double value of the monies, &c. lent, &c.

It has been decided in England, that the statutes of Ann. of Charles, of James and of Elizabeth, are founded upon the statute of Henry 8th; that they partake of its spirit and expression, and indeed vary little from it, in any other substantial respect than reducing the rate of interest; and consequently that the cases decided on the statute of Henry, are to be taken as authorities applicable to all the subsequent statutes; and that the decisions upon the statutes of Elizabeth, James and Charles, are to be considered as applicable to the statute of Ann. Comyn on Usury, 10; 1 Atkins, 340; 2 Ves. 142.

As our Legislature seems studiously to have copied the very terms of the "Statute of Usury" in England, I have no doubt that it was so done, in order to give us the benefit of the English decisions as

404 applicable to our statute; *and I be-

lieve it never was doubted that these decisions were applicable, until one of the counsel in the case of Taylor v. Bruce, Gilmer, 42, suggested that there was a difference between our statute of usury, and that of England; a suggestion totally unfounded in fact, as any one may see, who will compare the two statutes.

Having thus shewn the identity of our statute of usury with that of England, and, consequently, that they both admit and require the same exposition, I will now proceed to lay down some of the general principles, which have been established on the subject, and are supposed to have a strong bearing on the case before us.

The statutes of usury in England, have been always regarded and expounded as penal statutes. No one ever doubted the penal nature of the statute of Henry 8th. Its sole operation was to fix the rate of interest, and to inflict penalties for exceeding it. The statute of Elizabeth revived that of Henry, and was, of course, so far penal; and although it introduced a new clause, yet that also was penal in its nature, since it vacated the contract. The statute of James has no more reference to the statutes of Henry and of Elizabeth, than our statute has. But it incorporates into itself, by particular enactment, all the important provisions of both of those statutes; which provisions were afterwards transcribed and re-enacted in the statutes of Charles and of Ann. as they were also in our act of 1730. All the statutes subsequent to that of Elizabeth have been regarded as penal, not because they were governed by that of Henry, but because of the intrinsic nature of their provisions.

No difference of construction has ever been admitted between the clause vacating the contract, and that inflicting the penalty for the taking or receiving unlawful interest. In Hamitt v. Yea, 1 Bos. & Pul. 156, where the defence to an action of debt was usury, Brooke, Justice, said "on a penal statute shall we be so strict, for the purpose of defeating a fair claim;

405 for, I cannot but consider *the defence in the same light as I should a proceeding on the other branch of the statute, and think the present transaction entitled to as favourable a construction as if it were the object of a penal prosecution." A corrupt intent, a corrupt contract, is equally necessary in both clauses. All must agree that it is required by the clause inflicting the penalty; for, it would be monstrous to inflict the penalty of the treble value on the innocent assignee of a contract, in which, although it may have been usurious, he had no participation, and of which he had no knowledge. And a corrupt intent is equally necessary under the clause vacating the contract. For, the Legislature never thought of vacating, as usurious, a contract which was, in itself, fair and free from usury, but on which a greater rate of interest than the legal rate has been reserved by mistake in drawing the instrument; nor any other contract except where the parties intended to take or reserve more than 6 per cent. interest. And this intention to take or reserve more than 6 per cent. interest, is all that is

meant by the corrupt intent spoken of in the books, as applicable to either clause of the law.

There can be no usury where there is not a loan, express or implied, or at least a forbearance; which, however, is included in the term loan. Comyn, 156-7; Cowp. Rep. 113-14; 1 Vesey, jun'r. 531; Barclay, qui tam v. Walmsley, 4 East, 55. In Barclay, qui tam v. Walmsley, 4 East, 55, Lord Ellenborough said, "that to constitute usury, there must either be a direct loan, and taking more than legal interest for the forbearance of payment, or there must be some device contrived, for the purpose of concealing or evading the appearance of a loan or forbearance, when in truth it was so."

But, whether there was a loan or not, depends on the intention of the parties to the contract. It is universally admitted, that in enquiring whether a transaction be usurious or not, the principal subject to be attended to, is the intention of the contracting parties. I do not mean to
406 say, "that the parties must intend to commit usury; for, a person may commit it who never heard of the statute. But, no man can be guilty of it, without intending to do the thing which, according to law, amounts to usury. He must intend to do that which, in law, amounts to a loan or forbearance, at a greater gain than the law allows. And in such case, it matters not whether he thought that the transaction was a loan or only a sale, for, whether a transaction, the facts being established, amounts to a sale or a loan, is an inference of law and not of fact; and his ignorance of the law, shall not excuse him. His guilt consists in intentionally doing the thing which, in reality, is a usurious loan; and therefore, the law infers that he intended to make the usurious loan. This inference of law, is usually made by the jury, whose exclusive province it is, to settle the facts when they are in dispute. Where, however, the facts are found by a special verdict, agreed by the parties, or admitted by a demurrer, the inference of law as to the intention of the parties to lend or to sell, devolves on the Court. Roberts v. Tremaine, Cro. Jas. 507; Chesterfield v. Jansen, 1 Atkias, 301; 2 Ves. 125; 1 Wils. 286; Gibson v. Fristoe, 1 Call, 62; Marsh v. Martindale, 3 Bos. & Pull. 153; Reynolds v. Clayton, 2 And. 15; Mason v. Abdy, 3 Salk. 390; Batton v. Dunham, Cro. Eli. 642; Stribbling v. Valley Bank, ante. 159. And this inference, whether it be made by the jury or by the Court, must be made from all the circumstances of the case. For it is impossible, in any other way, to arrive at the real intention of the parties. Thus, in the case of Floyer v. Edwards, Cow. Rep. 114, Lord Mansfield said, "it depends principally upon the contract being a loan: and the statute uses the words, directly or indirectly. Therefore in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction: the view of the parties must be ascertained, to satisfy the Court that there is a loan and borrowing, and that the substance was to borrow on the one part, and lend

407 on the other: and "where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute." The same great Judge said, in *Lowe v. Waller*, (Doug. 738,) "the jury were to consider whether the transaction was not in truth a loan of money, and the sale of goods a mere contrivance and evasion. He then stated the material parts of the evidence, and made some strong observations to shew that it was not the intention of the parties to buy and sell, but to borrow and lend; and that the contract was in truth a loan of money, though under the mask of a treaty for the sale of goods."

But, before we attempt to apply these principles to the case before us, it will be necessary to ascertain the facts established by the verdict.

It sufficiently appears, that the note in question was made by Whitworth & Yancey to Wilson & Orr, without consideration, and solely for the accommodation of W. & O., the payees, to be sent into the market for the purpose of raising money; and that it was, for that purpose, put by W. & O. into the hands of a broker, who sold it to Wm. R. Johnson, at a discount greater than legal interest. But whether Johnson, at the time he made the purchase, knew that the note had been made without consideration, and was offered for sale by the broker, for the benefit of W. & O., the payees, is a matter of fact, which is not found by the jury. Whether the jury ought, from the other facts found by them, to have inferred and found the farther fact, that Johnson had such knowledge; or whether, if the facts actually found, had been presented to the Court by a demurrer, the Court ought to have inferred the farther fact, that Johnson had such knowledge, is a point not necessary to be decided. I will observe, however, that if I had been on the jury, I should have done as they have done; I could not have said, on my oath, that Johnson had such knowledge. How could they have said so, in the absence of all evidence on the subject? The broker himself had no reason to know that the
note had been given for the accom-

408 modation of W. & O., by whom he was employed to sell it. He received no such information; and although it very frequently happens that one man endorses for the accommodation of another, it does not often occur that he gives his own note, and thus represents himself as the debtor, solely for the accommodation of another. But, even if the broker knew it, how could Johnson know it? It is expressly found, that the broker made no other communication to him than that he offered the note for sale. Do brokers sell none but accommodation paper? And if it had been real paper, given in the ordinary course of business, yet as it had been endorsed in blank by W. & O., how was Johnson to know, without information, that it was still their property? It might have passed into other hands since their endorsement. Knowledge of these facts, by Johnson, would have had an important influence on the cause. Knowledge by him, that the note had been made for the accommodation

of W. & O., and was offered for sale by the broker for them, would have had a decisive influence on the cause; for, every body admits, that a purchase by him under such circumstances, at a greater discount than legal interest, would be usurious and void; for it would be, in truth, a loan at usurious interest, disguised by the mask of a sale. The jury had a right to find this fact, and it was their duty to have found it, if they thought the evidence justified it. Their omission to find it affords a strong presumption, that they were not satisfied of its existence. And the acceptance, by the plaintiff, of a special verdict which did not contain it, affords a strong presumption, that even he was not satisfied that it ought to have been found. But, it is useless to press this point farther; for, whatever the jury might have done, or ought to have done, we must take the special verdict as we find it; and as Judge Green said, in *Stribbling v. Valley Bank*, ante. 159, "it is an inflexible rule that the Court, upon a special verdict, cannot infer other facts from those found."

409 *We are, therefore, to consider the case arising on this special verdict, as the naked case of an accommodation note, made for the purpose of raising money, put by the person for whose accommodation it was made, into the hands of a broker, and sold by him, at a discount greater than legal interest, to a person ignorant of the character of the note, of the purpose for which it was made, and of the person for whose benefit it was sold. And, viewed in this aspect, it is precisely the case of *Taylor v. Bruce*, Gilmer, 42. It was decided in that case, by two Judges against one, that the sale under such circumstances, was a real, bona fide sale, and not a shift or cover for a usurious loan. But, as the Court which decided that case was a bare Court, consisting of three Judges out of five, and was divided, that decision has never been considered as settling the law, and is now to be re-viewed.

I did not sit in the case of *Taylor v. Bruce*, because it was supposed that the principle involved in it, was applicable to a case in an inferior Court, in which I was then a party. But that case has been, long since, decided in my favor, on other grounds; and the controversy forever terminated, by the refusal of a supersedeas to the unsuccessful party. The interest which I was supposed to have had in the decision in *Taylor v. Bruce*, if it could have had any effect on my feelings, would have inclined me to wish a decision different from that which was pronounced. But, that interest has certainly left no bias on my mind; for, after a laborious, extensive and careful examination of all the principles and authorities supposed to have any bearing on the subject, I entirely approve of the decision of the Court.

Our laws having put notes negotiable at bank, on the footing of foreign bills of exchange, this case must be decided by the principles applicable to such bills.

It is one of the privileges of a bill or note, that it imports a full and fair consideration; and it is consequently

410 *not competent to any party to it,

to allege the want of consideration, as against any person who has given value for it.

If a bill be, by its terms, payable to a particular person or bearer, it is transferable by delivery. If it be payable to the order of a particular person, or to him or his order, &c. it is transferable, in the first instance, only by endorsement. The endorsement of a bill or note may be either in full, that is, in favor of some particular person; or it may be in blank; that is, by the mere signature of the party making it. After an endorsement in blank, the bill or note is transferable by mere delivery: and so long as the endorsement continues in blank, it makes the bill or note payable to bearer. An endorsement in blank, even if made for a particular purpose only, or without intention to transfer it at all, puts it into the power of any person into whose hands it may come, either by special trust, by finding, by fraud or by theft, to transfer the bill or note, in the same manner, and as effectually, as if it had been, originally, made payable to bearer. And it would not be competent, in any such case, to any party to the bill, or note, to object to its payment. The holder of the bill or note, is the owner, as to every person to whom he may pass it for value. I do not understand this to be controverted, except as to those cases where the seller is, in truth, the agent of the endorser of the bill or note, or the agent of that party to an accommodation bill or note, for whose accommodation it was made; and where, in either case, the payment is resisted on the ground of usury.

Bills of exchange and negotiable notes are property; and they are as much the subject of sale as any other property. And the mere circumstances of their being sold at a discount greater than legal interest, does not subject the sale to the imputation of usury, unless it be made in such a way as to make the seller responsible for their nominal amount, in case of their being dishonored. If, therefore, the holder of a bill originally payable to bearer, or of a note or bill endorsed in blank, (which makes it payable to bearer,) sells it, at ever so great discount, "out and out," *(that is, solely on the credit of the other names upon it, which implies that he neither endorses it himself, nor makes any other engagement to be responsible for it, in case of its dishonor,) such sale cannot be impeached on the ground of usury, any more than if it had been the sale of a horse at a price less than his value. And I do not understand that this is denied, as to any case, where the bill or note was originally for value, and where the sale is not made by one who was, in fact, agent for him who endorsed it. But, it is contended that if the bill or note was originally for the accommodation of one of the parties to it, and was sold at a discount greater than legal interest, by a person who was agent for the party for whose accommodation the bill or note was made, it is void for usury; whether the purchaser knew, or did not know, the character of the note, or that it was sold for the benefit of him for whose accommo-

dation it was made: and this brings us to the great point in the cause.

I have already stated that, if the purchaser knew the character of the note, and that the person selling it was the agent of the party for whose accommodation it had been made, and purchased it, with such knowledge, at a discount greater than legal interest, it would be void for usury. And this was admitted by both of the Judges who decided the case of *Taylor v. Bruce*. It would be usury, because, the purchaser, knowing the facts above mentioned, could stand in no better situation than if he had purchased the note directly from the principal. Dealing with a known agent, is dealing with the principal. And if the purchase had been made directly from the principal, it would be clear usury; because, the note being merely for accommodation, was not, as between the parties to it, the evidence of any subsisting debt. It was, consequently, as to them, not an available note, nor could any action, as between them, be maintained upon it. It has no legal existence until it is negotiated for value. And if it be negotiated directly by the party for whose accommodation it was

412 *made, to a person acquainted with the facts of the case, on a contract to receive for it less than its nominal amount, discounting the legal interest, it would not differ in any substantial respect from the present advance, of money, on a contract, that in consideration of the advance, the person receiving it, should give his obligation to the party making the advance, to pay him at a future day, a sum greater than the sum received and legal interest. This last transaction would be a direct loan at illegal interest; and as the negotiation of the note, under the circumstances supposed, does not substantially differ from it, the law infers that the party really intended a usurious loan, and resorted to the sale of the note, as a shift or device to conceal it.

But how stands the law, if, as we are forced to say was the fact in the present case, the purchaser of the note did not get it, from the party to the note, but from a broker in the market, without knowledge of the character of the note, and without knowledge of the person for whom it was sold?

By the law merchant, which has, by adoption, become a part of the common law of the land, every bill of exchange imports, as before said, a fair and full consideration; and if it was originally made payable to bearer, or has become so payable, by having been endorsed in blank, every bearer or holder, be he agent, trustee, finder or thief, has a right to sell it, and to transfer it, by delivery. In no case whatever, is the person disposed to purchase it, bound by the law to make any enquiries as to the right by which the bearer or holder sells it; nor, after he has purchased it, can his right to demand and receive its amount from all the parties to it, be objected to on the ground that the person who sold it, exceeded his authority, violated his trust, or that having only found or stolen the bill, he had no title to

it. To compel the purchaser to go into enquiries as to the consideration, or to permit the parties to the bill to object to its payment, on any of the grounds stated, would greatly impair the negotiability of bills and notes; their most distinguishing, *most useful, and most valued feature. Surely, therefore, a

person purchasing such a bill from the holder or bearer, must regard him as the owner, and deal with him as the owner, even if he be a broker; unless, indeed, he had actual notice of the real owner. And if the purchase of an accommodation bill or note, be made in ignorance of the character of the note, and of the person who is the real owner, and be made at a discount greater than legal interest; on what principle can it be said to be a loan, express or implied; without which, we have already seen, there can be no usury? If to be a loan, there must be a borrower as well as a lender. To whom was the loan made; who was the borrower in this case? Every loan implies, necessarily, an obligation on the borrower to return the money received. But, it must be confessed that, in this case, the transaction imposed no obligation on Belches, the broker, to return the money he received, nor to be liable for it, in any event, or in any manner whatever. Nor did any of the parties intend that he should be so liable. The parties could not, therefore, have intended a loan and borrowing, so far as respects the broker.

But, it is contended, that it was a loan as to Wilson & Orr. In the case of *Floyer v. Edwards, Douglass, 114*, Lord Mansfield said "that the view of the parties must be ascertained, in order to satisfy the Court that there was a loan and borrowing." But, how is "the view of the parties to be ascertained?" From the facts of the transaction, as they were exhibited, and appeared to the parties, at the time. It is on this principle, that the purchaser of an accommodation bill or note, at a discount greater than legal interest, from the known agent of the party for whose accommodation it was made, is held to be usurious. In such a case, the facts of the transaction, as they appear to the purchaser, make known to him that he is advancing his money to the very man whose bill or note he gets, and that the bill or note had no legal obligation whatever, until he received it. The substance and nature of

414 such a transaction, *is nothing more than a loan, at more than legal interest, and the bill or note a security for it; and that was the real intention of the parties. If the facts of the transaction, as they appeared to the parties at the time, are to be examined, for ascertaining "the view of the parties," in order to satisfy the Court that the transaction was, in its "nature and substance," different from the form which they have given to it, surely the same examination should be made for ascertaining "the view of the parties," in order to satisfy the Court that the transaction was, in its "nature and substance," that which its form indicates. Applying this test to this transaction, the question as to a loan to Wilson & Orr is at an end. Johnson saw a note importing full consid-

eration, and payable to bearer, in the hands of Belches, a broker. He knew that Belches, as holder or bearer, had the right to sell it, and to transfer it by delivery; and that any person had the right to purchase it from him as holder, at any price that might be agreed upon, provided Belches did not make himself liable to return a greater sum than the sum received, and legal interest. Wilson & Orr appeared not in the transaction. Johnson knew not that they had any interest in it. How, under such circumstances, is it possible that Johnson, in exercising an acknowledged right to purchase the note which Belches had an acknowledged right to sell, intended to lend to Wilson & Orr, the money which he paid to Belches as the price of the note! If the circumstances of a transaction may be resorted to for ascertaining the "view of the parties," (and it is certainly a most legitimate source.) Johnson intended not to lend his money, but to buy a note. And, therefore, the transaction is untainted with usury; for, as has been said before, there can be no usury where there is no loan. I do not mean to say that if Johnson intended to do that, which, in law, amounts to a loan, his belief that it was a purchase and not a loan, would prevent its being considered a loan. Ignorance of law never excuses.

As for example, if A wishing
415 *to raise money, were to make his note payable to B, and then go to B, and offer to sell it to him, and B, supposing that a man might lawfully sell his own note, were to give the money for it, verily believing that he was purchasing a note, and not lending his money on the security of a note; this would unquestionably be a loan, on the ground that he had intentionally done that which the law makes a loan. And this intention, would, if the note were taken at too high discount, be a corrupt intent, sufficient to vacate the contract under the first clause of the law, and to subject him, criminaliter, to the penalty, under the second clause, if the usurious gain were received.

The argument generally relied on, in support of the proposition that the discounting an accommodation note at a greater premium than legal interest, makes the note usurious and void, is usually stated in the following form; "as none of the parties to the note could maintain an action on it, as among themselves, it was not an available security until it was discounted; and if the discount which thus gave it being, was at a premium greater than legal interest, the note is usurious and void."

It is certainly true that accommodation paper is utterly unavailable as a security for money, until, (in the language of Chief Justice Abbot,) "it is issued or negotiated to some real holder for valuable consideration;" or until, (in the language of Justice Bailey,) "it is issued to some person who can make a valid claim upon it." *Downes v. Richardson*, 5 Barn. & Ald. 674; 7th Com. Law Rep. 227. The term "negotiation," when applied to a bill or note, includes, as I understand it, every

mode of transfer, whether of sale or discount, by endorsement or delivery. It is admitted, therefore, that the note in question was never an available security, until it was transferred to William R. Johnson, at a discount of three per cent. per month. But it does not, in my humble judgment, follow, that the note is, therefore, usurious and void. It is rather, (I say it with

great deference,) an assumption
416 *of the very point in controversy, and which is required to be proved.

The note was unavailable before it was negotiated for value. But whether the note was void and available afterwards, or void for usury, depended, not upon the rate of discount, but upon the character of the negotiation as a contract of sale, or a contract of loan. If the negotiation was a contract of loan, then, if the rate of discount was higher than the legal rate, the note would be usurious and void. But, if the negotiation was a contract of sale, "out and out," that is, on the sole credit of the names already on the note, the sale was valid, whatever was the rate of discount; and the note is a valid and available security in the hands of the purchaser. For, by the rules of the law merchant, every bill imports a consideration not to be questioned, in the hands of a purchaser for valuable consideration; every endorser in blank, of a bill of exchange, even if the bill was an accommodation bill, makes it, thereby, payable to bearer, and enables a purchaser for valuable consideration, to deal with him as owner; and the holder may, consequently, transfer it, by delivery, to such purchaser, in the same manner, and as effectually, as if he were the owner of the bill, and as if the bill had been originally given for full value. Therefore, the mere circumstance of the bill having been transferred for less than its nominal amount, deducting legal interest, is no objection to the validity of the bill; unless the case can be brought within the statute of usury. But, that statute applies to those cases only where the transfer was made under such circumstances that the law considers the transaction a loan, and the bill a mere security for the loan: and I refer to a former part of this opinion, where I endeavoured to shew, that the purchase of an accommodation note or bill, at a greater rate of discount than legal interest, even from the agent of the person for whose accommodation the note or bill was made, is a real purchase, and not a loan; provided the purchaser did not know the character of the note or bill, nor that the person with
417 whom he dealt, *was the agent of the person for whose benefit the note or bill had been made.

But, it is said, that the case of a security avoided by the statute of usury, is an exception to the rules of the law merchant; and that, therefore, the rules of the law merchant do not apply to a case where the defence is usury.

I readily grant, that the statute of usury does constitute an exception to the rules of the law merchant, and that so far as the exception extends, (but no farther,) the rules of that law do not apply to cases where the defence is usury.

But, how far does the exception extend? To determine this, we must first ascertain the rule, and then the exception.

By the law merchant, it was not allowed to a party to a bill, to object, as against a purchaser for value, the want of a consideration; nor was it allowed to him to object, as against any body, that the bill had been given for a usurious consideration. Thus stood the law merchant until the statute of Elizabeth avoided all contracts founded on a usurious consideration. But, the statute made no other change in the law merchant, and of course, constitutes no farther exception to it, than to allow the party to a bill, to object, as against every body, that the bill had been given for the illegal consideration of usury, and was therefore void. I admit, however, that the statute having allowed him to plead the usury in bar, it allows him also to give evidence of every fact that will conduce to prove the usury. Thus, where the bill was an accommodation bill, and was sold by the agent of the party for whose accommodation it was made, the defendant will be allowed to prove both the want of consideration, and the agency of the broker, in all cases where those facts will conduce to prove the usury; as, for example, where they were known to the person purchasing the bill. In that case, they do conduce to prove the usury; because, they prove that his real intention was to lend his money, and not to buy a bill, in the way of them. But, where those facts

do not conduce *to prove the usury, they will be excluded; as, for example, were the agency and the want of consideration were unknown to the purchaser. In such case, they do not conduce to prove the usury; because, the question, whether usury, or no usury, depends upon the intention to lend: and it is impossible that a man's intention can be proved, in the slightest degree, by facts of which he had no knowledge.

I have not been able to find a single case, in any English Court of Justice, where the transfer of an accommodation bill has been decided to be usurious and void, merely on the ground that it was transferred by the agent of the party for whose accommodation it was made, at a discount greater than legal interest. There has not been a dictum to that effect; so far, at least, as I have observed. Knowledge in the purchaser, of the character of the bill, and of the agency of the seller, are considered in England, to be indispensable requisites, to constitute usury in such cases. On this point, the case of *The King v. Ridge*, 4 Price's Reports, 50, is an express authority, directly in point. The arguments of the bench and bar appear to me, to throw much light on this question, so much controverted in Virginia. Considering the case as very important, and entitled to great respect, and, as the book containing it is very dear, and very rare, (I have not heard of a copy of it in any library or in any book-store in Virginia,) I shall request our reporter to publish the case at large, in a note, or in his Appendix, from a manuscript copy which I obtained from Philadelphia, through the agency of a

friend, and which, I believe to be correct. I forbear, therefore, to make any farther remark upon it.*

As to the cases of *Dagnal v. Wylie*, 2 Campbell, 33; *Jones v. Davison*, 1 Holt, 256; 3 Com. Law Rep. 92; *Young v. Wright*, 1 Campbell, 139, and *Ackland v. Pearce*, 2

Campbell, 599; I have examined them with *great attention; but I can perceive nothing in the grounds on which the Judges themselves put their decisions, calculated in any manner, to shake my confidence in the principles on which the cases of *The King v. Ridge*, and *Taylor v. Bruce*, were decided.

It is true, that the great principle, involved in this case, has been settled in New York, differently from *The King v. Ridge*, and *Taylor v. Bruce*. I have very great respect for the decisions of the Courts of that State, and generally, I derive profit as well as satisfaction from consulting them. I have considered all their cases upon this point, but have not been convinced by them. And, great as is my respect for them, I cannot sacrifice to them the convictions of my own judgment; backed as they are by the uniform decisions of the English Courts.

My brother Judges have discussed at great length another question, which is this: If the note in this case could be regarded as an available security, as between the parties to it, and had been endorsed, at a discount greater than legal interest, by the payee, to a person who afterwards transferred it to a bona fide holder, could such holder recover in the bill?

This question, although made, does not judicially arise in the case. The note did not pass from the payee to the person who paid the money, nor was there any contract of endorsement between them. But if, as the question supposes, the note had passed from the payee to the person who paid the money, on a contract of endorsement, by which the payee received, for the bill, less than its nominal amount, deducting legal interest, I should be decidedly of opinion that the endorsement was usurious and void, on the ground mentioned by *Bailey, Justice*, in *Lowes v. Mazaredo*, Comyn's Usury, 181, that "every endorsement is considered in law as a new drawing." And as every holder subsequent to the payee, must claim through the endorsement of the payee, he could not, if that were void, recover on the bill.

This point was settled in "*Lowes v. Mazaredo*"; and I entirely approve of that decision. My brothers Carr and Green, have taken extensive views of this point, in which I concur.

I think the judgment should be affirmed.

THE PRESIDENT.

It is somewhat to be regretted, that the point decided by this Court, in the case of *Taylor v. Bruce*, Gilmer, 42, upon two very elaborate and able arguments by the bar, is to be re-viewed in this case, in which there has been no argument, there being no counsel on either side. Under these circumstances, I might content myself by referring to my opinion in that

*See Appendix, No. 2.

case; an opinion formed on as much light as I have now before me, and upon as laborious and deliberate consideration as I am capable of devoting to any case. I shall, however, without pretending to enter into a very elaborate discussion of all the cases that are supposed to have any application to it, confine myself to a few remarks on the principle, on which the case to be reviewed was decided, and to the few cases really applicable to it.

It must be admitted, I think, that a note, such as those in the case alluded to, and the one in the case before us, in the hands of a party who was the legal owner of it, as regarded the purchaser, might be purchased for less than its face, without the imputation of usury, and that the parties to it would be estopped, by the law merchant, to say, in a suit upon it, that it was without consideration, or tainted with fraud. The negotiable character, imparted to it by the law merchant, it must be admitted, forbids such defence. Upon these premises, the first question in the case of Taylor, &c. v. Bruce, was whether, though in fact the notes in that case were made to raise money on, the defendants could avail themselves of the plea of usury, against a party totally ignorant of the purposes for which the notes were made, and who had paid value for them; whether the policy of the act against usury must not only
421 *prevail over the policy of the law merchant, but was so strong as to subject a party to all the consequences of committing usury, in the absence of all proof, that he was intentionally guilty; a proceeding, directly opposed to the spirit of our laws, and reprobated in all trials for the breach of them.

In considering that question, though it was admitted upon principle and authority, that a contract, usurious in its inception, must be held to be void in the hands of a fair holder, as against the parties to it, yet it was thought by a majority of the Judges, that in a case in which the usury was not consummated before the sale of the note, its negotiable character, in the first instance, ought to protect it from the plea of usury; and the more especially, if the allowance of the plea would subject a party to all the consequences of committing usury, though totally ignorant of it at the time he purchased the note. Many cases were cited by counsel in that case, and some of the New-York cases much relied on. Upon the first argument, there was no division in the Court, on the law of the case. But on the fact, the dissenting Judge believed, on the evidence, that Bruce, the purchaser of the notes from the broker, had notice of the purpose for which they were made, and that he was purchasing from the maker; and on the second argument, which is reported, it is very evident that that impression had great weight in bringing him to the conclusion on the law, to which he finally came.

As regards Johnson, who purchased the note of the broker in this case, if he had knowledge of the purpose for which it was made, it ought to have been found by the jury. On the contrary, I think ignorance of the purpose for which the note was made,

sufficiently appears by the verdict. If any thing was to be inferred from the fact, that Belches, who sold the note to him, was a general broker, which is found by the jury, or from any other fact in the verdict, to fix the fact of knowledge of the purpose for which the note was made,
422 upon him, it ought to have been *found by the jury. On the contrary, the express finding that no questions were asked, and no information given, negatives, if it were necessary, any knowledge in Johnson, of the purpose for which the note was made.

As regards the purchase by Johnson, then, the question is precisely the one decided in the case alluded to. In a contest between the policy of the law against usury, and the policy of the law merchant, which gives to bills their negotiable character, a defendant ought not to be permitted to avail himself of usury, as a sword by which to injure others, as in the case of Taylor, &c. v. Bruce, (for in that case it was in evidence, that real bona fide notes might have been purchased at a rate not higher than the notes in question,) but as a shield with which to protect himself against the extortion of his adversary. The rule caveat emptor does not apply to bills and notes, because their title is on their face; their negotiable character absolves the purchaser from all enquiries beyond the paper itself. They are not affected by failure of consideration, or by fraud, in the hands of a fair purchaser without notice. A bill or note with a blank endorsement, is a bill or note payable to bearer, and passes by delivery. In the case of Lowe v. Waller, in which there was usury in the concoction of the bill, the Court, to preserve the principle of negotiability, struggled hard, but was compelled to yield to the force of the statute against usury. In the case of Parr v. Eliason, Lord Kenyon held, that intermediate usury, between an endorser and endorsee, did not taint the contract with usury in the hands of a bona fide holder. In the case of Lowes v. Mazaredo, Lord Ellenborough overruled that case, and in consequence of it, such was the shock given the negotiability of bills, that the act of 58 George 3, was passed, to re-establish public confidence in bills, &c. That act declares, that no bill of exchange or promissory note, though for usurious consideration, shall be void in the hands of an endorsee for value, unless at the time of his discounting it, or paying the consideration, he had actual notice of
423 *the usury. This act reverses the decision of Lowe v. Waller, and excludes negotiable paper, almost entirely, from the operation of the statute against usury. This act, it is true, is not in force in this country, and is only cited to shew the state of the contest in England, to sustain the negotiability of bills, against the policy of the law against usury.

The only case I have met with, which is directly in point to the case before us, is the case of The King v. Ridge, 4 Price's Rep. 50. The facts were, that Lord Moira drew four bills of exchange, payable to his own order, which were accepted by Ridge, his Lordship's regimental agent. They were endorsed generally by Lord Moira,

and by his agent, Major James, handed to the house of Austin & Maund, who discounted them at usurious interest. The real question in that case was, whether it was a sale of the bills, or a loan; and it was decided to be the latter, on the express ground that Austin & Maund, who discounted them, must have known that they were dealing with Lord Moira himself for the bills, and not with another, who might be the owner of them. Among others, Garrow, Baron, said, the confusion which has got into this case, proceeds from its having been at one time considered, that these bills were sent about the town, to be sold for what could be got for them; but the fact is, that this paper was sent by the maker to those, who well knew its precise value, to get that value for it, which was done. Nothing had been given by Major James for it; and whether the transaction was originally good, it is not necessary to enquire. But that this transaction, as between Major James, the acknowledged agent of Lord Moira, and Austin & Maund, was usurious and void, there can be no doubt. That it was nothing but a loan by Austin & Maund to Lord Moira, seems, from the facts, very clear. But, if they had not known, that the bills were the bills of Lord Moira, and sent by Major James, his agent, to borrow money on them, it is equally clear the decision would

424 *have been a different one. If, as in the case of Taylor, &c. v. Bruce, they had been sent about the town, to be sold, (as for all that appeared in that case they were,) and Austin & Maund had been totally ignorant to whom they belonged, as Bruce was, it is impossible to perceive that the transaction would have been condemned as usurious; unless, indeed, in no case can a bill or note be sold for less than its face, without subjecting the purchaser to the consequences of committing usury.

As to the cases in which a party purchasing a contract, usurious in its inception or concoction, though ignorant of the usury at the time, is to lose his money, they are not controverted. They have no application to the case before the Court. In such cases, he is not condemned as an usurer, though he loses his money. The usury exists anterior to his purchase, and is not consummated by his purchase. But even in these cases, it will be found, that before the passage of the act of 58 Geo. 3d, there was great repugnance in the English Judges, to subject an innocent purchaser of such a bill, to the loss of his money. In the case of Jones v. Davidson, Chief Justice Gibbs said, "I can never understand the equity of the rule, which has so long obtained under the statute, that an innocent endorsee shall be prevented from recovering on a bill of exchange, which has been contaminated in its creation with usury, by means to which he is not privy, and of which, when he receives the bill, he can know nothing. I own I have serious doubts on this construction; and if the case renders it necessary, I will reserve the point, except for usury committed by the parties who originally create the instrument. If the parties who create the instrument, and agree to put their

names upon it, commit usury, it is reasonable that they should answer for the consequences; but, I do not understand, why the security should be avoided in the hands of one who takes it for a valid consideration in the common course of business." In that case, A agreed to give B, a sum beyond legal interest, to get a bill 425 discounted. *C, discounted it at legal interest, and B, endorsed it. Held, that A, could not defend himself against the endorsee of C, on the ground of usury between him and B.

These cases, as before remarked, have no application to the one before us. There is an important difference between convicting a party of usury, and subjecting him to the loss of his money, by the conviction of others. In order to convict a party of usury, the intention to commit it must be wilful. There must be a corrupt agreement, and not a true and just intent. In a contract, fair upon the face of it as to himself, he cannot unknowingly, be made the instrument of others to commit it; unknowingly, not as to the law, but the facts, on which he proceeds to advance his money. The technical distinction between what is called a perfect bill and a blank, ought not to affect him; but in truth, there is nothing in it. A note made by A, and endorsed by B, for accommodation, though of no binding force between the parties until discounted, is not a blank piece of paper. As regards everybody else, it is a binding security, and when sold to a party without notice, neither want of consideration, nor fraud, can be alleged against the holder. To allege usury in the purchaser who discounts at more than legal interest, though real business notes might be purchased at the same or less discount, according to circumstances, and to subject him to the penalty, of usury would be to interdict the sale of bills and notes altogether, or to put him on enquiry, which would change the character of such paper. Nor can this consequence be avoided by any construction of the act against usury.

It cannot be said, that the contract may be avoided under the first section, and the party remain unaffected by the second section, if he receives its amount. The two sections must be taken together, to give any validity to the second. It must be considered as applying to the party embraced by the first. That section avoids the contract if usurious; and the second 426 *inflicts the penalty, if the usury is received. The first subjects him to the charge of having made a corrupt contract; and the second inflicts the penalty. Corrupt intention is required in both parties. Price v. Campbell, 2 Call, 11. That it is a legal inference from the facts, and need not be found by the jury, is admitted.

Upon the whole, I think the case of Taylor, &c. v. Bruce, was decided on correct principles, and that the case before us must follow its fate, and the judgment be affirmed.

Judgment affirmed.*

*Note.—The judgment was afterwards reversed, on account of interest being given on the costs of protest.—Note in Original Edition.

Heron v. Bank of the United States.*

June, 1837.

Deeds—Recordation—Statute.—By the act of 1814, a deed cannot be proved and recorded after eight months from its delivery, in the Clerk's Office: but such deed must be proved in open Court. By two Judges, of a Court consisting of three.

This was an appeal from the Williamsburg Chancery Court, where the bank of the United States filed a bill against Heron, Plume and others, to set aside a deed of trust, made by Heron to Plume & Co. which, the plaintiffs alleged, obstructed their execution. This deed was impeached, first, on the ground of fraud, and secondly, because it was not proved and recorded within eight months from its delivery; and then, it was recorded in the Clerk's office, which was not authorised by law. The grounds of this objection will fully appear by the following opinions.

427 *The Chancellor decreed, that the deed should be set aside, as void against the plaintiffs, and the defendants appealed.

Wickham, for the appellant.

Stanard, for the appellees.

June 15. JUDGE CARR.

In the Court below, the appellees, being judgment creditors of Heron, filed a bill against him and Plume & Co., charging that a deed of trust, made by Heron to Plume & Co. and which obstructed the execution of the plaintiffs, was, 1st, fraudulent; 2d, if not fraudulent, that it was void as to the plaintiffs, because not legally recorded. The Court of Chancery decided against the deed on both grounds. I will consider the last point, first.

By the early laws on the subject, deeds are directed to be recorded, in the General or County Courts (not restricting it to the county in which the land lay,) within six months. In 1705, they were required to be recorded in the General Court, or Court of the county where the lands lay, within eight months. In 1785, they are directed to be recorded before the General Court, or Court of the county, city or corporation, where the lands lay, within eight months.

When District Courts were created, the power was given to those Courts, for lands within the district; and when the Superior Court system succeeded, the power was given to those Courts also, for lands within the county. But in all these cases, the power was vested in the Court, and not in any officer; and the probate and order for recording, were always made in open Court. Nor was there any statutory power of recording, given to Courts, after the lapse of eight months from the delivery of the deed. Courts of record might, and did, exercise the common law power, of spreading conveyances and other instruments

428 *upon their records, for safekeeping; and the inexpressum would be evidence of the execution of the deed, against the grantor and those claiming under him, if the deed were recorded on his acknowledgment; but, such a deed could claim none of the privileges of a deed recorded under the statute.

In the session of 1813, a law passed, by

*For monographic note on Recording Acts, see end of case.

the first section of which it is enacted, "that the clerks of the several County and Corporation Courts, &c. are authorised and required to admit to record, at any time within the period, and in the form, now required by law, any conveyance, either on the acknowledgment of the party, or the proof on oath of such acknowledgment, by the legal number of witnesses thereto, made in the office of the respective clerks; and that any conveyance so recorded, shall have the same legal validity, in all respects, as if it were proved in open Court." It is under this law, that the question arises.

The deed from Heron to Plume & Co., bears date on the 1st of September, 1817, and was admitted to record in the clerk's office, on the 15th of February, 1819; nearly 18 months after its date. Was this deed legally recorded? Had the clerk power, after the lapse of eight months from its date, to take probate of the deed, in his office? This is purely a question of construction; and before entering upon it, I will avail myself of the remarks of C. J. Willes, in *Coleman v. Cook*, 1 Willes' Rep. 397, which seem to me very sound. "When the words of an act are doubtful and uncertain, it is proper to enquire what was the intent of the Legislature; but, it is very dangerous for Judges to launch out too far, in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words."

The law I have quoted, vests a new power in clerks; a power to admit deeds to record in their offices. But, this power is limited both as to time and manner. They may record deeds in their offices, "at any time, within the period, and in the form, now required by law." These are

429 *important limitations. It is impossible to suppose, that they crept into the law by accident; and if the Legislature intended to use them, it could be but in one sense. Strike out all these words of restriction, and the clerks are unlimited. Retain them, and they can record deeds in their office, only within eight months from the delivery; and in the form now required by law. The form required, is, the acknowledgment of the party, or proof by three witnesses. If the clerk can dispense with one of these limitations, why not with the other? If he is not confined to the time prescribed, why is he to the form? If he may record deeds after the expiration of eight months, why not without proof by witnesses, or acknowledgment by the party. The time and the form are equally clear and definite. It is just as palpable, that by the words of the act, the deed must be presented within eight months, as that it must be proved or acknowledged; and the power, which can dispense with one of these provisions, may, without difficulty, disregard the other. That the restriction as to time, was not introduced without design, the second section of the law is strong to show. By that, a deed may be recorded on the certificate of two magistrates, endorsed that it has been duly acknowledged before them by the party, and that he desires it may be recorded; "provided, that such a deed, with such certificate, be delivered to the clerk, within

the period now allowed by law." Here is a proviso, the express and sole purpose of which is, to limit the power of recording those deeds within the clause, to eight months; shewing the settled purpose of the Legislature to tie up these new powers given to clerks and magistrates; and this knot can only be untied, eo ligamine quo ligatur, however judicial usurpation may attempt to cut it.

The 7th section of this law enacts, "that any conveyance, which shall hereafter be recorded, after the expiration of the time now allowed by law for recording the same, shall take effect, and be valid in law, 430 as to creditors *and subsequent purchasers, from the time of such recording, and from that time only." It was strongly contended in the argument, that this section gave to clerks, by implication, the power of recording deeds in their office, after the lapse of eight months. The special and sole object of the first section was, to vest this new power in the clerks. In doing this, the legislative mind was, of necessity, directly turned to the nature and extent of the power to be given. Accordingly, the first section describes that power exactly, and limits it to eight months. Would it not seem very extraordinary, that a subsequent section of the same law should take away this limit: that of the same statute, one section should enact, that the clerks shall not record deeds after eight months; and another, that the clerks shall record deeds after eight months? If the legislative intent had changed in the course of discussion, before passing the act, would they not have evinced that change by striking out the words of limitation in the first section, rather than by letting them stand, and inserting a subsequent section to repeal them; thus exhibiting the unseemly spectacle of two sections in the same act, in direct conflict with each other? Ought not the words to be most clear, and the contradiction most positive and direct, which would justify us in attributing such a course to the Legislature? And would it not violate every rule of sound construction, to repeal the first section, expressly limiting the power of the clerks to eight months, by a subsequent section, which does not mention them at all, and can only apply to them by implication; an implication, not necessary to the operation of the 7th section, nor, in my opinion, even plausible in itself? Not necessary, because, though we should decide that the clerks could not record deeds after eight months, the power of the Courts to record them would still remain, and would be fully sufficient to meet the mischief, for which the 7th section meant to provide: Not plausible, because, in the construction of a statute, we must take 431 into view all its different parts; and when, in one section *it is said, that clerks shall not record deeds after eight months, and in another, that deeds, recorded after eight months, shall be valid, we must suppose that the Legislature meant, in the last case, those deeds, which Courts were always in the habit of admitting to record, under their common law power.

In the revision of 1819, there is a clear legislative exposition of the act of 1813. The first section is re-enacted verbatim, except with the omission of the words, "within the period," &c.; making the section read thus; "The clerks are authorised, at any time, to admit to record deeds," &c.; thus shewing the idea of the Legislature, that a law was necessary to expunge those words, with this Court is asked to expunge by construction; and which must be expunged, in some way, before that power can be considered unlimited as to time, which they expressly limit to eight months.

The 5th section of the law of 1813 directs, that after the 1st of November, 1814, deeds shall be recorded in the County and Corporation Courts only. This arrested the progress of many deeds, which had been lodged and partly proved, in the General Court, District Courts, and Superior Courts. To remedy this evil, the act of 1814, (Sessions Acts, p. 75,) enacts, that it shall be lawful for the General Court and the several Superior Courts of law, to receive further proof of such deeds, and to admit the same to record. It was insisted by the counsel for the appellants, that this law strengthened the construction he contended for; and he asked, might not these deeds, though over eight months old, be proved and recorded under the 7th section of the law of 1813? It would seem that the Legislature thought not; else, why pass another law, providing for their probate and admission to record? And it is very clear to me, that under this last law, the clerks of the General and Superior Courts cannot receive proof of these deeds in their offices, because the law expressly confines the probate to those Courts themselves. Why the 432 law, *either in this case, or that of deeds over eight months old, should confine the probate to the Courts, in exclusion of the clerks, it might be difficult to say; nor can the reason be sought after, where the law is clear. In such cases, it is enough for the Judge to say *ita lex*. We decided, very lately, a case under this same law of 1813, which exemplifies this doctrine. The 5th section directs, that deeds respecting the title of personal property, shall be recorded in the Court of that county, in which the property shall remain. No doubt, the word corporation was omitted by accident; and the revision of 1819 supplied it. Yet, as it was not in the law, we decided without hesitation, that a deed for slaves, recorded in the Corporation Court of Richmond, where all the parties lived, and where a recording was best for every purpose of notice, was void as to creditors; and this upon the ground, that the law being clear, we had nothing to do with the reason or propriety of it.

Upon this view of the case, I am of opinion, that the deed, as to the plaintiffs who are judgment creditors, is to be taken as an unrecorded deed, and void. Being against the appellants on this ground, it is unnecessary to consider the question of fraud.

I think the decree of the Court below, should be affirmed.

JUDGE COALTER.

The act of 1813, ch. 10, provides by the

first section, that the clerks of the several county and corporation Courts, and their deputies, be authorised and required to admit to record, at any time within the period, and in the form now required by law, any conveyance, either on the acknowledgment of the party, or the proof on oath by the legal number of witnesses thereto, &c.; and that any conveyance, so recorded, shall have the same legal validity, &c. as if proved in open Court.

The 3d section requires the clerks on the first day of every term, to return to the Court a correct list of all conveyances 433 *by them admitted to record, in manner aforesaid, since the term last preceding; specifying therein, the proof or acknowledgment of such conveyances, &c. and a description of the conveyance, by the names of the parties thereto, &c.; and when the list has been inspected by the Court, it is to be inserted in the minutes, &c.

The 7th section provides, that any conveyance which shall hereafter be recorded, after the expiration of the time now allowed by law for recording the same, shall take effect and be valid in law, as to creditors and subsequent purchasers, from the time of such recording, and from that time only.

In this case, the deed, under which the appellant claims, was executed on the 1st of September, 1817, and was proved and recorded in the clerk's office, on the oath of three witnesses, on the 15th of February, 1819, (a few days before the passage of the act of 1819, on this subject;) and the question is, whether it is a deed duly recorded?

This act is amendatory of the act of 1792, regulating conveyances; and the first two sections of those acts, read together, would be this; that no estate of inheritance, &c. shall be conveyed, unless by deed, &c.; nor shall such conveyance be good against a purchaser, &c. unless it be acknowledged by the party, or proved by three witnesses, before the Court, or in the clerk's office, before the clerk or his deputy, of that county, city, or corporation, where the land lies, and within eight months after the time of sealing or delivery.

Had the act of 1813, contained no other provision, than is found in the 1st and 3d sections, it would have been so read and construed; and then this deed, whether proved after the eight months, either before the Court or in the clerk's office, would not have been good against the creditors. The clerk was simply invested with the same power, that the Court before had, of taking the acknowledgment on proof, and admitting the deed to record. The power in

neither could be called judicial, in 434 the strict sense; for, *there was no day given to any party interested in contesting the regularity of the proceedings; nor would they be precluded from doing so thereafter. The object was, to relieve the Court during term time, of the pressure at the clerk's table in taking proof and acknowledgment of deeds, which was always done by the clerk as a matter of course, without any application to the Court. It was, in short, to enable him to

do in the office, what he was in the constant habit of doing at the clerk's table, without the interference or even knowledge of the Court, until it was announced in reading the minutes. The publicity given to the business by its being done in Court, and read in the minutes, was supplied by the list directed in the 3d section. So far as this goes, then, the plain object and effect of the law was to give the clerk in the office, the same power as the clerk in the Court.

Suppose the law had stopped here, and that at a succeeding session, the 7th section had been enacted, as a distinct law. What would have been its construction? It seems to me, we would have said this: The Legislature, in the laws previous to that of 1785, (from which the act of 1792 was taken,) had prohibited the Courts from admitting to record deeds not acknowledged or proved within the time limited; notwithstanding which, it had frequently happened that deeds were so recorded, and the Legislature had, from time to time, been called on to legalize these transactions, as will be seen in the laws of 1705, 1710, and 1748, on this subject, and I believe, others; and therefore, to prevent future applications and difficulties on this subject, and the injustice of legalizing deeds not recorded in time, whereby a retrospective operation would be given to them, the law wisely intended to provide a general and equitable rule on the subject; to wit, that as the parties, where the eight months had expired before it was convenient to have the deed recorded, might execute and receive a new deed, and as the old deed is still good between them, it may be admitted to record, so as to be preserved 435 as to *them, and to have the same effect as to purchasers and creditors, as if a new deed had then been executed.

But it is asked, how, or when it is to be recorded, how proved, &c.? No jurisdiction is given by the act to any one, to take the acknowledgment and proof, or to record it. The acts, both as to the power of the Court and clerk, restrict the recording and taking proof, &c. to deeds executed and delivered within eight months.

The reasonable, and indeed the only fair construction that could be given to it, it seems to me, would be this; that any conveyance which shall hereafter be recorded (not in any Court whatever, but) in the Court of the county where the land lies, after the expiration of the time now allowed by law, &c., by the authority having power to take the acknowledgment and proof of deeds, and to record the same, shall take effect, and be valid in law, &c. And that this would have been the sound construction, had the matter of this 7th section been the subject of a distinct act, seems to me not only manifest from the reason and nature of the thing, but from the legislative construction put on the act when brought into one by the revision of 1819. Why should the clerk have authority to take proof of, and record a deed, which was to have a retrospective effect, and not one which was merely to operate from the day on which it was recorded? The eight months might run out, if it could not be done

in the clerk's office, in the one case, so as to injure the party; and so, in the other, as he could not get his witnesses until the day after the eight months if he must wait for a Court, some one may purchase, &c., and he may thus be injured. They both seem to stand on the same ground of expedience, and as the act does not speak of a recording by order of Court, any more than in the clerk's office, it must have reference to both modes, and impliedly to extend the power of those having a right to take proof, &c. and to record within the time, &c. to the case of deeds out of date.

436 *But if this would be the construction, had this provision in the law been enacted at a subsequent session, I cannot see why it shall not be so construed in the present case.

The 7th section seems to speak this language; that though deeds, if they are to operate retrospectively, can only now be acknowledged or proved and recorded within eight months, by the County Courts, or by the clerks in their offices, as provided by this act; yet they may hereafter be recorded, after the expiration of the time, &c. in the same manner as deeds are to be recorded within the time, &c.; but such deeds shall only take effect and be valid as to creditors, &c. from the time of such recording.

The practice, so far as we may judge from this case, may have been, and probably has been, to record deeds, whether out of date or not, by proof, &c. in the clerk's office; and as that is clearly now the law, and was so a few days after this deed was recorded, it is expedient to adopt this construction if it can be done, as I think it may.

I think, therefore, that the deed is to be taken as duly recorded.

It is not necessary to give an opinion on the other point, as by the opinion of the majority, this seems to settle the question.

JUDGE CABELL concurred with JUDGE CARR, and the decree was affirmed.*

RECORDING ACTS.

- I. General Principles.
- II. Instruments Entitled to Record.
 1. Instruments Relating to Real Property.
 - a. In General.
 - b. Conveyances of Equitable Title.
 - c. Mortgages and Deeds of Trust.
 - d. Contracts for Sale of Land.
 - e. Powers of Attorney.
 2. Instruments Relating to Personal Property.
 - a. In General.
 - b. Bills of Sale.
 - c. Mortgages and Deeds of Trust.
 - d. Reservations of Title.
 - e. Assignments of Chose in Action.
 3. Lis Pendens.
 4. Judgments.
- III. Place of Recordation.
 1. Instruments Relating to Real Property.
 2. Instruments Relating to Personal Property.
- IV. Time of Recordation.
- V. Prerequisites to Recordation.
 1. Signing, Sealing and Delivery.
 2. Description of Property Conveyed or Affected.
 3. Acknowledgment or Proof of Execution.

*The PRESIDENT and JUDGE GREEN absent.

4. Prepayment of Tax.
- VI. Making the Record.
- VII. Failure to Record as Affecting Validity of Instrument.
 1. In General.
 2. As against Grantor and His Representatives.
 3. As against Purchasers and Creditors.
 - a. Purchasers.
 - b. Creditors.
 4. As against Third Persons with Notice.
- VIII. Effect of Recordation as Notice.
 1. Instruments Not Entitled to Record.
 2. Instruments Entitled to Record.
 - a. Notice to Whom.
 - b. Notice of What.
- IX. Destruction of Record.

I. GENERAL PRINCIPLES.

Recordation Not Necessary at Common Law.—The common law does not require any deed or writing in order to pass the title to land, and, of course, therefore, knows nothing of the doctrine of registration. The only notoriety which it demands in such transactions, is livery of seisin for estates of freehold, and entry for estates for years. 2 Min. Insts. (4th Ed.) 987; *Braxton v. Bell*, 92 Va. 229, 23 S. E. Rep. 289.

Recordation Required by Statute.—In Virginia and West Virginia, the legislature has been alive to the advantages of a general registration of all conveyances of, lienon, and transactions affecting lands, and the system has been gradually perfected, until it is believed there is nothing touching the title to lands which it concerns a purchaser or creditor to know, which is not required to be set down in the registry of the county or corporation where the land is, and that registry is made so convenient of access that for one to be deceived argues, in general, a negligence so gross as to exclude sympathy for the sufferer. 3 Min. Insts. (4th Ed.) 989.

II. INSTRUMENTS ENTITLED TO RECORD.

1. INSTRUMENTS RELATING TO REAL PROPERTY.

a. *In General.*—The practice of recording instruments being purely of statutory origin, it follows that no instrument need be recorded in the absence of a statute requiring it, and, as will be seen hereafter, the recording of an instrument not required or entitled to be recorded has no effect whatever. In Virginia and West Virginia almost every kind of instrument which could affect real property in any way is required to be recorded. Thus deeds of conveyance, deeds of trust, mortgages, contracts to convey, the report of commissioners in condemnation proceedings, and many other instruments which affect real property, are expressly required to be recorded, and their recordation is consequently notice to creditors and purchasers. *Heermans v. Montague*, 2 Va. Dec. 6; *Chesapeake, etc., Ry. Co. v. Walker*, 100 Va. 69, 40 S. E. Rep. 633; *Withers v. Carter*, 4 Gratt. 407; *Dobyns v. Waring*, 82 Va. 159; *Guerrant v. Anderson*, 4 Rand. 208; *Pace v. Moorman*, 99 Va. 246, 37 S. E. Rep. 911.

An undelivered deed filed as an escrow in the proceedings of a court of equity, administering a trust fund belonging to a married woman and her infant children, is not within the terms or intentment of the registry act. *Trout v. Warwick*, 77 Va. 731.

b. *Conveyances of Equitable Title.*—It has been held in Virginia that recording acts are applicable to conveyances of the legal title only, and are not applicable to a conveyance of the equitable title. *Doswell v. Buchanan*, 8 Leigh 365, 23 Am. Dec. 280; *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78; *Briscoe v. Ashby*, 24 Gratt. 454. It is otherwise in West

Virginia. *Damron v. Smith*, 37 W. Va. 580, 16 S. E. Rep. 807.

c. Mortgages and Deeds of Trust.

In General.—Mortgages and deeds of trust conveying real estate are required to be recorded in order to be good against creditors and purchasers of the grantor. Va. Code, § 2468; W. Va. Code, § 5, ch. 74; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. Rep. 813; *Dever v. Jordon*, 1 Va. Dec. 124; *Solenburger v. Duval*, 1 Va. Dec. 100; *Weinberg v. Rempe*, 15 W. Va. 380; *Heermans v. Montague*, 3 Va. Dec. 6.

Under statutes avoiding unrecorded deeds of trust as to subsequent judgment creditors, a trust deed will be void as to such creditors, notwithstanding the trust had been executed by a sale and conveyance of the property; for in this respect the statutes of registration make no distinction between executed and unexecuted trusts, but are designed to give notice of the state of the title as affected by successive alienations, as well as by incumbrances. *Campbell v. Nonpareil Fire-Brick, etc., Co.*, 75 Va. 291.

Equitable Mortgage.—A paper intended for a deed of trust, conveying land to secure a debt, signed by the grantor, but without a seal, though not effectual as a deed of trust at law, is an equitable mortgage, enforceable in equity, and may be recorded under Code W. Va. 1868, ch. 74, § 4, and when recorded, is a lien valid against subsequent purchasers and creditors. *Atkinson v. Miller*, 84 W. Va. 115, 11 S. E. Rep. 1007.

d. Contracts for Sale of Land.—It was formerly held that the recording acts requiring deeds to be recorded did not apply to parol or written contracts for the sale of land, and that one in possession of land under such a contract was protected against creditors and purchasers from his grantor, though the contract was not recorded. *Floyd v. Harding*, 28 Gratt. 401; *Burkholder v. Ludlam*, 30 Gratt. 255, and note; *March, Price & Co. v. Chambers*, 30 Gratt. 290, and note; *Long v. Mfg. Co.*, 30 Gratt. 635; *Trout v. Warwick*, 77 Va. 731; *Halsey v. Peters*, 79 Va. 60; *Bowman v. Hicks*, 80 Va. 806; *Powell v. Bell*, 81 Va. 222; *Brown v. Butler*, 87 Va. 631, 13 S. E. Rep. 71; *Reynolds v. Necessary*, 88 Va. 156, 13 S. E. Rep. 348; *Frame v. Frame*, 32 W. Va. 478, 9 S. E. Rep. 901. See 2 *Minors Insts.* (4th Ed.) 851 *et seq.*; *Withers v. Carter*, 4 Gratt. 407; *Eldson v. Huff*, 29 Gratt. 341; *Anderson v. Nagle*, 13 W. Va. 105, 107; *Delaplain v. Wilkinson*, 17 W. Va. 263, 264, 267; *Snyder v. Martin*, 17 W. Va. 289, 290, 300; *Pack v. Hanebarger*, 17 W. Va. 324, 338; *Fowler v. Lewis*, 36 W. Va. 158, 14 S. E. Rep. 463.

But this rule is changed by § 2463 of the Va. Code, which provides that "every contract not in writing, made in respect to real estate, or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate on a term therein of more than five years, shall be void, both at law or in equity, as to purchasers for valuable consideration without notice and creditors," and by § 2464 which provides that if the contract is in writing it must be recorded in order to be good against creditors and purchasers. *Thorn v. Phares*, 35 W. Va. 771, 14 S. E. Rep. 399; *Holt v. Haynes*, 1 Va. Dec. 201; *Young v. Devries*, 31 Gratt. 304.

e. Powers of Attorney.—It seems that a power of attorney for conveyance of lands falls within the letter and spirit of recording acts. *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 108. See W. Va. Code, § 1, ch. 73, which provides that "a power of attorney may be admitted to record in any court."

2. INSTRUMENTS RELATING TO PERSONAL PROPERTY.

a. In General.—The provisions for recording conveyances of land will not be construed as applicable

to personally or choses in action, and in the absence of an express statutory requirement, transfers of personally need not be recorded. While in Virginia and West Virginia the recording acts have not been extended to embrace absolute sale of personal property, they do embrace reservations of title to and chattel mortgages thereof. *Curtin v. Isaacs*, 36 W. Va. 301, 15 S. E. Rep. 171; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. Rep. 685; *Kirkland v. Brune*, 31 Gratt. 123; *Gregg v. Sloan*, 76 Va. 500; *Bank v. Gettinger*, 3 W. Va. 317; *Hundley v. Colloway*, 45 W. Va. 516, 31 S. E. Rep. 937; *Troy Wagon Co. v. Hutton* (W. Va.), 44 S. E. Rep. 135; *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163.

b. Bills of Sale.—Contracts for the sale of personally or absolute bills of sale thereof, unless made in consideration of marriage, are not required to be recorded either in Virginia or West Virginia, and if recorded, such recordation is, of course, not notice to creditors and purchasers. W. Va. Code, § 4, ch. 74; Va. Code §§ 2463, 2464, 2465; *Braxton v. Bell*, 92 Va. 220, 23 S. E. Rep. 239.

c. Mortgages and Deeds of Trust.—Deeds of trust or mortgages upon goods and chattels are required to be recorded by the recording acts of both Virginia and West Virginia. Va. Code § 2465; W. Va. Code, § 5, ch. 74; *Kirkland v. Brune*, 31 Gratt. 123; *Gregg v. Sloan*, 76 Va. 500; *Bank v. Gettinger*, 3 W. Va. 317; *Troy Wagon Co. v. Hutton* (W. Va.), 44 S. E. Rep. 135; *Curtin v. Isaacson*, 36 W. Va. 301, 15 S. E. Rep. 171; *Hardaway v. Jones*, 100 Va. 481, 41 S. E. Rep. 957; *McCormick v. Atkinson*, 78 Va. 8; *Hundley v. Calloway*, 45 W. Va. 516, 31 S. E. Rep. 937; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. Rep. 685; *Guerrant v. Anderson*, 4 Rand. 208. It has been held in several cases, however, that the recording acts requiring deeds of trust and mortgages of goods and chattels to be recorded, only to refer to and include personal property which is visible, tangible or movable. They do not include a chose in action, such as a debt, or claim on another for money due, and the assignment of such a debt or claim for value, though not recorded, is good against creditors and purchasers. *Kirkland v. Brune*, 31 Gratt. 123; *Gregg v. Sloan*, 76 Va. 500; *Bank v. Gettinger*, 3 W. Va. 317.

Deed Intended as a Mortgage is a Mortgage.—A writing importing an absolute sale of chattels, but in fact intended only to secure a debt is a mortgage, and must be recorded as a mortgage of chattels in order to be good against creditors and purchasers without notice. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. Rep. 685. See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

d. Reservations of Title.—Before the passage of the act now embodied in § 2462 of the Virginia Code, reservations of title to personal property were not required to be recorded in order to be good against the creditors of the vendee. *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664; *McComb v. Donald*, 82 Va. 903, 5 S. E. Rep. 558. But under that section recording is necessary in order for the reservation of title to have effect as against creditors of and purchasers from the vendee. *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163; *Arbuckle Bros. v. Gates*, 95 Va. 303, 30 S. E. Rep. 496; *Hash v. Lore*, 88 Va. 716, 14 S. E. Rep. 365. The provision of § 3, ch. 74 of the Code of West Virginia is to the same effect. But it has been held that the reservation of title need not be acknowledged in order to be entitled to record under this statute. *Troy Wagon Co. v. Hutton* (W. Va.), 44 S. E. Rep. 135.

e. Assignments of Chose in Action.—Assignments of choses in action are not required to be recorded, and such recordation will not charge third persons with constructive notice. *Gordon v. Rixey*, 76 Va.

604; Kirkland v. Brune, 81 Gratt. 126; Gregg v. Sloan, 76 Va. 500; Bank v. Gettinger, 8 W. Va. 817.

3. *LIS PENDENS*.—See monographic note on "*Lis Pendens*" appended to Stoutt v. Vause, 1 Rob. 169. The common-law rule of *lis pendens*, is that a *pendente lite* purchaser from a party to the suit, of the subject matter thereof, takes it subject to any decree rendered against his vendor in that suit. Because of the harsh operation of this rule upon *bona fide* purchasers, statutes have been enacted in most of the states with a view to protect purchasers who purchase in good faith. These statutes, which have been enacted in Virginia and West Virginia, provide, in substance, that the lien of the *lis pendens* shall not bind or affect a purchaser of real estate without notice, unless a memorandum setting forth the title of the cause, the court in which it is pending, the general object of the suit, the location and quantity of the land, and the name of the person whose estate is intended to be affected, is filed with the clerk of the county court of the county in which the land is situated. Where the *lis pendens* is not docketed as provided by these statutes, it is well settled that a purchaser without notice of the pendency of the suit takes a good title. § 18, ch. 139, W. Va. Code; § 3566, Va. Code; Hurn v. Keller, 79 Va. 415; Easley v. Barksdale, 75 Va. 280; Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. Rep. 702; Harmon v. Byram, 11 W. Va. 511; Beckwith v. Thompson, 18 W. Va. 103; Cammack v. Soran, 30 Gratt. 292; DeCamp v. Carnahan, 26 W. Va. 839.

4. *JUDGMENTS*.—See monographic note on "*Judgments*" appended to Smith v. Charlton, 7 Gratt. 426.

A judgment is not a lien on real estate as against subsequent purchasers for value and without notice, unless it is docketed in the mode and within the time prescribed by the statute. Va. Code 1873, ch. 183, § 8; W. Va. Code, ch. 139, § 7; Gurnee v. Johnson, 77 Va. 713; Duncan v. Custard, 24 W. Va. 787; Renick v. Ludington, 14 W. Va. 367; Hill v. Rixey, 26 Gratt. 77; Gordon v. Rixey, 76 Va. 604. See also, Bankers' Loan, etc., Co. v. Blair, 99 Va. 606, 39 S. E. Rep. 331.

III. PLACE OF RECORDATION.

1. INSTRUMENTS RELATING TO REAL PROPERTY.

County Where Land Lies.—The recording acts provide that the deed must be admitted to record in the clerk's office of the county in which the land lies. It is held that this statute is mandatory and that the clerk has no authority to admit a deed to record which conveys land outside of his county. Pollard v. Lively, 2 Gratt. 216; Horsley v. Garth, 2 Gratt. 471.

Land Lying in Different Counties.—An instrument conveying or affecting separate and distinct tracts of land lying in different counties must be recorded in each of such counties; recording in but one of them will be constructive notice only as to the tract lying in that county. Where distinct but adjacent tracts of land lying in different counties are conveyed by one deed, the recording of the deed in only one of the counties is not effectual in regard to the land lying in the other county. Thus where a navigable stream which forms the dividing line between two counties separated the land of a proprietor so as to throw part thereof in one county and part in another, it was held that such parts must be treated as separate tracts and a transfer thereof must be recorded in both counties. Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 493.

Deed to Land near City of Richmond.—It was held that the clerk's office of the chancery court of the city of Richmond was the proper office for the

recording of deeds conveying land lying within one mile of the city of Richmond on the north side of James river, though outside of the city limits. Burgess v. Belvin, 33 Gratt. 683.

2. INSTRUMENTS RELATING TO PERSONAL PROPERTY.

The Removal of Property to Another County.—Recordation in County to Which Removal is Made.—When the subject of a chattel mortgage is removed from the county in which the mortgage is recorded to another county, the mortgage must be recorded in the latter county within three months after the removal in West Virginia (W. Va. Code, ch. 75, § 7) and within one year from the date of removal in Virginia (Code 1867, § 2468). In construing the West Virginia statute in Hundley v. Calloway, 45 W. Va. 416, 31 S. E. Rep. 937, the court held, that where a deed of trust on personal property was recorded in two counties, and the property was then moved to a third county, and the deed of trust was recorded there, it was incumbent upon a purchaser of the property to show that he purchased it in the third county more than three months prior to the recordation of the deed in that county, and that he purchased without notice of the deed of trust.

IV. TIME OF RECORDATION.

An instrument not recorded within the time prescribed by statute is void as against creditors; and for the purpose of determining whether it has been duly recorded, it will be presumed to have been delivered at its date, unless the contrary appears by the record. Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519.

It was held in Eppes v. Randolph, 2 Call 123, that a deed reacknowledged within eight months, from its date, and recorded within four months from the reacknowledgment, was good from the date of the reacknowledgment, although where more than eight months elapsed after the deed was first executed before it was recorded.

V. PREREQUISITES TO RECORDATION.

1. **SIGNING, SEALING AND DELIVERY.**—Of course the instrument is not notice to third persons unless it be sufficiently executed by signing, sealing and delivery, where these are essential to its validity. No attempt will be here made however, to classify the cases wherein instruments have been held sufficient or insufficient as notice for lack of these essentials. For cases on this point reference is made to the monographic notes treating of the particular instruments whose validity was questioned on this ground. See monographic note on "*Deeds of Trust*" appended to Cadwallader v. Mason, Wythe 188; "*Mortgages*" appended to Forkner v. Stuart, 6 Gratt. 197; "*Deeds*" appended to Flott v. Com., 12 Gratt. 564; "*Assignments for the Benefit of Creditors*" appended to French v. Townes, 10 Gratt. 513.

2. **DESCRIPTION OF PROPERTY CONVEYED OR AFFECTED.**—As to description necessary in particular instruments, see monographic notes on "*Deeds of Trust*" appended to Cadwallader v. Mason, Wythe 188; "*Mortgages*" appended to Forkner v. Stuart, 6 Gratt. 197; "*Deeds*" appended to Flott v. Com., 12 Gratt. 564; "*Assignments for Benefit of Creditors*" appended to French v. Townes, 10 Gratt. 513.

Must Put Third Persons on Enquiry.—In order for the recordation of an instrument to amount to constructive notice to creditors, and purchasers, the description of the property conveyed must be such as to enable them, aided by the inquiries, which the instrument suggests, to identify the property. The recorded instrument is sufficient

to operate as constructive notice under the registry laws if the property be so described or identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that, if he should examine the instrument itself, he would obtain thereby actual notice of all rights which were intended to be created or conferred by it. *Florance v. Morien*, 98 Va. 36, 34 S. E. Rep. 890.

Where Enquiry Reveals Nothing.—If a purchaser has knowledge of any fact or circumstance sufficient to put him upon enquiry as to the existence of some right or title in conflict with that which he is about to purchase, and makes the enquiry suggested by such circumstances, and anything detrimental to the right he is about to acquire, is concealed or withheld from him, he cannot be affected by an undisclosed encumbrance or latent equity. *Kelly v. Land Co.*, 97 Va. 227, 33 S. E. Rep. 598.

Examples.—A deed of trust on "four mules," which does not give their color, sex, size, age, from whom purchased, nor state where or in whose possession they are, nor mention the residence of the grantor, the trustee, or the beneficiary therein, does not give constructive notice under § 2468 of the Code to innocent third persons. "In no case that we have seen has the recordation of a deed of trust been held to be constructive notice which contained no description of the animals conveyed except their number, which did not state in whose possession the property was or where it was located or might be found, or where any party to the deed resided." *Hardaway v. Jones*, 100 Va. 481, 41 S. E. Rep. 957.

The registry of a deed purporting to convey "all the estate, both real and personal," to which the grantor is entitled at the time of the conveyance is not notice to a subsequent purchaser of the existence of the deed; nor would notice in point of fact of the existence and contents of such deed affect a purchaser, unless he had further notice that the property purchased by him was embraced by the provision of the deed. *Mundy v. Vawter*, 8 Gratt. 518; *Warren v. Syme*, 7 W. Va. 474.

A deed conveying "all the right, title and interest of R. V. M. and wife, in and to the real estate lying in the county of Henrico, of which R. M. died seised and possessed," and duly recorded, contains a sufficient description of the property to put subsequent purchasers on notice, under the registry laws. *Florance v. Morien*, 98 Va. 36, 34 S. E. Rep. 890.

It has been held that the grantee in a quitclaim deed, with covenant of special warranty, which purports to convey "such interest only as they (the grantors) now have, whatever that may be" takes in subordination to a prior unrecorded deed, and such quitclaim deed cannot be introduced in evidence to defeat the title deduced under such prior unrecorded deed. *Va. & Tenn. Coal & Iron Co. v. Fields*, 94 Va. 102, 26 S. E. Rep. 426.

In *Banker's Loan, etc., Co. v. Blair*, 99 Va. 606, 39 S. E. Rep. 231, it was held that the docketing and indexing of a judgment in the name of "Mrs. John Smith," was no notice of a judgment against Mary Smith, who was in fact the wife of John Smith.

8. ACKNOWLEDGMENT OR PROOF OF EXECUTION.—See monographic note on "Acknowledgments" appended to *Tallaferrero v. Pryor*, 12 Gratt. 277.

Under the statutes, a valid acknowledgment or proof of execution is a prerequisite to the registration of an instrument, and the recording of an unacknowledged or defectively acknowledged instrument has no effect whatever. *Moore v. Auditor*, 3 Hen. & M. 332; *Raines v. Walker*, 77 Va. 92; *Nichol-*

son v. Gloucester Charity School, 98 Va. 101, 24 S. E. Rep. 899; *Iron Belt Bldg., etc., Assoc. v. Groves*, 96 Va. 138, 31 S. E. Rep. 23; *Fleming v. Ervin*, 6 W. Va. 215; *Tavener v. Barrett*, 21 W. Va. 656; *Parkersburg Nat. Bk. v. Neal*, 28 W. Va. 744; *Abney v. Ohio Lumber, etc., Co.*, 46 W. Va. 446, 33 S. E. Rep. 256; *Cox v. Wayt*, 36 W. Va. 807; *Carper v. McDowell*, 5 Gratt. 333; *Davis v. Beazley*, 76 Va. 491; *Robinson v. Pitzer*, 3 W. Va. 335.

It has been held that it is not necessary that a contract reserving to the seller of chattels, title until payment shall be acknowledged, to be recorded under § 3, ch. 74 of the Code of 1899. *Troy Wagon Co. v. Hutton (W. Va.)*, 44 S. E. Rep. 135.

4. PREPAYMENT OF TAX.—The Virginia statute providing that no deed shall be admitted to record until the tax thereon is paid is directory merely; the clerk may refuse to admit the deed to record until the tax is paid, but if he chooses to admit it without prepayment he assumes the tax and the admission to record is valid. *Lucas v. Claffin*, 76 Va. 269.

But a clerk is not bound to admit to record a deed which is not stamped as is required by law. *Hill v. Rixey*, 26 Gratt. 80.

VI. MAKING THE RECORD.

Instrument Must Be Kept for Recordation during Office Hours.—In order that an instrument may be filed for record it must be carried to the recording clerk's office and left with the clerk for the purpose of having it recorded. Going to the clerk's office just before midnight, and he not being there, taking it to his house just before sunrise the next morning and personally delivering it to him, stating the other attempt, does not make it good as a recorded deed from such previous day but only from the time of its actual delivery to the clerk. *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 398.

Admission of Deed to Record Has Same Effect as Recordation.—The admission of a deed to record has the same effect as if the deed were actually spread on the deed book, and a clerk who has once duly admitted a deed to record has no more power to recall his act than he would have to strike from the deed book a deed duly engrossed thereon. *Mercantile Co-Operative Bank v. Brown*, 96 Va. 614, 33 S. E. Rep. 64.

Leaving Instrument with Clerk Sufficient.—When a contract selling chattels, and reserving title until payment is left with the clerk of the county court to be recorded, it is deemed that its record is complete, and the fact that it is recorded in the "miscellaneous record book" will not invalidate its recordation. *Troy Wagon Co. v. Hutton (W. Va.)*, 44 S. E. Rep. 135.

By Clerk Who is an Interested Party.—The clerk acts to a certain extent judicially in taking and certifying acknowledgments of deeds and other writings in his office and admitting them to record, and therefore in accordance with the maxim that no man can be a judge in his own cause, the clerk is not allowed to perform any of those acts where his private interest might conflict with his duty to third parties and the public. *Davis v. Sims*, 1 Va. Dec. 390.

But a clerk who counseled a grantor in preparing an assignment, and who is trustee therein, may validly admit it to record, such act being merely ministerial. *Paul v. Baugh*, 86 Va. 955, 9 S. E. Rep. 329.

Recordation by Clerk after Ordinance of Secession.—The recordation of a deed by a clerk of a county court, who continued to exercise his office after the state had passed the ordinance of secession, but while the country was under the military power of the confederates, was a valid recordation, and will be so recognized in all judicial proceedings. *Henning v. Fisher*, 6 W. Va. 228.

Deed Need Not Be Indexed.—The recordation of a

deed, though not indexed is notice to subsequent purchasers; for while the index is the key to the deed books, it is not essential to registry. *Va. Bldg. etc., Co. v. Glenn*, 99 Va. 480, 39 S. E. Rep. 136; *Old Dom. Gran. Co. v. Clarke*, 28 Gratt. 617.

Judgments Must Be Indexed.—Before the passage of § 3561, Va. Code, it had been held, in *Old Dominion Granite Co. v. Clarke*, 28 Gratt. 617, that the indexing was no part of the docketing of the judgment. It is now expressly provided by § 3561 that no judgment shall be regarded as docketed as to any defendant in whose name it is not so indexed. *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. Rep. 863; *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163.

An allegation in a bill that a judgment sought to be enforced was duly docketed is a sufficient allegation of the indexing of the judgment as required by § 3561 of the Code, but if the fact of indexing be put in issue it must be proved, and it would seem that this is not sufficiently done by the mere production of an abstract of the judgment which does not certify that it was duly docketed, and makes no reference to the indexing. *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. Rep. 863.

Mandamus Lies to Compel Clerk to Admit Instrument to Record.—Mandamus is the proper remedy to compel the clerk to admit to record an instrument entitled to record. *Delaney v. Goddin*, 13 Gratt. 266; *Randolph Justices v. Stalnaker*, 13 Gratt. 523; *Manns v. Glvens*, 7 Leigh 689; *Dawson v. Thruston*, 2 Hen. & M. 132; *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163.

Statutes Curing Defective Recordation.—A statute which undertakes to give a retrospective effect to an invalid recordation, and thus divert or interfere with the rights of creditors and purchasers, is, to say the least, of doubtful policy; and although the words of a statute are broad enough in their literal extent to comprehend existing cases, they may be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein. *Campbell v. Nonpareil F. B. & K. Co.*, 75 Va. 291.

VII. FAILURE TO RECORD AS AFFECTING VALIDITY OF INSTRUMENT.

1. **IN GENERAL.**—The object of the recording acts being to protect certain specified classes of persons against fraud, failure to record will not, in the absence of an express provision to that effect, render the instrument void and inoperative to convey the legal title; the unrecorded instrument is valid against every one except the classes included within the terms of the statute. *Guggenheimer v. Lockridge*, 89 W. Va. 457, 19 S. E. Rep. 874. Of course it is competent for the legislature to provide that the recording of an instrument shall be part of its execution, and where there is a statute so providing, the title does not pass until the instrument is recorded. In Virginia there is a statute which provides that recordation is necessary to the validity of a conveyance by a married woman, consequently the deed of a married woman conveys no estate until it is duly admitted to record. *Rorer v. Roanoke National Bank*, 83 Va. 589, 4 S. E. Rep. 820; *Bldg., etc., Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58.

Unavoidable Circumstances No Excuse.—As to those classes of persons embraced within the terms of the recording acts, a prior unrecorded conveyance is void, and this legal consequence of a failure to record will not be affected by the fact that such failure was due to unavoidable circumstances beyond the grantee's control. *Eppes v. Randolph*, 2 Call 125; *Harvey v. Alexander*, 1 Rand. 219; *Withers v. Carter*, 4 Gratt. 407.

2. **AS AGAINST GRANTOR AND HIS REPRESENTATIVES.**—Of course the instrument is good against the grantor, his heirs and personal representatives without recordation. Recordation is only necessary as against creditors and purchasers. *Wade v. Greenwood*, 2 Rob. 474; *Guerrant v. Anderson*, 4 Rand. 208; *Raines v. Walker*, 77 Va. 93; *Thomas v. Stuart*, 91 Va. 604, 23 S. E. Rep. 511. See *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58; *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78; *Guggenheimer v. Lockridge*, 89 W. Va. 457, 19 S. E. Rep. 874; *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. Rep. 695.

3. AS AGAINST PURCHASERS AND CREDITORS.

a. **Purchasers.**—The Virginia and West Virginia registry laws declare that a failure to record the instrument avoids it as to purchasers and creditors. In construing these acts it has been held that a purchaser is one who takes the estate for a valuable consideration, but it need not be money, paid at the time; it is well settled that a pre-existing debt is a sufficient consideration to protect a purchaser. *Evans v. Greenhow*, 15 Gratt. 153, and *foot-note*; *Exchange Bank v. Knox*, 19 Gratt. 739, and *foot-note*; *Cammack v. Soran*, 30 Gratt. 292; *Chapman v. Chapman*, 91 Va. 400, 31 S. E. Rep. 818; *Wickham v. Lewis*, 13 Gratt. 427; *Williams v. Lord*, 75 Va. 404; *Witz v. Osburn*, 83 Va. 230, 2 S. E. Rep. 33; *Davis v. Miller*, 14 Gratt. 16.

Grantee in Quitclaim Deed.—It is a general rule that one claiming under a quitclaim deed is not a purchaser for value, within the meaning of the recording acts, and that he takes subject to a prior deed though it be unrecorded. *Va., etc., Coal, etc., Co. v. Fields*, 94 Va. 102, 26 S. E. Rep. 426.

Subsequent Mortgagees.—Subsequent mortgagees of an estate are purchasers within the meaning of the recording acts. *Weinberg v. Rempe*, 15 W. Va. 339.

Trustee in Deed of Trust.—It is well settled that a trustee in a deed of trust to secure debts is a purchaser for value within the meaning of the recording acts; but whether or not he is a purchaser without notice depends on the circumstances of the case. See *monographic note* on "Deeds of Trust" appended to *Cadwalader v. Mason*, Wythe 188.

One Put on Inquiry.—One is considered a purchaser with notice of another's equity, whenever he has such notice of such facts as would put him on inquiry; for the law imputes to a person knowledge of facts, of which the exercise of common prudence and ordinary diligence must have apprised him. *Cain v. Cox*, 23 W. Va. 594.

Purchasers of Different Tracts from Same Vendor.—The provision of § 5, ch. 114 of the Code of 1873, that every deed, etc., "shall be void as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record," etc., does not apply to purchasers of different tracts of land from the same vendor but refers only to "subsequent purchasers" of the same subject, as that embraced in the instrument declared to be void. *Harman v. Oberdorfer*, 33 Gratt. 497.

b. **Creditors.**—An unrecorded deed is void as to all creditors who, but for the deed, would have had a right to subject the property conveyed to their debts, whether such debts were contracted before or after such deed. The word "subsequent" in § 2465 of the Code applies to purchasers only. *Price v. Wall*, 97 Va. 334, 33 S. E. Rep. 599.

The recording acts only protect creditors who have affected a lien on the conveying debtor's property by attachment, judgment or otherwise, before the recordation of the prior conveyance. *Houston v. McCluney*, 8 W. Va. 153; *McCandlish v. Keen*, 13 Gratt. 615; *Dulaney v. Willis*, 95 Va. 606, 39 S. E. Rep. 334.

4. AS AGAINST THIRD PERSONS WITH NOTICE.—Purchasers who take with notice of a prior unrecorded conveyance, will not be entitled to the protection of the recording acts. The purpose of such act is to prevent fraud upon persons subsequently contemplating the acquisition of an interest in the property conveyed or affected by placing the means of obtaining information of prior alienations within their reach. And if a prospective purchaser has actual notice of a prior conveyance of the property, the necessity for recording is, as to him, removed, for it cannot be said that a prior conveyance of which he has knowledge can be employed in fraud of him. *Doswell v. Buchanan*, 3 Leigh 385; *McClure v. Thistle*, 2 Gratt. 182; *Mundy v. Vawter*, 3 Gratt. 518; *Long v. Weller*, 29 Gratt. 347; *Wood v. Krebbs*, 30 Gratt. 708; *Vest v. Michie*, 31 Gratt. 149; *Newman v. Chapman*, 3 Rand. 98; *Smith v. Proffitt*, 23 Va. 338; *National, etc., Assoc. v. Blair*, 98 Va. 496, 36 S. E. Rep. 513; *Mercantile Bk. v. Brown*, 96 Va. 614, 32 S. E. Rep. 64; *Cosgray v. Core*, 2 W. Va. 353; *Cox v. Cox*, 5 W. Va. 335; *Cain v. Cox*, 23 W. Va. 594.

A *bona fide* purchaser from a purchaser with notice is protected by the recording acts, as is also a purchaser with notice from a *bona fide* purchaser. *Lacy v. Wilson*, 4 Munf. 313; *Claiborne v. Holland*, 88 Va. 1046, 14 S. E. Rep. 915.

In Virginia conveyances of land are void as creditors notwithstanding that they have actual notice of a prior unrecorded deed. *Guerrant v. Anderson*, 4 Rand. 208; *Price v. Wall*, 97 Va. 334, 33 S. E. Rep. 599; *Heermans v. Montague*, 2 Va. Dec. 6.

VIII. EFFECT OF RECORDATION AS NOTICE.

1. INSTRUMENTS NOT ENTITLED TO RECORD.—Constructive notice from the record being dependent upon purely statutory provisions, it naturally follows that such effect will not be given to any and every recorded instrument, but only to such as fall within the statute. Therefore, if an instrument be not of a kind authorized by law to be recorded, or if though within the contemplation of the statute, it be not entitled to record because of its defective execution or a failure to comply with some of the prerequisites to recordation, the record thereof will be a mere nullity and will not operate to give constructive notice. *Lee v. Tapscott*, 2 Wash. 276; *Trout v. Warwick*, 77 Va. 781; *Braxton v. Bell*, 92 Va. 229, 23 S. E. Rep. 289. See monographic note on "Acknowledgments" appended to *Tallaferro v. Pryor*, 12 Gratt. 277.

2. INSTRUMENTS ENTITLED TO RECORD.

a. *Notice to Whom*.—The record imparts constructive notice to such persons only as would have been entitled to protection against the conveyance in case it had not been recorded, or, in other words, to such persons as are under a legal obligation to search for it. *Lynchburg, etc., B. & L. Co. v. Fellers*, 96 Va. 337, 31 S. E. Rep. 505.

The operation of the record as notice is prospective and not retrospective. It is only a subsequent conveyance which defeats a prior unrecorded conveyance, and therefore only persons who acquired their rights subsequently to the registration can be said to be charged with notice of a recorded conveyance. *Lynchburg, etc., B. & L. Ass'n v. Fellers*, 96 Va. 337, 31 S. E. Rep. 505; *Bridgewater Roller Mills Co. v. Strough*, 98 Va. 721, 37 S. E. Rep. 290.

It seems that a prior mortgagee is not affected with constructive notice from the record of a subsequent deed or mortgage of the same land; to charge him he must be given actual notice. *Bridgewater Roller Mills Co. v. Strough*, 98 Va. 721, 37 S. E. Rep. 290.

A record gives constructive notice only to per-

sons in the same line of title, or, in other words, only to persons who must trace their title through the same grantor. *Claiborne v. Holland*, 88 Va. 1046, 14 S. E. Rep. 915. Thus, where a conveyance of land is not recorded and the grantee therein subsequently conveys to a third person, the record of the latter conveyance is not constructive notice to a subsequent purchaser from the grantor in the prior unrecorded conveyance, since such purchaser does not trace title through such record. *Jones v. Byrne*, 94 Va. 751, 27 S. E. Rep. 591; *Hulvey v. Hulvey*, 92 Va. 183, 23 S. E. Rep. 233.

b. *Notice of What*.—The record of an instrument entitled to registration imparts to such persons as are bound thereby constructive notice of all facts which they could have ascertained by an actual examination of the record, not only of those recited in the record but also of those as to which it reasonably suggests an inquiry and which would be disclosed by such inquiry. A subsequent purchaser is entitled to rely upon the record, and cannot be charged with constructive notice of latent equities of facts not disclosed or suggested by the record itself. *Davison v. Waite*, 2 Munf. 527; *Colquhoun v. Atkinsons*, 6 Munf. 550; *Bell v. Hammond*, 2 Leigh 416; *Mundy v. Vawter*, 3 Gratt. 518; *Houston v. McCluney*, 8 W. Va. 150; *McClanahan v. Siter*, 2 Gratt. 280.

Where the property conveyed is not described sufficiently to identify it with reasonable certainty, and there is nothing to put the searcher on inquiry, the record will not give constructive notice of the conveyance. *Hardaway v. Jones*, 100 Va. 481, 41 S. E. Rep. 967. But the record, although defective as regards the description of the property, will nevertheless operate as notice if sufficient to put a reasonable man on inquiry as to what property was actually intended to be conveyed by it. *Florance v. Morien*, 98 Va. 26, 34 S. E. Rep. 890.

IX. DESTRUCTION OF RECORD.

A grantee in an instrument evidencing a conveyance to him, who has complied with the requirement of the law in effecting the record of the instrument, cannot lose the effect given to such recordation by a subsequent destruction of the record, as by fire or other cause; and in such case, it seems that he is not obliged to record the instrument a second time, or do any other act to notify purchasers, in order to protect his rights acquired thereunder. *Armentrout v. Gibbons*, 30 Gratt. 683.

437 *Epes's Adm'r v. Dudley, Adm'r &c.

August, 1837.

Administrators*—Suits against—Misjoinder of Counts.†

—A declaration against an administrator, containing counts charging him in his representative character, combined with other counts charging him in his individual character, is bad on general demurrer.

Same—Same—Counts—Sufficiency.‡—But, where all the counts are laid against the defendant as ad-

***Administrators**.—See generally, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

†**Same—Suits against—Misjoinder of Counts**.—It is well settled that promises which charge a man as executor cannot be joined with those which charge him personally; because the judgment in the one case would be *de bonis propriis*, and in the other *de bonis testatoris*. *Fitzhugh v. Fitzhugh*, 11 Gratt. 302, 307, citing the principal case as authority.

‡**Same—Same—Joinder of Counts**.—In *Braxton v. Harrison*, 11 Gratt. 55, it is said, "An executor or administrator, may be sued as such, on promises to pay a debt of the estate. A count, on an account stated by a defendant as executor respecting moneys due from the testator, or from the defendant as executor, may be supported, and joined with counts on promises by the testator. Chitty on

ministrator, they will be considered as applying to him in his representative character and therefore good; although the declaration, in some of the counts, omits to state that the claim was for money due from the intestate of the defendant.

Appeal from the Superior Court of Prince George county.

Joseph Dudley, administrator of his late wife, Eliza, suing for the benefit of John R. Walke, brought an action of trespass on the case, against Benjamin Cocke, administrator of Archibald Epes, deceased. The declaration contained five counts. 1. General indebitatus assumpsit, for wheat sold by the plaintiff's intestate, while sole, to the defendant's intestate. 2. For money laid out, paid and expended by the plaintiff's intestate, while sole, to the defendant's intestate, and for money had and received. 3. A quantum valebat for the same parcel of wheat, sold and delivered by the plaintiff's intestate, while sole, to the defendant's intestate. 4. This count states, that the defendant's intestate being indebted to the plaintiff's intestate, while sole, for wheat sold, money had and received, and money lent and advanced, died so indebted, and in consideration thereof, the defendant as administrator, assumed to pay, &c. to the plaintiff's intestate, while sole. The fourth count states, that the defendant's intestate, being indebted to the plaintiff's intestate, while sole, for wheat sold, money had and received, and money lent, &c., died so indebted; and in consideration thereof, the defendant, as administrator, assumed to pay the same to the plaintiff's intestate while sole. The last count is an insimul computassent between the plaintiff as administrator aforesaid, and the defendant as administrator of A. Epes, of and concerning divers sums, by the defendant as administrator as aforesaid to the plaintiff as administrator
438 *as aforesaid, due and unpaid, upon which account stated, it was found, &c.

The defendant filed three pleas and a general demurrer.

At the trial, the defendant demurred to the evidence.

The Court gave judgment for the plaintiff, and the defendant appealed.

Leigh, for the appellant.

Spooner, for the appellee.

August 21. JUDGE CARR.

On the merits, there is no question about this case. The whole estate, both real and personal, being devised to the widow for life, and the crop being made on her land with her slaves, the year after the testator's death, is, without doubt, of right hers, and may be properly recovered by her husband, as her administrator. The evidence stated and demurred to, is abundant to make out the case of the plaintiff. The only doubt in the case is, on the demurrer to the declaration.

It is objected, that there is a misjoinder

of counts; the two last being incompatible with the three first, because the three first charge the defendant as administrator of A. Epes, upon promises of the intestate; and the two last charge him upon his own promises; so that upon the first three, the proper judgment would be *de bonis testatoris*, and on the last two, *de bonis propriis*. If this be true, if the counts be so framed, that the proper judgment on the first set, would be against the goods of the intestate, and on the second, against the proper goods of the administrator, it must be acknowledged that the declaration is bad on general demurrer.

The first count is a general indebitatus assumpsit for \$784 for wheat sold by the plaintiff's intestate, while sole, to the defendant's intestate. The second count
439 is for the "same sum as money laid out, paid and expended, by the plaintiff's intestate, while sole, to the defendant's intestate, and for money had and received. The third count was a quantum valebat for the same parcel of wheat mentioned in the first count, sold and delivered by the plaintiff's intestate, while sole, to the defendant's intestate. The fourth count states, that the defendant's intestate, being indebted to the plaintiff's intestate, while sole, for wheat sold, money had and received, and money lent and advanced, died so indebted, and in consideration thereof, the defendant, as administrator, assumed to pay the same to the plaintiff's intestate; while sole. The last count is an insimul computassent, between the plaintiff as administrator aforesaid, and the defendant as administrator of A. Epes, of and concerning divers sums, by the defendant as administrator as aforesaid, to the plaintiff as administrator as aforesaid, due and unpaid; upon which account stated, it was found that the defendant, as administrator as aforesaid, was indebted to the plaintiff, as administrator as aforesaid, the sum of \$784; in consideration thereof, &c.

Now, these counts seem to me all consistent, all seeking the same sum of the defendant, in the same character of administrator, and not at all in his own character. Nor can I see how a judgment in this case, and on this declaration, could be given against him *de bonis propriis*. This is very different from the case in *Hobart, 88*, of *Harrenden v. Palmer*, where the widow was sued as administratrix of her husband, and the declaration charged, that the intestate had bought of the plaintiff gold and silver and pearl, to the amount of 200l., and that after his death, the defendant had bought of him pearl to the amount of 27l., and that upon account, she was found indebted both these sums, and promised to pay. Judgment for the plaintiff, and reversed on error, because the defendant was charged in two manners; one, in her own right, and the other, as administratrix. But here, the whole charge

440 against the defendant is as administrator; and the last two counts "charging a promise of the administrator, and an accounting with him, are frequently thrown in to avoid the statute of limitations; 2 Saund. 117, c., and does not change

Contr. 275; 1 Chitty's Plead. 206; *Secar v. Atkinson*, 1 H. Bl. 102; 2 Saund. 117, note 2; *Whitaker v. Whitaker*, 6 John. R. 112; *Carter v. Phelps' adm'r*, 8 Id. 343. This doctrine has been fully recognized in *Virginia*, *Epes v. Dudley*, 5 Rand. 437; *Bishop v. Harrison*, 2 Leigh 582.
To the same effect, the principal case is cited in *Bishop v. Harrison*, 2 Leigh 583. See principal case also cited in *Kayser v. Disher*, 9 Leigh 359.

the character in which the defendant is charged, nor authorise a different judgment. It might have been better, (because more clear and explicit,) to have added in the last count, that they accounted together concerning money due from the intestate of the defendant to the intestate of the plaintiff; but, I cannot think the omission renders the declaration bad.

The judgment ought to be affirmed.

JUDGE GREEN.

William Epes, who died in March or April, 1818, by his will, lent to his wife Eliza, his whole estate, real and personal, during her life. Archibald Epes, the executor of William, managed the estate, which was kept together, and in 1819, received the proceeds of the crop of wheat made that year, and passed it to the credit of his testator's estate. He died, and Benjamin Cocke administered on his estate. Joseph Dudley intermarried with the widow of William Epes; and she dying, J. Dudley administered on her estate, and brought this suit in that character, against Cocke as administrator of Epes, for the purpose of recovering the money which Epes had received for the crop of wheat of 1819.

There are several counts upon the assumpsits of Epes to the intestate of the plaintiff, while sole, and a count upon the assumpsit of Epes's administrator, to the intestate of the plaintiff while sole, to pay the debt of his intestate. The terms of the declaration in this count, are after stating the debt to be due from Epes to the intestate of the plaintiff, "The said defendant, as administrator as aforesaid, in consideration thereof, undertook, &c." There is also a count upon an account stated between the plaintiff as administrator, and the defendant as administrator, concerning divers "sums of money due by the defendant as administrator, to the plaintiff as administrator, upon which the defendant, as administrator, was found indebted to the plaintiff as administrator; in consideration whereof, the defendant, as administrator, promised to pay whenever he, as administrator as aforesaid, should be thereto required."

To this declaration, the defendant demurred generally; and pleaded, first, that his intestate did not assume as alleged. Secondly, that no assets came to his hands. Thirdly, that he had fully administered. To these pleas, there were replications, and issues were joined. The demurrer was overruled; and upon the trial of the issues, the defendant demurred to the evidence, which consisted of an account rendered by the defendant to the plaintiff, in these words:

"Dr. Joseph Dudley in account with Archibald Epes, executor of William Epes."

"1819. By amount of crop of wheat grown on the Bermuda Hundred plantation this year, \$784 44. This amount appears to have been placed to the credit of Mr. William Epes's estate by Mr. Archibald Epes; but, it is the wish of the parties, that it should be subject to the order of the Court of Chesterfield.

"B. Cocke, jr. adm'r of Archibald Epes, deceased." And proof was adduced that this crop of wheat was made in 1819, by the hands belonging to the estate of William Epes, and that assets of Archibald Epes came to the hands of the defendant, to the amount of \$24,000 or \$25,000. The Court gave judgment for the plaintiff.

There is no doubt upon the merits of the case. The proof is full, that Epes sold wheat to the amount of the plaintiff's demand, which was raised on the plantation, and by the labour of the slaves, and use of the team and tools, devised to Mrs. Epes for her life; the testator dying in the spring of 1818, and the wheat being of the crop of 1819. The whole estate was kept together under the management of the executor, and the profits belonged to the devisee; whilst the executor held the 442 personal property, "with a power to sell so much of it as might be necessary to pay debts, which ought to have been paid out of the capital of the estate, and not out of the profits, which belonged to the widow. The executor did not hold the land adversely to the widow; as is virtually admitted by the account and memorandum attached to it, rendered by the defendant to the plaintiff.

The only question is, whether the declaration was good, in joining counts upon the assumpsit of the defendant's intestate, to the plaintiff's intestate, with a count upon the defendant's assumpsit as administrator, to the plaintiff as administrator.

The cases referred to in 1 Chitt. on Pleading, 202, 204 and 213; Brassington v. Ault, 2 Bing. 177, and Catherwood v. Chaband, 1 B. & C. 150, leave no doubt that these counts were properly joined, if the last count is to be understood as in effect averring that the accounting between the plaintiff and defendant, was in respect to money due from the intestate of the defendant to the intestate of the plaintiff. I think this is the effect of the count; although it is contended, that under this count evidence would be admissible to prove, that the defendant, as administrator, had himself received money belonging to the plaintiff's intestate, in which case, he would be liable personally, and therefore, this count, upon which the judgment should be *de bonis propriis*, could not be joined with the others, upon which the judgment is *de bonis testatoris*. I do not think that such evidence could be given under this count. If the intestate of the defendant had held a bond payable to himself, but in trust for the intestate of the plaintiff, and the defendant had sued for and recovered the money in his character of administrator of the trustee, he would have been debtor for the money, not as administrator, but individually; and it could not have been given in evidence upon a count, charging that he had accounted as administrator, concerning money due from him as administrator. A careful pleader would have stated the accounting to have been, concerning 443 money due from the "intestate of the defendant to the intestate of the plaintiff, explicitly, and not left that to be

ascertained by construction; and would probably thereby have avoided the delay of this appeal.

The judgment should be affirmed.

JUDGE CABELL.

This is an action of assumpsit by Joseph Dudley, administrator of his deceased wife Eliza, against Benjamin Cocke, administrator of Archibald Epes deceased. The declaration contains five counts; three of which are on promises made by the intestate of the defendant to the intestate of the plaintiff, while she was sole. The fourth count is on a promise made by the defendant as administrator of Archibald Epes, to the plaintiff as administrator as aforesaid, in consideration of a debt due from his intestate to the intestate of the plaintiff, to pay the same to the plaintiff. The fifth is, upon an account stated between the plaintiff as administrator as aforesaid, and the defendant as administrator as aforesaid, of and concerning divers sums of money due by the defendant as administrator, &c. to the plaintiff as administrator, &c. upon which the defendant as administrator, was found indebted to the plaintiff as administrator; in consideration whereof, the defendant as administrator, promised the plaintiff as administrator, to pay him the same when thereto required.

To this declaration there was a general demurrer. The defendant also filed three pleas. 1. Non assumpsit by his intestate; 2. No assets; and 3. Fully administered. Issues were joined on the demurrer and on the pleas. The demurrer to the declaration was overruled; and on the trial of the issues of fact, there was a demurrer to the evidence. The jury found a verdict for the plaintiff, subject to the opinion of the Court on the demurrer to the evidence.

The first question is on the demurrer to the declaration, and the only objection which it presents, is, as to the propriety *of joining the several counts found in the declaration.

The objection has a two-fold aspect.

1. As regards the person to whom the promises were made.

2. As regards the person by whom they were made.

As to the first. It is certainly true, that a plaintiff cannot join in the same action, a demand as executor or administrator, with a demand in his own right. 1 Term Rep. 480; 3 Term Rep. 659; 2 Saund. 117, d. But it is equally clear, that promises made to a plaintiff, as executor or administrator, may be joined with counts on promises made to the testator or intestate; on the principle, that in all such cases the damages and costs will be assets. *Cowell & Wife adm'x v. Watts*, 6 East's Rep. 405; 1 Chitt. Pl. 202-3-4-5. The declaration in this case, therefore, is free from objection, so far as relates to the person to whom the promises were made.

Secondly, as to the person by whom the promises were made. It is clear, that a promise which charges a man as executor or administrator, cannot be joined with

one which charges him personally; because the judgment, in the one case, would be de bonis propriis, and in the other, de bonis testatoris. 2 Saund. 117, d. note; *Herrenden v. Palmer*, Hob. 88; *Hall v. Huffam*, 2 Lev. 228; 2 Vin. Abr. 45, pl. 52, 47, pl. 5; Chitt. Pl. 205. But a promise by a defendant, as executor or administrator, in consideration of a debt due from the testator or intestate, may be joined with a promise by the testator or intestate. 2 Saund. 117, a. note; *Secar v. Atkinson*; 1 Hen. Black. 102. The four first counts in this declaration (the three first being on promises by the intestate of the defendant, and the fourth being on a promise by the defendant as administrator, to pay a debt of his intestate,) might, therefore, be well joined; and it is equally clear, that the fifth count might be joined with the other four, provided it had been expressly stated, that the accounting set forth between the plaintiff as administrator, and the defendant as administrator, had been also stated to have been of and concerning

445 monies, owing from the intestate of the defendant. *Secar v. Atkinson*, 1 Hen. Black. 102. Now, although it would have been more formal, and less liable to cavil, and therefore more prudent, to have stated expressly, not only that the accounting was between the plaintiff as administrator and the defendant as administrator, but also that it was of and concerning monies due from the intestate of the defendant, yet I do not consider the last allegation as indispensably requisite; for, when the accounting is stated to have been between the plaintiff as administrator, and the defendant as administrator, it will be taken (unless the contrary expressly appear, as it did in the case in *Hobart*, p. 88,) to be of and concerning monies due from the intestate of the defendant.

There is, therefore, nothing in the objection as to the misjoining of the counts in the declaration; and, of course, the demurrer to the declaration was properly overruled.

The demurrer to the evidence presents still less difficulty. It shews that William Epes died in the year 1818, after having made his will, by which he devised to his wife for life, (the intestate of the plaintiff) his whole estate, both real and personal, and appointed Archibald Epes (the intestate of the defendant) his executor. Archibald Epes kept the estate together; and in the year 1819, made thereon the crop of wheat, the proceeds of which are the only subject in controversy in this suit. These proceeds were not necessary for the payment of the debts of William Epes. They were, however, received by Archibald Epes, and were applied by him to the credit of the estate of William Epes. But, they were unquestionably the property of Mrs. Epes, the intestate of the plaintiff; since the wheat was made on her land, and by her slaves; and they were recoverable by her administrator, in this form of action, since the possession of Archibald Epes was not adverse to her.

The judgment must be affirmed.*

*The PRESIDENT and JUDGE COALTER absent.

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*Atkinson v. Ball.

August, 1827.

Appellate Practice—Road—Approval of Judgment Below—On an application to turn a road, where the witnesses on each side are nearly equal in number and credibility, the concurrent judgments of the County and Superior Courts ought to be approved by the Court of Appeals. By two Judges.

This was an appeal from the Superior Court of Hanover county.

An application was made by Harrison Ball, to the County Court of Hanover, for leave to turn a road. The usual steps were taken by the Court; and a report was made by the viewers in favor of the application. The motion was opposed by James Atkinson, and evidence introduced on both sides; and the County Court granted leave to turn the road. Atkinson appealed to the Superior Court.

At the trial in the Superior Court, the appellant moved the Court to reverse the judgment of the County Court, and to quash the report of the viewers, because the new road was to run across the lands of the heirs of Edmund Hooper deceased, without any previous summons having been served upon any of the tenants or proprietors of the said land, or their having been made in any manner parties to the controversy. But, the Court sustained the report in this respect, because the new road, as established by the order of the County Court, did not interfere with the said lands. Atkinson excepted.

Atkinson also moved the Superior Court to reverse the judgment of the County Court, and quash the report, because the order of the County Court appointing the viewers, did not designate any points or places within the said county of Hanover, at which the proposed alteration of the road should commence and terminate, but left the applicant in the County Court and the viewers at liberty to alter the said road for any length of distance, from its beginning to the city of Richmond, in the county of

Henrico. But the Court were of opinion, that the distance for *which it was proposed to alter the said road, was a matter in pais, and to be determined by the viewers, and that the points of commencement and termination need not be further designated than they have been designated by the order of the County Court, and therefore rejected the said motion. The appellant, Atkinson, excepted.

The Superior Court affirmed the judgment of the County Court, and Atkinson appealed.

Daniel, for the appellant.

No Counsel, for the appellee.

August 21. JUDGE CARR.

Ball applied to the County Court of Hanover for leave to alter a road. The road to be altered is designated in the motion as "the road leading from the Old Church, by Cold Harbour, to Richmond." That it is a road leading to Richmond, is mentioned in the petition (I presume) to bring it within the law, which gives a citizen a right to make application for the opening a road, or altering a road, leading to the Seat of Government. The Court ap-

pointed viewers, who, being first sworn, were "to view the road and ground, along which it was proposed to be conducted, and to report to the Court truly and impartially, the comparative conveniences and inconveniences, which would result, as well to individuals as to the public, if such road should be turned." The viewers make a report, with a diagram shewing very clearly the course and distance of the contemplated change, giving their reasons why they think the new road will be better for the public, of great convenience to Ball, and of no inconvenience to any individual. On the return of this report, Atkinson was permitted to enter himself a defendant. The cause was continued for about twelve months; and then, on a hearing, the report

of the commissioners was approved, 448 and leave *given to Ball to turn the road accordingly. From this decision, Atkinson appealed. It was tried in the Superior Court. Many witnesses were examined; and the judgment of the County Court affirmed. Atkinson appealed to this Court, having filed two bills of exception to the opinions of the Judge. The evidence also, given in the Superior Court, is spread upon the record, in obedience to the law.

If I felt doubtful as to the weight of this evidence, the opinion of the Courts, who heard the witnesses, would turn the scale. But, I am not doubtful. The number of witnesses, and the weight of evidence, are with the decision, in favor of the new road. This point, indeed, if not given up, was not relied on, in the argument.

The whole rests upon the two points made in the Superior Court. The second seems to come first in the natural order, as it strikes at the foundation of the proceeding. The appellant moved the Court to reverse the judgment, and quash the order of the County Court appointing viewers, because that order does not designate any points or places within the county, at which the proposed alteration in the road should commence and terminate. The Court overruled the motion, and very properly, I think. The law requires no such particularity as this. It says, where a party shall make application to have "a new road opened, or a former one altered, the Court shall appoint viewers," &c. The reason of the thing requires no such strictness. The view is a mere incipient step, to bring the matter before the Court. If, in the motion made for a view, it is shewn, that the road leads to one of the places, (the courthouse, warehouse, landing, &c.,) mentioned in the act, that is enough. The Court, then, names viewers, who act upon oath, and their report shews the particulars. It is upon this that the Court acts, and also upon any other evidence, which the parties may bring before them. If, upon the return of this report, it appears, that the proposed change will

carry the road through the lands of 449 others, not parties *to the motion, a summons issues, &c. I do not think that this exception has any thing in it.

The next is, "the appellant moved the Court to reverse the judgment, &c. because the County Court established the road, running across the lands of the heirs of

*The principal case cited with approval in Leighton v. Maury, 76 Va. 874. See also, Downman v. Downman, 2 Call. 507, and foot-notes.

Hooper, without any previous summons having been served on the tenants or proprietors of the land, or their having been, in any way, made parties to the controversy." If this objection had been founded in fact, it would have been a sound one. But I think, with the Judge, that it is not so founded. This matter will be clearly understood, by looking on the diagram, and comparing it with the report. The viewers say, the new road strikes off from the old at N. Johnson's residence on Ball's land (letter A.) and is 1,320 yards, to where it intersects the established road. From Rawleigh to Cold Harbour tavern, is 96 yards. Now the old road runs by Cold Harbour; so that, here would naturally end the alteration: and they report, that from the commencement of the new road to its intersection with the Rawleigh road, it is solely on Ball's land, and that the old road, from where the new one leaves it to Cold Harbour, is on Ball's land. But, to shew more clearly the advantages of this new road, and to give a view of the whole ground, the viewers add, that just at the spot where the new road intersects the Rawleigh road, there strikes off from that road, one, which has been used for more than twenty years, as a near cut from the Richmond road, into the Rawleigh road. By taking this near cut, the acute angle made by the Rawleigh and Richmond roads, at their point of junction at the Cold Harbour tavern, is avoided; and a traveller would gain by it 146 yards. It is this near cut, which, the viewers tell us, borders on Hooper's estate; and it is on this, that the objection hangs. But, so far from considering this near cut as a part of the new road, they expressly state it in their report, to have been in use upwards of twenty years; and in their diagram, they also distinguish it from the new road, laying down the latter
450 *by black lines, and merely dotting the near cut, to shew its direction.

Some of the advantages to Ball by the change, are, that it will save him 2,000 yards of fencing, and enable him to have water in a pasture field, now without. The sole disadvantage to the appellant, is, that he is the keeper of the Cold Harbour tavern, and that this new road, instead of forcing travellers by his door, will bring them within 96 yards; leaving them the choice of taking the near cut, and avoiding the angle; or following the old road, and passing his door.

The case seems to me a very clear one for affirmance.

JUDGE CABELL.

This is an application to turn a road. All the preparatory proceedings appear to have been sufficiently regular; and the only question before us, is, whether the proposed change shall be established or not.

In such a question, the public convenience should be the ruling consideration; and on this point, the testimony (all of which is in the record) is contradictory. The witnesses are nearly equally divided. Those, however, in favor of the new route, appear to have examined both routes most carefully, for the purpose of ascertaining their comparative merit in relation to the

public convenience; and I acknowledge, that I should, therefore, be disposed to respect their testimony, more than that on the opposite side.

But, suppose the witnesses were precisely equal in number, and that their testimony, judging by the record only, appeared to us to hang precisely in equipoise.

Witnesses should be weighed, not numbered; and in estimating the weight of testimony, the Judges of the Superior Court of Law, who see and hear the witnesses examined, possess advantages which we have not. The justices of the County Court have the same advantages as the

Judges of the Superior Courts of 451 Law; to which may be *superadded an intimate personal knowledge of the character of each witness. In a doubtful case, therefore, upon a subject of this nature, I should always lean in favor of the concurrent judgments of these two tribunals.

Both judgments should be affirmed.

JUDGE GREEN.

This is an application to turn an old road, which runs from the Old Church to Richmond, and crosses the Bottom's Bridge road nearly at right angles. The proposed substitute for the old road and which was sanctioned by the judgments of the County and Superior Courts, terminates at the Bottom's Bridge road, ninety-six yards from the crossing of the old road and the Bottom's Bridge road. From this termination of the new road in the Bottom's Bridge road, the traveller must go to the old crossing of the roads, to travel towards Richmond. From the point where the new road leaves the old road, to the old crossings by the new road and Bottom's Bridge road, is 1,416 yards; and by the old road, is 1,180 yards; so, that the old road is 236 yards shorter than the proposed road, between the two points in which they coincide. In respect to the qualities of these roads respectively, I consider them as proved to be equal; and so far as the public are concerned, the old road is preferable in respect to distance, by 236 yards in less than a mile.

There is an old established tavern at the old crossings of the road, and as the road is established by the judgments in this case, those travelling by the Old Church road to Richmond, would still be obliged to pass by this tavern. But, if the new road be established, it will be a matter of course to open a new road, pointed out by the commissioners as the near cut, which would be a continuation of the road now proposed, and would fall into the Richmond road a considerable distance from the tavern, so as to carry travellers to Richmond, without passing the tavern;

452 and *when this is done, the new road would be, from the departure from the old road to its junction again with it, 1,470 yards long, and the old road, 1,380 yards; leaving the old road still preferable, in respect to distance, by 90 yards. If it is not, therefore, against the public interest to change the old road, it certainly does not appear to be necessary for the public convenience, to do so.

The individual benefits to Ball, the ap-

plicant, from this change, are, that he will save 2,000 yards of fencing, and have a pasture with water, which it is now destitute of: that some facilities will be afforded him in hauling wood; and that he will be enabled to make his house, which is 81 yards from the new road, a public house; whilst the injury that may result to the appellant, the occupier of the old tavern, consists in the diversion of the travelling custom from his house to Ball's. Both the old and the new road are entirely on Ball's land.

The legal presumption is, that when this old road was established, a fair and full compensation was made to the owner of the land, for any damages which he thereby suffered, and we may confidently believe, that the convenience of the cross-roads as a place for a house of public entertainment, and the well-founded confidence that these roads would not be changed, but for the public convenience, or for the advantage of one individual when it would not injure another, was the inducement to the owner of the tavern, to lay out his money to provide a house of public entertainment. This gave him rights, which, although not amounting to absolute property, were in the nature of property, (as the good will of a trade,) the loss of which would inflict upon him an injury, equal to the loss of specific property of the same value. A sacred regard to the rights of property, is the foundation of all law and civilization; and the smallest scintilla of right ought not to be invaded. The maxim, "sic utere tuo ut alienum non loedas," applies to this case. The interests of the appellant, so acquired, should yield to the public, but to no private interest. When he acquired that interest, he knew that according to existing laws, he must yield it to the public convenience, when required. The judgment should be reversed.

The judgment was affirmed, two Judges constituting a majority of the Court.*

M'Clung v. Hughes.

June, 1837.

Equitable Relief—Failure to Prosecute Caveat.—The doctrine of the case of Noland v. Cromwell, 4 Munf. 156, examined in this and the next case.

Same—Grant—Fraud.—After a grant issued, any one claiming a prior equity against the grantee, can, in no case, have relief in equity, unless upon the ground of actual fraud in the acquisition of the legal title; or, unless the party was prevented from prosecuting a caveat, by fraud, accident or mistake.

Same—Same—Definition of Fraud.—By actual fraud, in such case, is meant the proceeding to procure a patent, after actual notice of a prior equity.

This was an appeal from the Chancery Court of Greenbrier, where Edward and

Thomas Hughes, filed their bill against Andrew Moore and William M'Clung, praying for an injunction to a judgment at law. The Chancellor awarded the injunction, and finally decreed that it should be made perpetual. The defendant, M'Clung, appealed. The following opinions give so complete a history of the case, that no other report is necessary.

Wickham, for the appellant.

Johnson, for the appellee.

454 *June 13. The Judges delivered their opinion.†

JUDGE CARR.

In 1794, when the rage for speculation in wild lands was at the height, Moore and M'Clung entered into a contract for taking up in partnership 60,000 acres of land, in the county of Greenbrier, on Gauley river, and its waters, along the south side of the river, below Hominy creek. Having made many entries, they had an inclusive survey, made in September, 1794, comprehending 44,317 acres, for which a patent issued to Moore in June, 1795. The general position of the survey was this. Gauley running nearly a west course; the beginning call was near the river on the south side; thence the line ran off in a southerly course for some distance; turning then westerly, it ran off for a great distance with the river, and down it; then turning northerly, it ran to the river, and called (not for the meanders of the river,) but for a straight line, to the beginning. The length of this closing line was 5,060 poles, rather upwards of 15 miles. It was not actually run out at the time of the survey, but left open; a practice said to be common in that quarter. Hughes, the plaintiff, in 1795, entered for 400 acres of land on the north side of Gauley river, opposite to a part of Moore's survey. In 1798, he surveyed, and in 1800, obtained a patent. In 1807, Moore and M'Clung, for the first time, ran the closing line of their patent. This being a straight line, and the rivers in that mountainous country generally crooked, it was to be expected that it would, in the distance of 15 miles, cross the river several times. Accordingly, we find that it crossed four times; took in a considerable quantity of land on the north side, and among other tracts the 400 acres of the plaintiff. He being in possession, and refusing to yield the land, M'Clung, (who had bought of Moore) brought 455 *ejectment against him, and recovered judgment. This bill was filed to enjoin that judgment, and to obtain a decree for the legal title. The Chancellor decreed in favor of Hughes, and M'Clung appealed:

This statement shews that the ejectment must have presented a question of title and boundary purely; a question peculiarly proper for a Court of law, and a jury. They have pronounced that the patent of M'Clung covered the land; and being the eldest, carried the legal title. Can this question be re-examined in equity? We will consider this, first, on general principles; secondly, on the doctrine of caveats.

1. If there were mala fides or fraud of any

†The President absent.

*The PRESIDENT and JUDGE COALTER absent.

†Equitable Relief—Failure to Prosecute Caveat.—See foot-note to Noland v. Cromwell, 4 Munf. 156, where it is shown that the construction of Noland v. Cromwell given in the principal case has been adhered to in subsequent cases.

The case is cited on this point in Jackson v. McGavock, 5 Rand. 514, 539; Lewis v. Billips, 1 Leigh 364, 366; French v. The Successors of the Loyal Co., 5 Leigh 640, 648, 652, 668, 673, 675, 680; Beckwith v. Thompson, 18 W. Va. 124.

He is guilty of actual fraud who, knowing another's prior equity, proceeds to get a grant for the land. Cline v. Catron, 22 Gratt. 391, quoting from the principal case.

kind in the transaction, it is clear that equity might interpose, and say to Moore or M'Clung, "though you have gotten the legal title, you shall not enjoy the fruits of your iniquity. Taking hold of your evil conscience, we will postpone you to Hughes, and compel you to release to him your legal title." Does the bill contain any charges sustained by evidence, which would authorise this procedure?

The first ground of equity is, that Moore and M'Clung sold the land to Morris and Nicholson, who, in 1794, sent Robert James as their agent, to view it and ascertain the boundaries: that he, with Welch the surveyor, went round the survey, and ran the closing line on the south side of Gauley, declaring he had no claim to land on the north side. Supposing this literally true, it is difficult to perceive how it would attach an equity upon the conscience of Moore or M'Clung in favor of Hughes, who had not then even made his entry. But when we find that this James was a mere agent for Morris and Nicholson, whose only business was to view and report the quality of the land; that the contract with Morris and Nicholson was either never executed or afterwards rescinded; and that (as the witness Patterson says) the reason why they did not cross the river in running the lines of the land, was, that it was so high they could not cross, and
456 therefore, they had to go *up the south side; surely we must conclude, that there is nothing in this allegation or proof, to authorise equity to compel a release of the legal title.

The next ground of equity is, that Welch the surveyor was a partner with Moore and M'Clung: that he told the plaintiff's neighbours that they meant to take no land on the north side of the river, and encouraged them to locate those lands: that after Hughes had made his entry, it being suggested to him that the last line of Moore and M'Clung might take in the land, he sent to Welch for the lines, by Campbell, and to ask whether they would include the 400 acres; when Welch said he might send the lines, and take their money; but it was unnecessary to tell them and others to proceed and make their surveys, for that they closed their survey by the river.

Supposing Welch a partner in this land, and that this charge were made out by satisfactory evidence, its weight would depend very much on the good faith of Welch's declaration. There is a good deal of evidence, tending to shew that none of the parties expected the line to take so much land on the north side of the river; nor is it strange that they should err in their conjectures on the subject. The line was a straight course of 15 miles and better, through an unsettled mountainous country, and the windings of the river would be the main circumstance to determine, what land on either side, it would take in or leave out. The same means of information were open to all. Any person who chose to run a straight line from the given corners above and below, might ascertain how much land it would include on the north side, just as well as Welch. It would be difficult, therefore, to conceive,

that Welch, in his messages, intended to deceive or defraud Hughes. Nor is it pretended that by those messages, he meant (if he had the power) to enter into a contract, changing the last line of the survey, and making the river the boundary. Hughes well knew that his line would stand in the patent, precisely as it
457 stood in the survey, a *straight line.

He had in his own power all the means of arriving at perfect certainty; and the survey gave him full notice. He ought then, in common prudence, to have run the closing line, and not to have rested on the opinion of any body as to its crossing the river.

But, it is useless to consider how far the declarations or admissions of Welch, taking him as a partner, would affect the rights of M'Clung and Moore, until it be first proved that he was a partner. The bill specially charges, that he was a partner in the 43,417 acre survey, and that this was proved by a written contract, and also by the deed from Moore to M'Clung, which contains an exception of Welch's claim; and particular interrogatories are put to the defendants, to answer whether there was not a written contract, with a prayer, that they be compelled to produce it. In answer, the defendants explicitly declare, that there was no contract, by which Welch was a partner in the 43,417 acre survey. They set forth a contract bearing date the 28th of August, 1793; by which they and Welch were to be equally interested in taking up lands on Gauley river. This contract appears to have been reduced to writing, after the entries made under it were located; as it specifies the seven entries to which it applies, and states that the lands which they embrace, (amounting by my calculation to 50,783 acres,) were held in equal shares by the partners. They set forth another agreement, dated the 20th of September, 1794, by which Moore was to furnish warrants for 60,000 acres of land, and M'Clung to locate them on Gauley river and its waters; Moore to pay all expenses, and M'Clung to have one fourth of the proceeds, when the land should be sold. This contract is signed by M'Clung, but not by Moore; and Welch, who is the subscribing witness, annexes to his attestation this remark, that it was acknowledged by M'Clung, and the next day, Col. Moore, after reading the article, agreed to the contents, but did not sign it, because the meeting between them being on the great road, there was no pen and ink.
458 This is the agreement, *(as seems acknowledged on all hands,) under which the entries were made, (except one,) which compose the 43,417 acre survey; and to this agreement, it is most clear that Welch was no party.

To prove that he declined a partnership in this adventure, M'Clung files and refers to an agreement between Welch and himself, dated in May, 1807. This agreement, referring back to the original contract between Moore, M'Clung and Welch, states, (by way of recital,) that 54,000 acres were taken up under it: that then, Welch declined a further partnership: that Moore and M'Clung agreed to go on: that Welch, at

the instance of M'Clung, agreed to assist him in locating and surveying; for which service, M'Clung was to make over to him all right, title and claim to 4,500 acres out of his share of the partnership concern of 54,000 acres, to be adjoining Welch's division, in case M'Clung's share should join Welch's. After the recital, the agreement states that Welch had performed his undertaking to the satisfaction of M'Clung; for which, M'Clung binds himself, &c., in the penalty of \$20,000, to perform his part; that is, to convey the 4,500 acres. Thus, the written contract called for and produced, as well as the subsequent contract between M'Clung and Welch, shew that Welch was not a partner in the 43,417 survey. As to that part of the deed from Moore to M'Clung, which excepts the claim of Welch, the answer of Moore explains it thus. Previous to the sale to M'Clung, it had been discovered that the inclusive survey of 43,417 acres had taken in a part of the joint property, the 54,000 acres; and the exception meant to exclude Welch's proportion of this part from the conveyance. What this part was, is seen at once by recurring to the first contract, and the surveyor's statement of the entries, on which the 43,417 acre survey was made. The contract shews that one of the entries, in which the three partners had a joint interest, was "an entry dated the 7th of June, 1792, of 14,562 acres, part of a location of 17,562 acres;" and the surveyor's

459 *statement shews, that this same entry was one of those, on which the 43,417 acre survey was made. To the amount of his proportion of this entry, Welch had an equitable interest; but, if he had owned the whole entry, (thus accidentally included,) it would hardly be contended, that this would constitute him so far a general partner in the various other entries comprised in the whole survey, as that (under the rule of law making the admissions or acts of one partner binding on the firm) his declarations and admissions would control and alter the written calls of the survey, or raise such an equity against Moore and M'Clung, as would postpone their legal rights to those acquired under a younger patent. A partnership is a voluntary contract between two or more persons, for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them; and it is upon this community of profit and loss, this mutual confidence, and the character held out to the world, that the rule rests, making the acts and declarations of one partner binding on the rest. The very foundation of the rule is wanting here. This limited and accidental interest in a single entry, could not make Welch the partner or agent of Moore or M'Clung, so as to bind them by his declarations; and as to any joint general interest, I can find nothing that weighs as a feather, against the strong evidence I have stated, proving that he was not a partner. A paper is found in the record, purporting to be an agreement, by which Moore, M'Clung and Welch sell to Susanna Wilson 195 acres of land, and bind them-

selves to convey it to her, &c. How this paper came into the record, I cannot perceive. It is not an exhibit either in the bill or answers; nor is there a title of evidence going to authenticate it in any way. I should not, therefore, notice it, but that it seems to have had weight with the worthy Judge who decided the cause below. Although the name of Welch is in the body of the agreement as a

460 vendor, it is *executed only by Moore and M'Clung; nor is there any evidence where the land lay, unless we consider this as proved by the deposition of D. Stuart, who says, Welch refused to sign the agreement, saying he would take his land on the other side of the river. This would be slight proof, even if the witness were unimpeached; but, it is more especially so, as his situation (contesting the same point with the same party, against whom his evidence is given) goes strongly to his credit. But, take his evidence as true, and it amounts to this. Welch refused to bind himself to convey on the N. West side of the river, because he would not take his land there; and this was yielded to by all parties. Now, if Welch had been a general and joint partner in the whole survey, he could not have disclaimed an interest in any part of it, before a division. His execution of the contract, jointly with his partners, both they and the vendee would have had a right to insist on; but they had no such right, as he was interested only in a single entry, which, he might well contend, lay entirely, or principally on the other side of the river. This, therefore, certainly does not prove a partnership. There are several depositions as to declarations of Welch, M'Clung and Moore, that Welch had an interest in the 43,417 acre survey; but these may either be explained by the limited interest I have mentioned, or are fully rebutted by counter evidence; and if not, would deserve little weight; because the conversations they relate, were loose and vague, and the witnesses under a bias, which goes strongly to their credit. This is especially the case, with those who testify as to the declarations of Welch, that the closing line would not cross the river. Campbell acknowledged himself interested; and Fitzwater and Stuart had land within that same closing line, if it was permitted to cross the river. Without deciding on the competency of these witnesses, I must say, that I could never feel safe in receiving their evidence as proof of the parol declarations of their adversaries; going to

establish the very fact, on which

461 their own *titles depended. Upon general principles, therefore, I think there is nothing in the case to justify a re-examination of the law-judgment by a Court of Equity.

2. But if this question were more doubtful than it is, I think the second point to be considered, to wit, the doctrine of caveats, as settled by this Court, would be entirely conclusive of the case; and on this ground, in my judgment, the decision ought to be exclusively placed.

In the discussion of this point, I shall consider the case of Noland v. Cromwell, 4 Munf. 155, as binding authority. I shall

do so, first, because *Noland v. Cromwell*, was decided by a full Court, on great consideration, with the express view of settling finally the jurisdiction of equity in such cases, and has, ever since its decision (now upwards of twelve years) been taken as giving the law to the subject. Such cases ought not to be disturbed; for (as has been well said) it is of more importance to the community that the law be settled, than how it is settled. When it is clearly understood, that the solemn decisions of this Court are to stand, counsel will know how to advise their clients, and litigation will be discouraged. Who can tell how many titles we might shake, how much litigation we might set afloat, by overruling now, the case of *Noland v. Cromwell*? Perhaps these remarks might have been spared, when it is recollected, that in the case of *Jackson v. M'Gavock*, (argued since the present case, and before three of the same Judges) we, after hearing a long argument assailing the authority of *Noland v. Cromwell*, stopped the reply, declaring that we considered *Noland v. Cromwell* as settling the law at the date of the decision; though the effect of subsequent statutes on that case, was open to argument. That their effect is nothing, will be shewn in *Jackson v. M'Gavock*.

Taking now, the case of *Noland v. Cromwell* as settled law, I will enquire whether it does not govern and decide the case at bar.

462 *In *Noland v. Cromwell*, the bill charged fraud and combination between the defendant and the surveyor. In this Court, the case was decided on the preliminary question, whether in any case equity would relieve on a bill suggesting no excuse for failing to caveat. In the argument of this question, the bill was to be taken for true, and the strongest case which could arise out of it, as established; and this course was no doubt taken, because (in the words of the Court) "it has been thought best to meet the question in full, and endeavour to put it at rest in future." The opinion of the majority of the Court was delivered by Judge Fleming. The following extracts will shew the nature and extent of the decision. It begins thus: "After the solemn resolution of this Court upon the question of jurisdiction, rendered in the case of *Johnson v. Brown*, which was founded upon former decisions, and particularly upon that in the case of *Jones v. Williams*; after the accession to this decision by Judge Tucker in the case of *Depew v. Howard*, on the ground of its being the established law of the land; after this rule of property, sanctioned by the opinions of all the successive Judges of this Court, to the number of perhaps seven or eight, prior to the present organization thereof, had been promulgated as the law of the land, and hundreds of our citizens may have regulated their transactions thereby, it might have been reasonably supposed, that the point, at this day, had been at rest. If there were even error in the opinion of all these Judges; if the solemn decisions of this Court, upon the point, were even replete with error; that error, upon general principles, had better be ac-

quiesced in, than corrected at this late day. But no such error has been committed; and we owe that deference to the decisions of former times, that we ought not to suppose that those decisions were rendered without due consideration. We ought rather to admit the possibility of being ourselves mistaken. On authority, therefore, the question is irrevocably settled; and on principle also, we think it rightly settled.

463 The *point seems to be, as thus established, that although a party may be let into a Court of Equity, on grounds which he could not have used on the trial of a caveat, and which, in fact, make another case, or upon a case suggesting and proving that he was prevented by fraud or accident, from prosecuting his caveat; he is not to be sustained in a Court of Equity on such grounds as were or might have been brought forward on the trial of the caveat." The opinion then proceeds to detail the reasons of the decision: That the State having much vacant land for sale, it was important to have it settled, and the titles thereto quieted, as soon as possible; that for this purpose, the Legislature constituted a peculiar tribunal, and made provision for the speedy decision of the whole law and equity of the case, on the trial of the caveat, prior to the emanation of the patent; that it was important, in relation to this extensive territory, to act by general rules, and establish a general criterion as to notice; that the act meant to cut up the numberless doubts and disputes as to notice or no notice, and to establish a general criterion analogous to the provisions of the registration acts, which do not permit any person to aver the want of notice of a deed duly recorded; that the notice principally established by the act, is the entry in the surveyor's book, open to all; which, when followed up by a survey, directed by law to be made shortly thereafter, affords complete notice of the claim; that of this survey, it is not competent to adjacent adventurers to aver an ignorance; and that if a particular case of hardship should be found to exist, it must yield to the general policy of the statute, which acts by general rules, and adopts, of necessity, a general criterion; it being better that hardship should be endured by an individual, than that the general policy of the Legislature should be defeated. According to this case, then, a party may be let into equity upon grounds which he could not have used on the trial of the caveat; or upon a case suggesting and proving that he was prevented by fraud or

464 accident from prosecuting *his caveat; but not on such grounds as were, or might have been used on the trial of the caveat. How then can the bill before us be sustained, which, so far from making out a new case of which the plaintiff could not have availed himself on the trial of a caveat, shews a case, every fact and circumstance of which was available on such trial, and might have been submitted to that tribunal, and does not suggest even, that the plaintiff was prevented by accident or fraud from prosecuting his caveat?

The Chancellor seems to think it sum-

cient to give equity jurisdiction, that the case, as appearing from the evidence, should shew a good excuse for the plaintiff's not having prosecuted a caveat. I question this exceedingly. The general rule is, that equity has no jurisdiction in such cases; but, if fraud or accident has prevented a resort to the caveat, equity will relieve. Ought not the bill, then, to state expressly, that fraud or accident has intervened? Where are you to look for the plaintiff's case, but to his bill? If that does not give jurisdiction, it would be demurrable; thus cutting off the evidence entirely. Again. No evidence can be taken which is not relative to the matters in issue. Now, if the bill alleges neither fraud nor accident in excuse for not filing a caveat, how can the plaintiff take evidence to prove such facts? They make no part of his case. The defendant has had no notice by the bill, that they would be relied on. He has not had the benefit of his answer to the allegation. He has no warrant for taking countervailing evidence. I do not agree with the Chancellor, therefore, that the case made out by the evidence will give equity jurisdiction, where the case stated in the bill gives none. Such a position is as directly opposed to the general rules and principles of equity, as it is to the particular case of *Noland v. Cromwell*, which expressly says, that to give equity jurisdiction, the plaintiff must suggest and prove that he was prevented from prosecuting a caveat by fraud or accident.

465 *But, if the Chancellor's idea were correct, I do not think the case made by the evidence furnishes a good excuse for failing to caveat. The survey of Moore and M'Clung was prior to the plaintiff's entry; and of this survey, he had not only legal, but actual, notice. He knew that this was an inclusive survey, setting out from Gauley river above, running round a large body of land to the river 15 miles below; and then, to close the survey, calling for a straight line, not for the river according to its meanders. The Chancellor seems to think, that it could never have been supposed by the plaintiff, that this closing line would cross the river, 1st, because there was no call to cross; 2d, because such crossing would have gone into the county of Kanawha, for which the surveyor had no authority.

This last objection is founded on a mistake of the fact. By adverting to the law establishing Kanawha, (12 Hen. Stat. 670,) it will be seen that the N. E. line, cutting off part of Greenbrier, runs from Cumberland mountain to the Great Kanawha river, crossing the same at the end of Gauley mountain; thence along said mountain to the Harrison line. Now, the maps shew us, that the part of Gauley river embraced by this survey, is some distance south of Gauley mountain. Both sides of the river, therefore, were in Greenbrier; and the line, in crossing the river, did not run into Kanawha. In December, 1795, (after the date of Moore's patent,) the county line was changed by the Legislature, from Gauley mountain, to Gauley river.

As to the first objection, that the line could not cross the river, without calling

to cross, I understand the surveyor Shanklin to say, that he had known other such cases; and the case of Hughes itself is such an one. There is no call in his survey to cross the river, and yet it does cross, and take in three or four acres on the south side. But, the conclusive answer to both these objections is, that the question whether the closing line could cross the river, is purely a legal question; a question of boundary arising on the calls of the patent, decided in the action of ejectment, 466 and (as we *must take it, while that judgment stands,) correctly decided; the Law Court having decided that the closing line could in law, and did in fact, cross the river. The plaintiff is charged with knowledge of that fact, by his notice of the survey; and justly so charged, as he had it fully in his power to ascertain the actual course of the line, and it was gross negligence in him, not to have done so.

Upon every view of the case, therefore, I think that the decree should be reversed, and the bill dismissed.

JUDGE GREEN.

The judgment at law must be considered as conclusively settling the fact, that Moore's patent includes the land in controversy; there being no impediment to a full and fair investigation of that question in the action of ejectment. If the Court of Law erred in any way on that point, it is not competent to a Court of Equity, again to investigate the question of boundary, and to correct the error, if any existed.

Whether the plaintiff in the Court below, was entitled to any relief in equity against the legal title of the defendant, depends on two questions: First, whether he had better equitable title to the land in question than Moore had, which would have been preferred in the Court of caveat, if he had prosecuted a caveat before Moore's patent was issued? And if so, secondly, whether, having failed to prosecute a caveat, he was entitled to relief in a Court of Equity, after the patent issued? The facts, upon which these questions turn, are as follows:

Prior to the 28th of August, 1793, Andrew Moore, William M'Clung, and Alexander Welch, the surveyor of Greenbrier county, located upward of 50,000 acres of land in the names of Moore, and of Moore and M'Clung, on the waters of Gauley and Meadow rivers, in which the partners were equally interested. The original agreement of these parties was, to locate 467 100,000 acres; but on the *28th of August, 1793, Alexander Welch retired from the partnership, and Moore and M'Clung entered into a new contract, which the parties proceeded to execute forthwith. This contract was verbal, and not reduced to writing until the 20th of September, 1794, after the location under the contract, and the survey of the lands located, were actually made. The terms of this last contract were, that Moore should furnish to M'Clung land-warrants to the amount of 60,000 acres, pay all the expenses of locating, surveying, &c., and give M'Clung one fourth of the land which might be located under these warrants; and M'Clung was to locate, direct and have surveyed, the above quantity of land, "if so much was to be

found unappropriated, lying, adjoining, and on the south side of Gauley river, between the said river and surveys made for said Moore (and others, naming them) along the south side of Gauley river, below Homminy creek, and joining the above claims, and other prior claims, so far as the Kanawha road and bounds of the county line of Greenbrier."

The first entry made under this last contract, was dated September 6, 1793, for 11,907 acres, of which only 6,040 acres were included in the survey upon which Moore's patent issued. It began in one of the lines of a survey made in the name of Moore, for 20,000 acres under the former contract, which lay on the south side of Gauley river; the lines of which nearest the river, ran nearly parallel to the river, and the nearest of which were about three miles from the river. The entry beginning at one of the corners of this survey, calls to run with three lines of the survey of 20,000 acres nearest to the river, and to extend for quantity parallel to the lines of the old survey, so called; this location was the uppermost of all those included in Moore's patent, and lay almost entirely about Homminy creek.

The next entry made February 11th, 1794, for 8,300 acres, lay next below the former, and called to join the north east of the said survey of 20,000 acres, and to run north west with the lines of said survey, 468 down different *branches of Gauley river, and to continue nearly north west, leaving said survey to Gauley river; and thence, to extend up the Gauley river, and thence around northeastwardly to the beginning, for quantity.

Next below the entry of 8,300 acres, lay an entry of 17,562 acres, made June 12, 1792, not under the contract between Moore and M'Clung, but under the previous contract between Moore, M'Clung and Welch; of which 3,000 acres being withdrawn, the balance 14,562 acres was included in the survey upon which Moore's patent in question issued. This entry calls to begin in a line of said survey of 20,000 acres, and to run with two long lines of that survey; and thence extending S. W. and N. and N. W. down branches of the Meadow river and Gauley river, to include the land in the forks of said rivers, and up said Gauley river waters around for quantity.

The last two entries were made September 19th, 1794, after the survey was made, and the day before the contract was reduced to writing. The first for 4,515 acres calls to join the southeast and southwest of the entry of 17,562 acres, to include part of the waters of Meadow river for quantity. The other for 10,000 acres joining the southwest of the entry for 4,515 acres, and to include waters of Meadow and Gauley rivers for quantity.

The survey was made by Welch on the 9th, 10th, 11th and 13th days of September, 1794; and the patent issued June 22d, 1795; so that the survey must have been returned to the Register's office before the 22d of December, 1794. This survey began at a large poplar between the Gauley river and the line of the 20,000 acre survey, 870 poles from the latter, and several hundred poles

from the former, and the corner of a survey of 5,867 acres made for Moore on the 8th and 9th of September, 1794, and running with the line of that survey 870 poles, to the 20,000 acre survey; then with the lines of that survey, and leaving it to a corner on the top of Gauley river ridge (on the south side,) and thence N. 67, E. 5,060

469 poles to *the beginning. It appears that all the land on the south side of Gauley river, between this last line and the river, not included in this survey, had been surveyed for Moore before this survey was made. This appears from the inclusive survey afterwards made for Moore, which includes all this land. The patent describes the land as lying on the south side of Gauley river, and on Homminy creek, and on both sides of Meadow river, a south fork of Gauley river, and including several other branches of said river. This patent excepts many prior titles included in the survey on the south side of Gauley, but none on the north side; although it is said, though not proved, that there were many such on the north side included in the boundary of the survey as now claimed by M'Clung. This closing line was not actually run at the time of the original survey; nor until 1807, when it was found to include several thousand acres on the north side of the river, and amongst the rest the land claimed by the plaintiff. Shortly after this survey, Moore sold this land to Morris and Nicholson of Philadelphia; and in the fall of 1794, James, an agent for Morris and Nicholson, came to Virginia to see the land; and William Renwick, John Patterson and the said James, examined the land in company with Welch and M'Clung, to see whether it answered the description given by Moore to Morris and Nicholson; and the land was surveyed in the fall of 1794, under the superintendence of these persons. It does not distinctly appear, whether this survey alone, or other surveys above and below it on the river and surrounding it, were sold to Morris and Nicholson; though the latter, I think, may be safely taken to be the fact; for, in January, 1795, Moore procured an order for an inclusive survey, which was returned and recorded as surveyed in May, 1795; this survey including the land on the river above and below the survey of 43,417 acres, and other lands surrounding it, to the amount in all of 100,230 acres. There is no evidence of any actual

470 survey of any of these lands, between the time of the original survey *and the year 1807, except as to the survey made in the fall of 1794, when James was present; and I think that very survey was returned and recorded as the survey made under the order of January, 1795, for an inclusive survey. The beginning corner of the survey of the 43,417 acres, made in September, 1795, was a considerable distance from Gauley river on the south side; and the lines run eastwardly, southwardly and westwardly, to the last corner, near, though not on the river, and on the south side. The closing line, about 15 miles long, was not then run; and it was then thought it would not cross the river, although it was afterwards ascertained that it did cross

it four times, owing to several deep southern bends of the river, and embraced many thousand acres on the north side. Accordingly, the report of the surveyor, and the patent afterwards issuing upon it, described the land as lying on the south side of Gauley river; and the contract made with Morris and Nicholson, was for the sale of lands on the south side of Gauley river. The fact, that the closing line crossed the river, was ascertained, when the land was conveyed to Morris and Nicholson, in a very short time after the survey of September, 1794; though to what extent, was not then ascertained, as the line was not run. But, the survey was closed by the meanders of the river, according to the contract with Morris and Nicholson, and the meanders laid down as the boundary of the inclusive survey before mentioned. That the parties knew that the closing line would cross the river, and did not intend, by closing the inclusive survey by the meanders of the river, to limit their claim to the land on the south side, and abandon their right to that included in the original survey of 43,417 acres on the north side of the river, and that the inclusive survey was made with a view to procure a patent separately for the land sold to Morris and Nicholson, is demonstrated by the fact, that the report accompanying the inclusive survey (in describing what former surveys were included in that) states, that a part

471 *only of the survey of 43,417 acres was included; and the part not included, could only have been that lying on the north side of the river. Welch, the surveyor, had an interest in a part of the entry of 14,562 acres, included in the survey of 43,417 acres. How he disposed of it, does not appear; but, he probably sold it to M'Clung, who also purchased the interest of Moore after the survey of 1807, which ascertained, for the first time, what land the closing line would include on the north side of the river.

Four months after, Moore's survey of September, 1794, was made; but, whether before or after the survey upon the sale to Morris and Nicholson was made, and the closing line ascertained to cross the river, (although that survey was bounded by the river,) cannot be clearly ascertained. Hughes, under the impression which seems to have been common in the neighbourhood, that the closing line would not cross the river, (or more probably, that it would not cover the land he located,) entered 400 acres on the north side of the river, the land in controversy. But, before he made his survey, having a doubt, as he says, "whether Moore's closing line, when it came to be run, might not include his entry," he applied to Welch through a messenger, to know whether it was intended that Moore's survey should cross the river, and to send the lines of Moore's survey, as he wished to know whether his entry would be embraced by Moore's survey; "and if it was, that he would lift his entry, and be at no further expense about it;" when Welch answered, "Tell Mr. Hughes, I could take his money and send him the lines of the survey; but, tell him to proceed in his survey, and se-

cure his land, for, we do not intend taking one foot of land on that side of Gauley river." Accordingly, Hughes proceeded, though not till more than three years after, to make his survey, and took out his patent. Several years after this patent was taken out, and before the survey of 1807 ascertained that Moore's survey included the land taken up by Hughes,

M'Clung sent a message to Hughes, 472 advising him to erect "a ferry on his land for the advantage of the lands in the neighbourhood. I think it probable, that Welch's message to Hughes was sent before the survey, in pursuance of the contract with Morris and Nicholson; for, then his answer would be true. If after, it would be false without a motive.

Hughes's claim to relief seems to have been founded chiefly on the ground, that Moore's patent did not in fact cover the ground in controversy, and upon this ground principally, the decree of the Court of Chancery proceeded. The bill charges, that the complainant was not permitted at law to avail himself of the matters stated in his bill, by giving them in evidence to the jury. All evidence touching the question of boundary was admissible upon precisely the same principles, and to the same extent, both in a Court of Law and a Court of Equity. If the Court of Law erred in excluding proper evidence of the boundary, it was an error which a Court of Equity could not correct in any form. Fraud, accident, or surprise, which prevented the party from bringing his case fully before the jury, or after-discovered matter, which he could not bring before the jury, are the only grounds upon which a Court of Equity can re-examine, in any form, any fact put in issue between the parties, and decided at law. None of these grounds are alleged in the bill; and the true boundary of the land, according to the patent, must be taken to be as settled by the judgment at law.

A party acquiring an interest for valuable consideration in, or expending his money upon, the property of another, and induced or encouraged to do so by the fraudulent suppression of the truth or suggestion of falsehood, on the part of the owner, is entitled in equity to be indemnified, either by retaining the property, or otherwise recovering satisfaction from the owner. But, to give such an equity, a fraudulent intent must be brought home to the owner; or at least, a negligence so gross as to amount to evidence of fraud. A clear mistake or ignorance of his rights, 473 on the part of the owner, repels the imputation of fraud, and gives to the other party no equity; as was held in *Stewart v. Luddington*, 1 Rand. 403.

In this case, the bill charges no such fraudulent misrepresentation or suppression of the truth. The declarations of Welch, and the message of M'Clung, are stated for the purpose of shewing that they believed that the closing line would not cross the river, and to operate as evidence of the real boundary of Moore's survey; and it is clear upon the evidence, that all parties laboured under a mistake in that respect, in which all were equally inno-

cent; or, if guilty of culpable negligence, that charge attached as strongly on Hughes as on the other parties, the means of correcting the mistake being equally accessible to all. If, therefore, M'Clung, in other respects, has the better right, Hughes has no equity against him founded on this mistake as to boundary, either in respect to the property, or otherwise, except so far as to set-off the value of the permanent improvements, made by him, against M'Clung's claim for rents and profits.

The only remaining ground upon which the plaintiff can claim relief, is, that Moore's entries did not cover the land in question, and that his survey did not conform to his entries: that, therefore, his original equitable right, before either party obtained a patent, was superior to Moore's: that he could have prevented Moore from getting a patent for the land in question, by filing a caveat; and that his mistake in respect to the boundaries of Moore's survey, encouraged by the mistaken declaration of Welch, was a sufficient excuse for his failure to file a caveat, and affords just ground for the interposition of a Court of Equity.

The bill does not suggest, or charge, that Moore's survey included any greater quantity of land than his warrants and entries entitled him to. Nor does it charge directly, that his survey did not conform to his entries, so as to put that question directly in issue. Yet it calls for the exhibition of the entries, and suggests

474 that all of them were *made on the south side of the river. Five entries are exhibited, as those upon which the survey was founded; one of which could not cross the river, beginning a great distance from it, and running in directions parallel to, and from it: one other is bounded by the river, and runs North-easterly from it, so as not possibly to cross it. The calls of the other three are such, that it may, or may not have been necessary to cross the river, in order to embrace the quantity of land called for; and if it were necessary to cross the river for that purpose, it is impossible to determine with any certainty, from any thing in the record, whether these entries, duly surveyed, would include the land in controversy. If this question be proper to be enquired into, it will be necessary to have a survey in the cause, and perhaps an issue to be tried by a jury.

If Moore's survey included lands not covered by the terms of the entries, Hughes locating, even after the survey, the land not covered by the entries, might have prevented the patent from issuing to Moore for the land in controversy, by a caveat; as was determined by the Supreme Court of the U. S. in the case of Wilson v. Mason.

The question, therefore, is, whether in that case, Hughes, having failed to prosecute a caveat, can, under the circumstances of this case, successfully assert his originally prior equitable right, in a Court of Equity.

In examining this question, we are at the outset struck with the observation, that the Court of Appeals in Virginia, and the Supreme Court of the United States, (the latter, in administering the law of Ken-

tucky,) seem to have come to opposite conclusions, in respect to the question, to what extent and upon what principles, Courts of Equity can entertain a jurisdiction in cases of conflicting claims to land, under the Land Laws of Virginia. In *Noland v. Cromwell*, 4 Munf. 155, the former held, that a Special Court having been appointed for the determination without appeal of all questions arising before the issuing of a patent, a Court of Equity

475 had no jurisdiction after the *patent issued, unless the claim of the plaintiff in equity was of such a nature, that it could not have been asserted in a caveat; or, unless the party had been prevented from availing himself of that remedy, either by fraud or accident, upon the ground that such was the policy of the law, in order to avoid multiplied and tedious litigation, and, I presume, also upon the ground, that in general, a Court of Equity has no jurisdiction to give relief, if the party had an adequate and simple remedy elsewhere, or that remedy were lost by his default.

The Supreme Court held, in *Bodley v. Taylor*, 5 Cranch; that it had been decided in the Court of Appeals of Virginia, whilst Kentucky was a part of that State, and confirmed by an uninterrupted series of decisions in Kentucky, that the true ground of jurisdiction was, that an entry was considered as a record, of which a subsequent locator might, and is presumed to have had notice; that the jurisdiction of a Court of Equity, is not granted by statute, but is assumed by themselves; and that they cannot decide as a Court of Caveat could, but must exercise the jurisdiction upon the general principles of the Court of Chancery. The effect of this description of the foundation of the jurisdiction is, that as it is an invariable maxim of a Court of Equity, that where both parties claim an equity, the prior equity must prevail, when neither party had obtained a patent, unless there were circumstances in the case, which, upon the general principles of a Court of Equity, would postpone him.

But, if the subsequent locator had acquired a legal title by patent, then another inflexible maxim of equity would immediately apply to the case, that when the equity is equal, the law shall prevail. All equities are equal, without regard to priority of time, or this maxim would be unmeaning. The inequality proceeds from fraud or culpable laches; and to deprive a subsequent locator, with the legal title, of the benefit

of this rule, it must appear that
476 *he was guilty of some act or laches, which made it unconscionable in him to insist upon his title.

Applying these principles to the case of a prior locator, contended with a subsequent one, having the legal title, if the latter had notice of the prior equity of the former, before he obtained his patent, he would be guilty of a fraud, if he proceeded; as in the case of a purchaser with notice of an unregistered deed. *Le Neve v. Le Neve*, 3 Atk. 646. Upon these principles it was held, that the prior entry being considered as a record, and the subsequent locator having notice of it, or if he had not, his ignorance proceeded from culpable

negligence, his equity becomes inferior to that of his competitor; he loses the advantage of his legal title, and the prior equity will prevail.

In the very next case reported, *Taylor, &c. v. Brown*, 5 Cranch, 234, the Court asserted a still broader principle. Both parties claimed under military warrants issued under the proclamation of 1763. The law in respect to that class of claims, does not appear, at that time, to have required locations previous to survey. The plaintiff's warrant was surveyed July 7, 1774, and his patent issued in 1792. The defendant's survey was made June 24, 1775, and his patent issued in 1780. The Court decided in favor of the plaintiff, declaring that if the plaintiff's survey came within the law, (as it did,) the circumstance that the subsequent survey was made without notice in fact, cannot alter the case. His warrant only authorised him to acquire vacant land, and he took upon himself to find lands of that description. The principle of caveat emptor is strictly applicable. The principle upon which relief is granted, is, that the patent, which is the consummation of the title, relates to the inception of title; and therefore, in a Court of Equity, the person who has first appropriated the land has the best title, unless his equity is impaired by the circumstances of the case. The Court repeats, "In this case, the first patentee is said to be a purchaser without notice. His warrant authorises him to survey waste and unappropriated
477 lands; *and he undertakes to find land of that description. The Government acts entirely on his information; and the terms of his grant were, that the lands were waste and unappropriated. It is not for him to say that he had misinformed the Government, and had surveyed appropriated, instead of vacant land, and thereby entitled himself to be considered as a purchaser without notice."

Two cases are reported in 7th Wheaton, *Miller v. Kerr*, page 1, and *Hoofnagle v. Anderson*, page 212, which illustrate these opinions of the Supreme Court. In the first case, the plaintiff claimed under a military warrant, by mistake of the Register, stated to be for services in the Continental line, when in fact, the Executive had directed the warrant to issue for services in the State line. A part of this warrant was located in Ohio, when it was lawful to locate warrants for service in the Continental line, but not in the State line. The entry was on the 16th of June, 1795; the survey, on the 30th of October, 1796; and the patent, in February, 1808. The defendant entered a warrant on the same land in 1806, and got his patent in 1807. The defendant, having the legal title, prevailed, on account of the mistake of the plaintiff's warrant.

In the other case, a part of the same warrant was entered in Ohio on the 16th of October, 1790, surveyed on the 30th of October, 1796, and the patent issued October 9th, 1804. The defendant was entitled under this patent. The plaintiff's entry was made on the 28th of May, 1806. The defendant succeeded.

The reasoning on which the judgment of

the Court was founded in this last case, and the principle asserted in *Bodley v. Taylor*, would, I think, have led them to decide in favor of the losing party in the first case, if he had had the legal title, instead of the other party. They state, that the mistake in the warrant was perfectly innocent; and that when it was issued, the mistake was perfectly immaterial. For, the party had the same rights as to quantity of land, and was entitled to locate it
478 in the same districts *of country, whether it were issued for services in the Continental or State lines. In that case, the party would have had a perfect equity with the legal title, which would have protected him, but was not sufficient to enable him to assail the legal title of another.

I cannot assent to the principles on which *Taylor v. Brown* was decided. The defendant there had the legal title and equal equity. He had neither actual nor constructive notice of the prior equity, nor was any laches imputed to him; and a Court of Equity, acting upon its ordinary principles, could not take away his legal right. The idea of the patent's having relation to the inception of the right, was entitled to no weight; for, the equitable right of the plaintiff was the same, whether he had obtained the patent or not, since the patent gave him no title. If the doctrine of relation could have any effect whatever, it would have overruled the patent of the defendant, and destroyed its effect. This doctrine of relation, was acted on in several cases by Chancellor Wythe, particularly in *Pickett v. Dowdall*. In that case, Judge Pendleton, in delivering the opinion of the Court, said, that the defendant had the legal title, and the law was in his favor; that relations were legal fictions to promote justice, not to work an injury to innocent persons; and the defendant had judgment. Nor, do I consider that the argument founded on the supposed obligation on the party to locate vacant land, would affect the party, if he was guilty of no fraud or negligence. Neither the warrant, nor the patent, specify the land as waste and unappropriated. The law directs that the owner of a warrant, wishing to locate any waste and unappropriated land, shall deliver it to the surveyor, &c. These terms meant unpatented land. The words unpatented, waste and unappropriated, and waste and unpatented, are used as synonymous throughout the statutes; particularly all of them are so used in the 1st section of the act of 1779, ch. 12. To the same purpose were used the terms unpossessed land in the act of
479 1705, ch. 22, sec. 6; and "not *before granted by patent," in the act of 1748, ch. 19, sec. 2. To these waste and unappropriated lands, adventurers might have legal rights or claims, which are noticed in many parts of the statutes. Thus, in respect to actual settlers, it is provided, that all persons who, before the 1st of January, 1778, have really and bona fide settled themselves, &c. upon any waste and unappropriated lands, to which no other person hath any legal title or claim, shall be entitled to 400 acres, &c. If the stat-

ute had not excepted such waste and unappropriated lands as others had a legal claim to the settlement-right would have superseded a prior right founded on warrants. The case of *Jones v. Williams*, 1 Wash. 230, cited by the counsel in *Taylor v. Brown*, was a case between a settler claiming under this clause of the statute upon a settlement before 1775, and another claiming under a military warrant located in 1775. The judgment was for the latter; the statute only giving preference to settlement-rights upon waste and unappropriated lands, when no person had a legal claim to it at the passing of the law in 1779; the Court in effect declaring, that this, although waste and unappropriated land, was not such waste and unappropriated land, as was subject to the claim of a settler, under that act. The direction to locate treasury warrants on waste and unappropriated land, does not except that to which another has a legal claim, if it be not a legal title by patent. The party locates at his peril, so far as that if he innocently interferes with the prior right of another, it is at the peril of being intercepted, in procuring his patent, by a caveat, or, if fraudulently, of being corrected by a Court of Equity, even after he has obtained his patent. But, if he obtains his patent without actual fraud, he will be entitled to all the benefits of having the advantage of the legal title, which are sanctioned by the general principles of a Court of Equity.

Upon examining all the cases decided in the Court of Appeals which are reported, and which touch these questions, 480 *I do not think that the proposition said in *Bodley v. Taylor*, to have been decided in Virginia, whilst Kentucky was a part of the State, that an entry was a notice to a subsequent locator, which tainted his legal title founded upon a prior patent, with fraud, was ever so decided in this Court. The only case, which seems at first view to have established that proposition, is that of *Johnson v. Buffington*, 2 Wash. 116, which, as reported, seems to justify the proposition above stated. But, upon an examination of the original record, it will be found, that this report is entirely erroneous; and that the subsequent locator, who procured the first patent, had actual notice, and was guilty of gross fraud. The examination of these reported cases, will, I think, shew, that neither this proposition, nor those laid down in *Taylor v. Brown*, in respect to the doctrine that the patent relates to the entry as the inception of the title, and that an entry made upon land not patented, is invalid, if it had been previously located by another, are supported by any decision of this Court.

In *Wilcox v. Calloway*, 1 Wash. 38, Wilcox was entitled to the land by patent in 1764. Cox petitioned for the land as lapsed, in December, 1767. Pending this petition, Wilcox sold to Donaldson in 1768. In June, 1772, the petition was tried, and Donaldson was offered as a witness to prove, that the quit-rents, (the non-payment of which was the cause alleged why the land was forfeited,) had been paid. He was rejected on the score of interest. The fact could have been proved by others; and

the defence had been left to Donaldson. Cox had judgment. But, before he took out his patent, he assigned his right to Donaldson, who took out his patent in 1774. But in 1773, Cox not having taken out his patent, Wilcox caveated him for this cause, and recovered a judgment, and took out his patent in 1783. In the meantime, and pending the last caveat, Donaldson sold and conveyed to Calloway, the defendant. The Court declared that Calloway had the legal title: that the Court, if

Donaldson alone had been defendant, 481 *would have had jurisdiction to vacate the patent to Donaldson as surreptitiously obtained, and to relieve against the judgment of forfeiture in 1772; Wilcox having a good defence, which was lost by mistake. But, Calloway being a bona fide purchaser without notice, the bill was dismissed. Here fraud and mistake would have given jurisdiction against the party to the fraud, but did not avail against a bona fide purchaser.

In *Jones v. Williams & Tomlinson*, before mentioned, the plaintiff had filed a caveat, which was dismissed in consequence of an accidental miscarriage of the subpoenas for witnesses. On this ground, the Court examined the merits as the General Court would have done upon a caveat, and dismissed the bill; the defendant having the legal right and prior equity.

In *Reid v. Burnside*, 2 Wash. 43, the plaintiff prosecuted a caveat, and obtained a judgment. The defendant enjoined the issuing of the patent; and pending this suit, obtained a patent. Both claimed under settlement-rights; and the plaintiff, having the oldest right, succeeded in Chancery. This was the case of an actual fraud.

Johnson v. Buffington, 2 Wash. 116. On the 25th of March, 1753, Peter Peters procured a warrant to survey 300 acres of land described in the warrant. The survey was made on the 28th of April, 1753, in the name of Frederic Vinegard, by order of Peters. On the 1st of September, 1790, Jacob Unrod, the heir of Frederic Unrod, called in the survey Vinegard, sold all his right to this land to Buffington the plaintiff, who obtained a grant the 26th day of April, 1791. Subsequent to 1783, Johnson, the defendant, under a treasury warrant, located 219 acres, and got a patent November 4th, 1789. Buffington, who was in the possession of the land, charged in his bill the facts above stated, and that Johnson had, before he got his patent, full knowledge of the rights of Jacob Unrod, and actually contracted with an agent of Unrod's for the purchase of it; and it is fully proved, that in 1787, he did

482 *make such a contract, and that there was an old settlement on the land in 1790: that Unrod's widow, and her second husband, lived on the land after Unrod's death; and about the year 1780, sold her dower interest in the land to a purchaser, who lived upon it. It was, therefore, a case of full notice and actual fraud, on the part of the defendant; and the plaintiff succeeded. No reason is assigned why a caveat was not filed by the plaintiff.

This statement is taken from the original record. The report of the case omits

to state the charges in the bill of actual notice and fraud, supported by full proofs. This case, reported without attention to these facts, has probably aided much in establishing the rules prevailing in Kentucky, and involving their land titles in such ruinous confusion. In this case, the counsel for the plaintiff admitted, that where the equity was equal, and one of the parties had the law also on his side, he shall prevail; but if the legal title has been obtained by fraud, or by taking advantage of one labouring under a disability, he will not have the benefit of the advantage. The ground upon which the defendant's counsel mainly relied, was, that the plaintiff's claim was forfeited by a non-compliance with the rules of Lord Fairfax's office, and that the defendant's entry was therefore valid. The Court decided, that under the acts of Assembly particularly relating to the Northern Neck, the prior survey continued to be good; and that only was intended to be asserted by the expressions, that it could not be re-granted by the Commonwealth; that it could not be considered as unappropriated, and consequently subject to be granted under the act of 1785; and that the land was legally appropriated by Lord Fairfax, and consequently could not, under the act of 1785, be granted to any other person. The patent to Johnson was admitted to pass the legal title, which could not have been its effect, if the land could not be granted by the Commonwealth.

483 *In *Pickett v. Dowdall*, 22 Wash. 106, the plaintiff claimed under a warrant in 1741, and a grant in 1788; the defendants, under a warrant of 1762, and a grant from Lord Fairfax in 1780, and under a warrant of 1779, and a grant in 1780. The plaintiff's bill was dismissed, on the ground of his laches, and that his rights had been forfeited, and Lord Fairfax had availed himself of the forfeiture, by granting the land to the other parties. The bill charged, that the defendants had notice of his title before they made their surveys, which the answers denied. The Reporter says, there was no proof of the fact. The Chancellor affirms, in his decree, that they had notice before their grants were obtained, and the Court of Appeals say, "It is unnecessary to enquire if the Picketts had notice of Crop's title; since, if they had, it could not have affected them, unless Dowdall (who claimed under Crop) had been prevented by fraud from obtaining a legal title.

In *Currie v. Burns*, 3 Call, 183, the plaintiff had the eldest survey and youngest patent; the defendant, the youngest survey and eldest patent. The lands were in the Northern Neck; and the plaintiff, having forfeited his right according to the rules of the office, Lord Fairfax had availed himself of the forfeiture, by granting to another; and the Court refused to relieve against the forfeiture, on account of the plaintiff's laches. In this case, no caveat could have been filed. The only remedy, if the plaintiff had right, was in Chancery.

Hunter v. Hall, 1 Call, 206. Hall had the prior survey, and Hunter one subsequent.

Hunter caveated Hall. No judgment was pronounced on the caveat; but Hunter dismissed it, and took out a patent. Hall filed his bill, on the ground of this fraud. The Court held, that the caveat not being dismissed on its merits, did not preclude Hunter's taking out his patent, and that Hall's survey was not warranted by his entry; and dismissed the bill.

White v. Jones, 1 Wash. 116. Plaintiff claimed under entry of 1740, and patent of 1764; defendant, under entry 484 *of 1743, and patent before 1764.

The bill charged, that defendant had obtained his patent by a fraudulent collusion with the officers of the government, in procuring his patent. The Chancellor dismissed the bill, on the ground, that if the patent was surreptitiously obtained, it was void at law, and the interposition of a Court of Equity was unnecessary. The decree was affirmed, upon the ground, that the plaintiff had not proved the fraud alleged. But, the Court declared, "the plaintiff has stated a very fair and proper case for a Court of Equity. He was a purchaser, against whom the defendant unfairly and fraudulently obtained a preference; and in questions like this, when fraud is suggested and proved, Courts of Equity have competent jurisdiction, and can afford the most ample and adequate relief. But, in this case, the plaintiff has failed to support the charge of fraud." The bill assigned no reason why a caveat was not filed. The effect of this case is, that in cases of actual fraud, a Court of Equity has jurisdiction, when there was no reason for failing to file a caveat, and will relieve; but will not relieve against a legal title without actual fraud, (the defendant pleaded that he had no notice,) in favor of a prior equity; and that an entry and survey is not such a notice to a subsequent locator, as of itself to affect his conscience, and deprive him of the advantage of his legal title, in a Court of Equity.

Johnson v. Brown, 3 Call, 259. The plaintiff claimed under a prior entry; the defendant, under a prior grant. The Court said, "We first consider the case on general principles, as a claim to set up an equitable interest, in opposition to a legal title; in which case, the plaintiff, to succeed, must shew a superiority of equity to the defendant; for, if it be equal only, the law must prevail.

"Brown appears to have proceeded regularly, fairly, and legally, to acquire a title to vacant lands; and has, without fraud, obtained a patent. Johnson, on the other hand, appears to be a man searching 485 for defects in his neighbours' "land-titles, hunting up and purchasing a stale and dormant claim, in order to disturb that title, &c.

"But let us suppose that Johnson had such an equity as would, upon a caveat prior to the grant, have entitled him to a preference. It would be no ground for a bill to set aside the patent, unless it had been suggested and proved that he was prevented by fraud or accident from prosecuting a caveat. On these grounds, this Court has sustained bills of this sort, and enquired into the equitable preference, as if

on a caveat. But, to admit such bills in all cases, without even suggesting an excuse for not having entered a caveat, would be to transfer the whole caveating business from the Courts of Law, where the Legislature have placed it, into the Chancery, which this Court cannot sanction. It was foreseen by the Legislature, that there would be interfering entries and surveys; and the caveat was the remedy for settling all those disputes, prior to the patent." The Court also declared, that an entry, although declared by statute to stand good until the surveyor gave notice of the survey, was only the first legal step towards acquiring waste lands, and gives the person making it, (not an absolute legal right, but) if properly pursued, a preference to a grant. This was the unanimous judgment of the Court.

Depew v. Howard and Wife, 1 Munf. 293. The plaintiff claimed under a prior entry and later patent. The bill charges that the defendant had notice of his prior entry, and fraudulently procured a survey, which had never been actually made, to be returned, and got a patent. But, before the patent issued, he filed a caveat, which was dismissed, "either because he could not attend to it, the smallpox being then at the Courthouse, or because the Howards resided out of the State, so that no summons could be served upon them." The bill was dismissed; the plaintiff having elected his remedy by caveat, and not having been prevented from pursuing it, by any fraud, accident, or mistake. I presume if he had not filed his caveat, or had
486 *been prevented by his ignorance of the fraud, he might have claimed the aid of the Court of Equity, upon the ground of actual fraud, according to the principles of the former decisions. But he elected a remedy which was adequate, and lost it by his own default.

Then came the case of *Noland v. Cromwell*, 4 Munf. 155, before referred to. The literal terms of the opinions of the majority of the Court in that case, seem to preclude a party from resorting to a Court of Equity in a case of actual fraud, unless it was such an one as prevented his resort to, or could not be tried in, a caveat. Most, if not all, possible frauds, might be tried in the Caveat Court, which proceeds upon equitable principles, before a patent issues to either party. If this was the intention of the Court, it contradicted many of the former cases, particularly *White v. Jones*. I do not think the Court had in their mind a case of actual fraud, in procuring the prior patent. Their expressions are general, and lay down a general rule, which might well be liable to an exception of the case of actual fraud; and in subsequent cases, the same Judges have given relief upon the ground of actual fraud, when the filing or prosecuting of a caveat was not prevented by fraud, accident or mistake. As in the case of *Preston v. McKinney* (not reported) in which the same Judges, except *Fleming* and *Coalter*, gave relief upon the ground of the actual fraud of a surveyor in locating land in the name of his infant son, he having had actual notice that it was previously located by another,

and getting a prior patent, without any fraud, accident or mistake, preventing a caveat. The patent unquestionably conveyed the legal title.

Christian v. Christian, 6 Munf. 541. In 1747 and 1753, the father of the plaintiff had entered and surveyed large bodies of land, which were never patented; but he and his devisees were in possession of them. He devised it to his four sons. The heirs of one of those sons, with actual and full knowledge of the facts, entered,
487 surveyed *and procured a patent for a part of the land. *Henry and Drury Bell* procured a patent for a part, and *John Booth and Thomas Staples* for a part. The plaintiff filed caveats against the patents to the heirs of the son, and *Booth and Staples*, which were dismissed for his failure to file a copy in the proper Court, within the time prescribed by law. The patents to the Bells had not been caveated; but one of them had purchased the land patented to him, from one of the devisees of the first locator. The Court held, that as to the heirs of the son and *Booth and Staples*, the principles of *Noland v. Cromwell*, did not apply, because the rights of the parties could not have been adjusted in the Court of Caveat, and gave relief as to them; but as to the Bells, as to whom the principles of *Noland v. Cromwell* applied, the bill was dismissed. All against whom relief was given, had been guilty of actual fraud; and those, against whom no relief was given, were guilty of no fraud. If the right of the parties to a partition, made the case unfit for a Court of Caveat, as to the parties against who relief was given, it had the same effect as to the Bells, one of whom was not a purchaser from any of the devisees. But this was no impediment to a caveat; especially against parties not entitled to come into partition, as were two against whom relief was given. The decree is to be supported upon the ground of actual fraud only.

The last case I shall mention, is that of *Lyne v. Jackson*, 1 Rand. 114. The plaintiff placed treasury warrants in the hands of the defendants to locate and survey for him; and for this service, he was to convey to him, as soon as the patents issued, a moiety of the land, and each party was to bear one half of the expense. The defendant forged an assignment of the warrants to himself, and located and surveyed them in his own name. Before any patent was issued, the plaintiff filed his bill to enjoin the issuing of them, and the sale of the surveys. He does not state that he could not prove without a discovery, the facts
488 alleged in his bill; but on the contrary, proves them by *witnesses.

Pending the suit, another located and surveyed the land; and he was made a defendant by a supplemental bill. The Chancellor dismissed the bills; no doubt, upon the authority of *Noland v. Cromwell*, as he understood that case; the plaintiff having an unquestionable remedy by caveat against all the defendants, and to the prosecution of which not the slightest impediment existed. This decree was reversed, and the Register directed to issue patents to the plaintiff to be by him held

liable to the claims of the original defendant, to be prosecuted in another suit. The Court was unanimous. There is no other possible ground upon which this decree could be founded, except that in cases of actual fraud, a Court of Equity has, upon its general principles, an original jurisdiction concurrent with that of a Court of Caveat, before a patent is issued, and after it is issued, even in cases where there was no impediment to a caveat.

Upon the best consideration which I can give to the statutes and those authorities, I conclude that all lands which had never been patented, unless particularly excepted by the acts of Assembly, are liable to location by any holder of a treasury warrant; that lands already located by one, may be located by other holders of warrants, and that these entries give to each locator an equitable right (not absolutely, but) upon pursuing his rights as the law prescribes, to claim a patent: that the one who first obtains a patent, has a complete legal title, of which he cannot be deprived, unless he has been guilty of an actual fraud in the acquisition of the legal title; or unless another party, who had made the prior valid entry, can shew that he has been prevented from asserting his prior right in the mode prescribed by law, (a caveat) by fraud, accident or mistake; in which cases, the Court of Equity will proceed upon the principles which would have governed the Court of Caveat, if a caveat had been filed in time, and the legal title would not avail the defendant, to any purpose; and that in the cases of actual

489 fraud, the party having such *prior right may resort to a Court of Equity for relief, upon its original principles, without alleging any excuse for not filing or prosecuting a caveat; a Court of Equity having an original concurrent jurisdiction with the Court of Caveat in case of actual fraud, before the patent is issued, and afterwards, an exclusive jurisdiction, founded on the original character of the Court. And that a Court of Equity has no jurisdiction, except in cases of actual fraud, and in which the party has lost the benefit of a caveat, by fraud, accident or mistake. By actual fraud I mean, the proceeding to procure a patent, after actual notice of a prior entry.

To recapitulate the effect of the cases cited; the case of *Lyne v. Jackson* affirms the concurrent jurisdiction of a Court of Equity, before the issuing of the patent, in a case of actual fraud. The jurisdiction of equity, after the issuing of the patent, in a case of actual fraud, is affirmed in the cases of *Wilcox v. Calloway*; *Reid v. Burnsides*, (in which cases the patents were issued pending a caveat by the other party;) in *Johnson v. Buffington*, and *White v. Jones*, (in which cases the jurisdiction was affirmed, although no caveat was filed, and no reason assigned for the failure;) and such were the cases of *Preston v. M'Kinney*, and *Christian v. Christian*. The cases of *White v. Jones*, and *Johnson v. Brown*, assert the doctrine, that equity will not relieve but upon the ground of actual fraud, against the patentee, unless the party has been deprived of the benefit of a caveat, by fraud,

accident or mistake. The cases of *Johnson v. Brown*; *Depew v. Howard*, and *Noland v. Cromwell*, whilst they declare in general terms that a party cannot resort to a Court of Equity, upon any ground which would have availed him in a caveat, unless he was prevented from prosecuting a caveat by fraud or accident, (and it might have been said by mistake, for that is a species of accident,) do not advert directly and in terms, to the case of actual fraud in procuring the legal title. This was, I

490 should think, rather an *exception to the general rule, overlooked by the Court in laying down the rule, than a case which they intended to embrace in the general rule, contrary to the prior decisions of the Court; which they would hardly have overruled intentionally, by laying down a general proposition, and not adverting to this particular case of fraud, or to the former decisions upon it; and the subsequent decisions on the same point, fortify this impression. Understanding *Noland v. Cromwell* thus, with an exception of the case of actual fraud, I think it was perfectly right, and in conformity with the former decisions of the Court, and the spirit of the statutes.

This seems to me to be the effect of the judicial decisions on these questions; and I think the same conclusions are dictated by the spirit of our land laws.

When the Commonwealth opened office for the disposition of all the unpatented land from the Alleghany mountains to the Mississippi, for the avowed purpose of increasing the population of the State, and of raising funds to meet the pressure of the revolutionary war, not only by the sale of, but by the revenue to be raised by taxing the land, the public had a deep interest, not only for the purpose of effecting these objects, but to prevent unbounded and ruinous litigation, in respect to the land titles acquired under that act, that all conflicting claims to unpatented lands should be promptly and finally adjusted. The individual adventurers had even a greater interest in a speedy decision of their claims. In that case, if they failed in their claim to any particular piece of land, their injury would be inconsiderable, as they might still acquire, with very little additional expense, the same quantity of land, equally valuable, or nearly so, in the vast range allowed for selection. But, if the decision of an adventurer's rights was protracted by tedious litigation in the ordinary Courts, and in the ordinary forms, and subject to the delays of appeals and writs of error, that opportunity of indemnifying himself would be

491 lost, in consequence of all the valuable land being in the *mean time occupied by others. To avoid these evils, the Legislature adopted a policy for expediting the decision of these questions, which had prevailed before the revolution, when the same motives for such a course existed, though not in the same degree. They allowed a person claiming a better right to unpatented land, to file a caveat, the effect of which was, to prevent the emanation of a grant, until the right could be determined. To enable him to pursue

this remedy, no patent could issue, until the survey had been six months in the Register's office. A copy of the caveat was required to be filed in the General Court, within three days after it was filed in the Register's office, or the caveat to be void. The defendant was to be summoned to the next Court, where the right was to be determined in a summary way, without pleadings; and no appeal or writ of error was allowed to the judgment. If the defendant succeeded, he was bound to take out his patent within three months, and the plaintiff succeeding, within six months; or any other might caveat them for that cause; and if the plaintiff succeeded, the defendant was entitled to a new warrant for the same quantity of land. By the act of October, 1784, ch. 12, the Register was required to pay to the defendant in that case, the fees which the successful plaintiff paid to him, upon taking out his patent; and by the act of May, 1783, ch. 39, the caveat was directed to be dismissed, if the summons was not returned, or was returned not executed, unless the Court was satisfied that the failure to execute the summons was not owing to the default of the caveator. All these provisions shew a strong anxiety on the part of the Legislature, to coerce the parties claiming, to assert their rights in the mode prescribed by law, with promptitude and vigilance, to take out the patent immediately, and to provide for the indemnity of the losing party as far as was possible. All these objects of expedition and indemnity would have been utterly lost, if the plaintiff was authorised to pursue his remedy in the Court of Equity, or in the Caveat Court, at his election, whenever he chose the
492 *former. The delay in that Court, and by appeals, would be necessarily great; and if the plaintiff succeeded, the defendant could not have been indemnified. For, besides that, all the valuable land might be pre-occupied, he would lose his warrant and the fees he had paid to the public, without redress; both of which would have been restored to him, upon a judgment against him by the Caveat Court; and the provision of the statute that the caveat should in certain cases be void, and in others dismissed, would be fruitless and idle.

In addition to these mischievous consequences, contrary to the spirit of the law, (which induce an opinion that the Legislature did not intend to leave a concurrent jurisdiction to a Court of Equity to give a party in all cases the benefit of his prior equitable claim,) the general principles of a Court of Equity forbid its taking jurisdiction, when the party has an adequate and simple remedy in another forum, with the exception of a few cases, in which it has an original and concurrent jurisdiction; of which description, are all cases of actual fraud.

I have considered it my duty to examine these principles, because of the manner in which this case, and that of Jackson v. M'Gavock,* (the latter particularly) was argued; and because it is understood, that

*See the next case.

the decision of Noland v. Cromwell was greatly disapproved of, and which is apparent from the decisions of the inferior Courts, and the acts of the Legislature of 1814 and 1819. These acts were probably passed under the impression that it had been decided, that even in a case of actual fraud, a Court of Equity could give no relief, unless the party had lost the benefit of a caveat by fraud, accident or mistake. The act of 1819 does not give the same remedy in equity, as the party might have had by a caveat; but only provides that the party might have such relief in equity as he might have had there, if no remedy by caveat had been provided.

493 "If, therefore, a party came into equity before a patent issued, both parties claiming equitable rights only, the prior equity would prevail; but, if he came after the patent issued, the acquisition of the legal title, if bona fide acquired, would give to the equity later in point of time, the advantage of having the law on its side; and the equity being equal, the law would prevail. This statute, therefore, whether prospective or retrospective, or both, seems to me to have no effect upon these questions; for, a party would now come into a Court of Equity, after failing to file his caveat, upon the same terms that he was entitled to, and bound by, before the statute.

Nor does it appear to me, that the act of 1814, re-enacted in 1819, providing for the repeal of letters patent, has any effect upon these questions. That only allows such repeal, at the instance of one having a subsisting equitable right to the land, at the time he sues out the scire facias, and commencing before the date of the patent; and the Court is directed to decide the case, as law and equity may require. The plaintiff would, therefore, be determined to have a subsisting equity or not, precisely upon the same grounds, as if he was prosecuting his right in his own name, under the act of 1819 aforesaid, after the patent had issued. Indeed, the object of both acts, being to vindicate only private rights, it would be absurd that these rights should vary as the party might think proper to pursue the one or the other of these remedies, in the name of the Commonwealth, or in his own name.

In the case at bar, there is no allegation by the plaintiff, that there was any fraud, accident or mistake, which prevented him from filing a caveat. But, on the contrary, he alleges that he intended to withdraw his entry, if he found that Moore's survey included it. He cannot, therefore, claim to set up his right in the Court of Chancery, upon the same principles as he could have done in the Caveat Court, even if he could do that in case he had been so prevented.

494 He can claim no relief against the legal title, unless "it be tainted with fraud. No fraud is charged. The mistake of the parties in respect to the boundary, is only relied upon as a proof of the actual boundary; and in truth, there was no fraud. The fact that the land was included in the survey, whether covered by the entries or not, was no fraud either upon the plaintiff or the Commonwealth. The

survey was made before the plaintiff made his entry; and it is not alleged that it included more land than the warrants and entries called for. If the river had run a straight course, or its bends had been westwardly instead of southwardly, the line would not have crossed the river, and there would have been no pretext for saying, that the survey covered land not covered by the entry. The mistake arose from the ignorance of the parties as to the real course of the river. All knew that this last line of the survey was a straight one, and not governed by the meanders of the river. The mistake was perfectly innocent and honest on all sides. If there was any negligence, it was imputable to both parties alike. Each had the same means to correct it, even if the surveyor had improperly refused a copy of the courses. The plat was in the Register's office, and a copy might have been had there. There was no greater moral or legal obligation on the one party than on the other, to ascertain the precise location of the line. If there was no fraud in making the survey as it was made, there was none in taking out the grant; as there was no change of circumstances, or in the state of the information, or rather ignorance, upon which the parties acted, which could have that effect.

Upon the whole, the decree should be reversed, the injunction dissolved, and the bill dismissed, but without costs.

JUDGE COALTER.

On a view of the answers, documents and depositions, it seems to be established that Moore, some time between 495 *1791 and 1794, embarked in the speculations of that day, in surveying and vending large tracts of land, and had made a contract with Morris and Nicholson of Philadelphia, to sell 100,000 acres in the northwestern parts of Greenbrier county, on the Meadow and Gauley rivers, lying on the south side of the latter. Whether he had made any conditional sale or not, before he began the locating, does not appear; but it is pretty clear, that such sale must have been made before the business of locating and surveying was closed; for, some dispute seems to have arisen, as it regarded the quality of the land, which seems to have been submitted to the opinion of certain arbitrators or viewers, who were called on for that purpose, and who examined the land early in the winter of 1794, and shortly after the last survey of 43,417 acres was made, as hereafter mentioned. According to this contract with Morris and Nicholson, the land was to lie on the south side of Gauley.

It also appears, that about the year 1791, the said Moore made a verbal agreement with M'Clung and Welch, the surveyor, to assist in procuring the land; each party to perform certain services, and to be equally interested in the proceeds of sale: that prior to August, 1793, M'Clung and Welch had made entries and surveys, in part compliance with this agreement, and which are enumerated in a written contract bearing date the 8th of August, 1793; the object of which seems merely intended to shew how far they had advanced with the business at that date, in order that Welch, who

had determined to do so, might withdraw from the partnership, and leave Moore and M'Clung to procure the residue of the land themselves. It was found, that at this time, entries and surveys had been made to the amount of 53,780 acres, or thereabouts, including 3,000 acres, a part of an entry of 17,562 acres, made 12th of January, 1792. These lands, I take it for granted, were then surveyed; and at all events, a 496 survey of 20,000 acres* of them, lying to the east of the 43,417 acres survey, hereafter mentioned, had been made.

It is admitted on all hands, that after the quantity of about 54,000 acres were located and surveyed, Welch withdrew; but, he was still entitled to one-third of 14,562 acres, the residue of the entry of 17,562 acres above-mentioned, when that should be surveyed.

In this posture of affairs, Moore and M'Clung agree to go on and locate the residue of the land, on certain terms, as will be seen by their agreement, which, I take it, was first verbal, but was reduced to writing on the 20th of September, 1794; in which it is stipulated particularly, that the lands shall lie along the south side of Gauley river, below Homminy creek, and joining the above claims and other prior claims, &c. M'Clung, it seems, applied to Welch to join him in this business, but he refused to be a partner, and M'Clung then agreed to give him, for his assistance, 4,000 acres out of his share of the land first above-mentioned.

But it is to be remembered, that at this time, the 14,562 acres above-mentioned was unsurveyed, and that that location was precisely within the bounds mentioned in this last contract. It joins the 20,000 acre survey, is to run down branches of Meadow river and Gauley river, so as to include the lands in the forks, and up the said Gauley river waters for quantity. It cannot be said, I think, that this entry was intended to cross the river; and if it did, it would be far below the land in dispute. Thus the contract to locate, and the contract of sale, both call for lands on the south side of the Gauley river; and it would have been in violation of each, to cross it.

The next entry is of the 6th of September, 1793, being the first one made under the new agreement between Moore and M'Clung, and is for 11,907 acres. This entry lies above Homminy creek, if it can be said to be any where; for, I have great doubts whether it can be considered sufficiently special. It calls to begin at a 497 corner of the *20,000 acre survey, and to pursue three lines to the third corner. These lines lie in the form of a half-moon, from A, in the plat, and do not cover half an inch of the plat. Lines are to be run parallel to these, so as to include the quantity; and so far from calling to go across the river, it is not even named; and if it did go across, I think, could not interfere with the land in dispute.

The next is the entry of 8,300 acres, made the 11th of February, 1794, and which lies along the river opposite the land in dispute, and is expressly bounded by the river. It is to run to it, then up it, and round for quantity. On this subject of entries on, or

joining, large rivers, (as this is charged in the bill to be,) without calling to cross them, I will refer to the case of *Hunter v. Hall*, 1 Call, 210, in order to shew the necessity of saying so in the entry, if it was intended to cross the river. The calls of the entries themselves, I think then, will not justify crossing the river; whilst the contracts for locating, and for sales of the land, and all the contemporaneous declarations and early acts of the parties, shew that it never was intended to cross the river. Of this there is abundant and most conclusive proof; and I consider it a clear case on this point, independent of other considerations hereafter to be mentioned. So that, had the surveyor closed the open line by running on the north side of the river, they could have been met there, with success, by a caveat, and defeated on a younger entry.

But, let us pursue the history of this business further. On the 9th, 10th, 11th, and 12th days of September, 1794, Welch proceeds to make a survey of 43,417 acres, beginning some distance from the river and running round, and again approaching the river; and from the last station, he calls to run to the beginning, supposing he had begun so far from the river, that the closing line would not cross it; and after this, to wit, on the 19th of September, 1794, Moore made two other entries within the bounds of this survey, one for 4,515 acres, and another for 10,000 acres;

498 *so that as to this quantity, the survey preceded the entries. Neither of these entries cross the river; and if one of them would, it would be still further down the river from the land in dispute, than either of the others. Welch is admitted to have been interested in this survey as far as one third of 14,562 acres aforesaid. This is admitted in Moore's answer, and in his deed to M'Clung the interest of Welch is reserved; and as late as the year 1807, in the agreement for the sale of some land on the north side of the river to Mrs. Wilson, the sale is stated to have been made by Moore, M'Clung and Welch, and that the bonds for the purchase money were taken to them; and although he disclaimed any right to go on that side of the river, he was nevertheless interested in the survey.

Soon after this survey was made, to wit: late in the fall, or in the early part of the winter 1794-5, one James came on from Philadelphia, as an agent or referee on behalf of Morris and Nicholson, and insisted with Patterson and Renwick to explore the land, and see if it was equal to the description given of it. M'Clung attended them part of the time, and Welch, the surveyor and partner, made the survey. They ran round the land as Patterson says, I presume, by running the exterior boundaries; and when they came to the lowest corner of the 43,417 acre survey, and proceeded on the course of the closing line, they struck the river. It was high, and they could not cross; and they then closed the survey, by meandering the south margin of the river. This is clearly proved by several witnesses; and it is also proved, that though M'Clung had left them, he was informed that it was so closed; but that the closing line, had it

been run straight, would have crossed the river. Where or how it would run on the other side, was not then known; nor was it known, until it was closed in 1807, when the surveyor and all the parties were much surprised to see how it ran, and how much land it took in on that side. An inclusive survey having thus in fact been made,

it very naturally occurred to the 499 *parties, that it would save trouble, and perhaps be more in the spirit of their contract with Morris and Nicholson, to get an order of Court for an inclusive survey, which was procured on the 28th of April, 1795, and without further survey, I presume; for, we hear of no other being made. An inclusive survey is recorded in the surveyor's office on the — day of May, 1795; a copy of which is in the record. This survey is bounded by the Gauley river. It is admitted by Moore, that he made a deed to Morris and Nicholson; but when, or whether according to this survey, we are not informed; and when the contract was cancelled with them, we know not. It seems to have been put an end to, however, some how or other. I suppose Morris was unable to pay, and this land was taken back.

In this posture of affairs, or rather on the 20th of January, 1795, the appellees, supposing the Gauley river was the line between Greenbrier and Kanawha, make their entry with the surveyor of Kanawha, on the north side of the river, for the lands in dispute. This opinion, which must have been a general one in the country, that the river was the line, is another fact to shew that Moore, who entered in Greenbrier, could not have intended to take land in Kanawha. This is nearly about the time when the land was explored and surveyed as aforesaid; and consequently we find, that soon after they made their entry, it was rumoured that possibly M'Clung and Moore's survey would cross the river by the closing line; and they sent to Welch the surveyor, to enquire if it did cross the river, and to get the courses of the survey. He sent them word that the survey did not cross the river, and they might go on and survey the lands, &c. How were the appellees to know, had they got the courses, that they would cross the river, when the surveyor himself did not know it, until he came to try the closing line, and struck the river; and years after, when he ran it out, was utterly astonished to find how it ran? M'Clung also, after this, and before 1807,

(but at what precise time does not 500 appear; *though it is charged in the bill to have been in 1803, or 1804,) sent the appellees word to make a ferry-boat, stables, cabins, &c. for the accommodation of travellers, so as to draw custom, and induce settlers in the wilderness on his lands, &c.; thus clearly recognizing their rights, and inducing them to lay out their money. All this is charged in the bill; which M'Clung admits, but says he sent them word, that if the land turned out to be his, he would pay them for the improvements. But this, so far from being proved, is disproved. In short, no claim is ever pretended to this land, until 1807, twelve or thirteen years after the transac-

tions aforesaid; when, on going to close the line on the north side, it is found that it embraces a larger tract of country, now become valuable. Welch, however, well knowing there was no justice in the claim, positively refused to have anything to do with it, or to join in the sales to the innocent holders of these lands, saying he would take his share elsewhere.

But again. On examining the entries on which this survey of 43,417 acres is said to have been made, I was struck with some marginal notes, and have been led to examine the patent for that tract, and compare the warrants returned with it, with those mentioned in the entries, and find that several warrants in the entries are not mentioned in the survey, and that others are mentioned in the survey, which are not in the entries; which shews a shifting of warrants not sanctioned by law. Thus in the 17,562 acre entry, 500 acres are said to be by warrant No. 25; 500 by warrant No. 2, and 6,759 by warrant No. 12,227; in all, 7,759 acres. None of these are mentioned in the patent. But, 3,000 acres of this entry had before been surveyed, which, deducted from the 7,759 acres above, would leave 4,759 acres of this entry, without warrants. And so of the entry of 8,300 acres; 2,000 acres are by warrant No. 9,880, and 500 acres, by warrant No. 6,515. These are not named in the patent; which, added to the above, make 7,259 acres. But,

the patent mentions warrants not in any *of the entries; as for instance, No. 7,720; 65,513; 9,889. These may be enough to cover the 7,259 acres above, and it may be that no actual fraud has ultimately been practiced on the public. But, surely such shifting ought not to be countenanced; especially, when the parties had interested the surveyor with them in the surveys. These warrants may have been withdrawn, and probably were, and applied elsewhere; whilst the ostensible entry kept these lands covered, until other warrants could be procured. Such matter, coming out on a caveat, would have its due influence; and why some regard ought not to be paid to it here, I cannot at present see.

But again. Memoranda are made in the margins of the entry-book opposite the entries. Thus, opposite that of 17,562 acres, it is stated "14,562 surveyed and included in a survey of 43,417." Opposite the 8,300 acre entry, is this note. "Surveyed in survey of 43,417. This entry removed on account of an inclusive survey." This must be the inclusive survey noticed above; in which it is stated, that it is made by such and such surveys, and by part of a survey of 43,417 acres, and the last part of this marginal note was made after that inclusive survey. It will be found too, that the other surveys amounted nominally to 47,557 acres. Deducting the 8,300 acre entry from the survey of 43,417 acres, leaves say 35,117; making in all 82,674. But when the inclusive survey as actually made, it turns out to contain 100,230 acres, or 17,556 acres of surplus land beyond warrants.

This entry of 8,300 acres was withdrawn then, in consequence of that inclusive survey, and some of the warrants at least,

otherwise appropriated. How came it to be re-instated? It was withdrawn, I presume, as a counterpoise to what was thrown off on the north side, by confining the survey to the river. It was, however, withdrawn, as appears by the surveyor's books, on account of an inclusive survey.

How comes it, that the party now
502 *claims this very land in dispute, by it; for, it is the very entry that lies nearest the land?

In fact, this is the only entry that can touch the land in controversy. The surveyor, being interested, had it in his power to smooth over all these matters. But, they appear on the face of the appellant's title papers; and though they are not charged in the bill, but have thus come out by his own exhibits, they are well calculated, I think, to induce a Court to look with no favouring eye on large speculating grants of this kind; especially, where so unjustifiable an attempt is made to use them, against the innocent and fair purchasers and improvers of the soil; and who have made their purchase and improvements with the knowledge and approbation of those now seeking to disturb them. It seems to me, that these acts of encouragement to the appellees to acquire the land, and spend their time and labour in improving it, are enough, of themselves, on the general principles of a Court of Equity, to protect them.

But, if there is any doubt as to this, surely all the circumstances combined are enough to take this case out of that of *Noland v. Cromwell*. The security into which they were lulled, is surely excuse enough for not filing a caveat. I must content myself, however, with referring to my opinion in the case of *Jackson v. M'Gavock* (now also under consideration) for a further illustration of this point; believing that on every ground there taken in relation to the caveat question, this is stronger than that case.

But, how it can be taken out of the general doctrine of one standing by, and even encouraging another to lay out his labour, time and money, in acquiring and improving land, and then claiming it, I cannot see.

On the whole, I think the decree ought to be affirmed.

JUDGE CABELL.

This was a case in which Hughes, a subsequent patentee, went into a Court of

Equity, seeking to be relieved,
503 *on the ground of superior equity, against a prior patent to Moore, under whom M'Clung claimed. The Chancellor granted the relief prayed; and an appeal was taken from his decision.

It is contended, for the appellant, that the decree is erroneous, because the relief which it grants, is founded solely on grounds, of which the plaintiff in the Court below, might have availed himself on the trial of a Caveat; and that, according to the principles settled by this Court, in the case of *Noland v. Cromwell*, 4 Munf. 155, it is not competent to a Court of Chancery to grant relief on such grounds, unless the party had shewn that he was prevented from filing a caveat, by fraud or accident;

which, it is said, was not the case in this instance.

A majority of this Court are not disposed to question the propriety of the decision in *Noland v. Cromwell*; but doubts having been entertained as to the extent of that decision, it becomes necessary to ascertain the principles which it really settles. This is to be done by an examination of the opinions of the Judges, which were delivered seriatim. And in making this examination, it will be useful to determine, in the first place, what is universally admitted to have been settled by *Noland v. Cromwell*, and then, what it is that is doubtful, or, as to which, a difference of opinion still exists.

The great contest, in the case of *Noland v. Cromwell*, was whether, in all cases where the question between the parties was as to the equitable right to the patent, it was not as competent to go into a Court of Equity to settle that question, after the patent had issued, as it would have been to go into a Court of Caveat for a settlement of it, before the patent had issued; and that, without assigning any reason for not having filed a caveat. Or, in other words, whether on all questions of this sort, a Court of Chancery had not, after a patent, on current jurisdiction with the Court of Caveat, before the patent. Judge Coalter

supported the affirmative of the proposition. But, on *this point, all the other Judges were of a different opinion. All the other Judges were of opinion, that the general rule was that, after a patent had issued, it was not competent to go into a Court of Equity to set it aside, unless the party assigned a good reason for not having filed a caveat. This general rule, may, therefore, be considered as indisputably established.

But, all the Judges who were of opinion that this was the general rule, admitted that there were exceptions to it; that there were some cases in which a Court of Equity would have jurisdiction, after the patent had issued, although no excuse should be suggested or proved for the failure to file a caveat.

The only question, therefore, as to the extent of the decision in *Noland v. Cromwell*, is as to the exceptions to the general rule established by that case.

A reference to my opinion will show that I thought the case of fraud was an exception; because, fraud constitutes one of the ancient, established and most essential grounds of equitable jurisdiction; and consequently, that in all cases where the acquisition of the patent was tainted with fraud, the Court of Chancery might set it aside, although no reason should be assigned for not having filed a caveat.

To guard against any doubt or misapprehension as to the kind of fraud, which, in my opinion, constitutes an exception to the general rule, so as to authorise a Court of Equity to interfere where no reason is assigned for the failure to file a caveat, I think it proper to state, that I do not mean mere constructive fraud from the implied notice of the entry or location being a matter of record. That would be to destroy the general rule entirely, by giving to the

Court of Equity concurrent jurisdiction in all cases whatever, since all our titles to land are founded on entries or locations. I mean actual fraud; such as proceeding to procure a patent after actual notice of another's prior entry, or equitable right.

505 "The other three Judges delivered a joint opinion: and the doubts on the subject arise from the broad expressions used by them, without any express qualification or exception. They say, "the point seems to be, as thus established, that although a party may be let into a Court of Equity, on grounds which he could not have used on the trial of a caveat; and which, in fact, make another case; (in reference to that which he might have availed himself of no such trial;) or, upon a case suggesting and proving that he was prevented by fraud or accident, from prosecuting a caveat; he is not to be sustained in the Court of Equity, on such grounds as were or might have been brought forward on the trial of the caveat." These expressions are so general that, construed literally, they would exclude from the jurisdiction of a Court of Equity, even actual fraud, unless a proper reason were assigned for not filing a caveat. Could the Judges have so intended? I presume not; because it would be to take from the Court of Equity one of its ancient and established grounds of jurisdiction; because, it would be in opposition to former express decisions of the Court upon the very point; *White v. Jones*, 1 Wash. 116; and because the same Judges, or at least two of them, in the subsequent cases of *Preston v. M'Kinney*, and *Christian v. Christian*, granted relief in cases of actual fraud, although no reason was assigned for not having filed a caveat.

I am, therefore, of opinion, that all the Judges who laid down the general rule in the case of *Noland v. Cromwell*, intended that actual fraud should constitute an exception to it; and, consequently, that according to the true construction of that case, a party wishing to set aside a patent, may go into a Court of Chancery for that purpose, without assigning any reason for not having filed a caveat, in all cases where the acquisition of the patent is tainted with actual fraud.

It remains to apply this principle to this case.

506 "The entries under which M'Clung claims, are prior to that by which Hughes claims the land in controversy. Those entries shew by their terms that they were made on the south of Gauley river. The surveyor's certificate of survey recorded in his office, and transmitted to the Register's office, states, that the land embraced by it lies on the south side of Gauley river. The survey began at a point on the south side of the river, and a considerable distance, several hundred poles from it. From that point it ran southerly, a great distance; then westerly, nearly parallel to the general course of the river, and then northerly to the top of Gauley river ridge, without stating how far from the river, but certainly on the south side of the river. From this point the survey calls for a straight course to the beginning. Gauley

river is a large river, certainly one of the largest in that part of the State. There is no mention made of the river in the survey, except that it describes the land as lying on the south side; and except that the last corner, is stated, as aforesaid, to be on the top of Gauley river ridge. The closing line, from this last corner to the beginning, was not actually run and marked, as the law requires, but was laid down by protraction. It was, however, a straight line; and although it was fifteen miles long, yet as the point from which it was to begin, was on the south side, and as the point at which it was to end, was several hundred poles from the river, on the same side, no idea was entertained, by any body, not even by the surveyor, that it would ever touch, much less, that it would cross the river. This is abundantly proved in the cause; for, it appears that even the surveyor, when he discovered, some time after, that it crossed the river, was greatly "astonished." It is evident from all these circumstances, that neither Moore nor M'Clung intended, by their entries, to cover land on the north side of the river; nor did they intend that their survey should cross the river and take lands on the north side. And although the closing line of the survey does in fact, according to its

507 *course, cross the river and embrace the land in controversy, yet the failure actually to run and to mark that line, (as it was their duty, according to law, to do) prevented a discovery of the fact, that the course of the line would lead them across the river, and thus left all others in the just and reasonable belief that the lands, on the north side of the river, were open to any adventurer. It was after the survey of Moore and M'Clung, was thus made, and under these circumstances, that Hughes made his location on the land in controversy; and some time after he had made the location, he was encouraged by a message from M'Clung, not only to go on and perfect his title, but to lay out his money in improving the land, establishing a ferry, building houses, &c. which, as M'Clung said, would accommodate travellers, and promote emigration; and thus encouraged the settlement, and increase the value of the neighbouring lands; much, if not most of which belonged to M'Clung. Under such circumstances, I think it was actual fraud in M'Clung, to attempt to avail himself of his legal title for defeating the rights of Hughes; especially if Hughes has lost the opportunity of vesting his money advantageously in other vacant lands, which is probably the fact. And this fraud requires that his patent should be vacated.

This view of the subject renders it unnecessary to enquire whether Hughes has shewn an excuse for not having filed a caveat. But, if it were necessary that he should do so, I am clearly of opinion that he has shewn a sufficient one.

In speaking of the excuse for not filing a caveat, the Judges, in the case of Noland v. Cromwell, say that the party must shew that he was prevented by fraud or accident. The real question in Noland v. Cromwell, was, whether the party should

be allowed to go into a Court of Equity, without an excuse; not what was a sufficient excuse. The words fraud and accident, were, therefore, used only as examples, and not as being the only grounds *of excuse. I am clearly of opinion, that mistake would be as just a ground of excuse, as the two circumstances that were mentioned as examples.

In this case, the mistake under which Hughes laboured, that the lands in controversy were not embraced by the survey of Moore and M'Clung, a mistake produced by the acts and improper omissions of M'Clung, (viz: the calls of the entries and of the survey for the south side of the river only, the omission to run and to mark the closing line, and above all, the message of M'Clung to Hughes,) sufficiently accounts for his failure to file a caveat. How should it be required of him to file a caveat to prevent Moore and M'Clung from getting a patent for his land, when Moore and M'Clung, themselves, neither knew, expected, nor intended, that their patent would or should touch his land? To this might be added the information received by Hughes from Welch, the surveyor who made the survey. I put out of view the fact of Welch being interested in the survey, and regard him only as surveyor. He was applied to by Hughes for a copy of the courses of the survey, for the purpose of ascertaining whether the survey embraced his entry, in order that if it did, he might withdraw his entry, lift his warrant and locate it elsewhere; which he might, very probably, have done advantageously, at that time. Welch sent him word that he would not take his money by unnecessarily copying the courses; for, that the survey did not cross the river. Now, although I do not rely on this declaration of Welch as fixing fraud on Moore and M'Clung, yet I do rely on it as shewing that Hughes laboured under such a mistake as ought to excuse him for not having filed a caveat. When neither the calls of the entries, nor of the survey, were calculated to excite the least suspicion that the survey had crossed the river, the direct and positive information of the surveyor, that the survey did not cross the river to that side on which the lands in controversy lie, affords a sufficient excuse,

on the ground of mistake, for failing to file a caveat. I will *go farther and say, that if there had been no message from M'Clung or Welch, to Hughes; if there had been nothing but the entries and the survey, even they are so expressed as to be calculated to produce a belief that they would not touch any land on the north side of the river; and this would have been a sufficient excuse for not filing a caveat. When the description which the party himself makes in the entry, and the description which a sworn officer makes in the survey, leads necessarily to the belief that the land lies on the south side of a river, there is no obligation on a party wishing to locate lands on the north side, to trace the lines actually run, for the purpose of satisfying himself that they do not take in lands on the north side; and much less would there be an obligation on him to be

at the expense of employing a surveyor to run lines mentioned in a survey, but neither actually run nor marked.

I am for affirming the decree.

Jackson v. M'Gavock.

June, 1827.

Equitable Relief—Failure to Prosecute Caveat. *—In this case, and the preceding, the doctrine in the case of *Noland v. Cromwell*, was re-viewed. See the result in the note to the preceding case.

This was an appeal from the Wythe Chancery Court, where David M'Gavock filed a bill against Thomas Jackson. The whole subject is so fully unfolded in the following opinions, that it is only necessary to refer to them.

Wickham, for the appellant.

Johnson, for the appellee.

510 *June 14. The Judges delivered their opinions.†

JUDGE CARR.

In 1806, the appellee filed his bill against the appellant, stating that the plaintiff was the assignee of a tract of land derived from one Razor: that the defendant was owner of a tract derived from Madison & Co., being part of the pre-emption right attached to a settlement called "The Pasture:" that Razor's was the eldest entry and survey; but that the defendant has the eldest patent. The bill then goes on to detail the facts and circumstances which give him, in equity, the better title; and prays that the defendant may be decreed to convey to him the legal title.

This brief statement shews, that in its origin, this case presented the naked point so often decided in this Court, and at length so solemnly in *Noland v. Cromwell*, 4 Munf. 155; whether equity could interpose to set up the younger against the elder patent, where no caveat had been taken out, and no reason for the omission was stated in the bill. *Noland v. Cromwell*, was decided in 1814.

In 1819, the plaintiff had leave to amend his bill. The object of this amendment was to furnish ground of excuse to the plaintiff for having failed to resort to the caveat. The ground is this: that on the 10th of February, 1789, Newell, a deputy surveyor, surveyed the land claimed by the plaintiff: that on the 6th of June of the same year, the same surveyor made, for those under who the defendant claims, the surveys which conflict with the plaintiff's; and he expressly charges that the lines of these last surveys, so far as they interfere with the plaintiff's, were never actually run, but protracted from the survey made for Razor; and he refers to the connected survey, to illustrate the fact. This, he believes, was done with fraudulent intent, in order to keep the said Razor in utter

511 ignorance that there *was any interference; and the fraud, he avers, succeeded, as the said Razor, an ignorant man, residing upwards of fifty miles from the surveyor's office, never discovered any such interference; nor had the plaintiff the least knowledge of it, until the patent

had issued. Hence it was impossible that a caveat could have been entered: This is the ground of excuse.

Before I test its sufficiency by the standard of *Noland v. Cromwell*, it will be proper to ascertain what is the authority, at this day, of *Noland v. Cromwell* itself. The Court have said, that this case shall be taken as a correct exposition of the law, at the date of the decision; but, that the effect of subsequent statutes on it, is open to argument. Accordingly, it has been contended, that the act of 1814, giving the scire facias to repeal patents, and the declaration in the revision of 1819, that the failure to caveat shall not affect the legal or equitable rights of the party, have prostrated *Noland v. Cromwell*, proclaiming in language not to be mistaken, the legislative will and understanding on the subject.

Noland v. Cromwell, pronounced the law to be, "that though a party may be let into equity, on grounds which he could not have used on the trial of the caveat, or upon a case suggesting and proving that he was prevented by fraud or accident from prosecuting his caveat; he is not to be sustained in the Court of Equity, on such grounds as were or might have been brought forward on the trial of the caveat." The Legislature certainly have not undertaken to declare, that this is a misconstruction of the law. They have understood better the line which separates their powers from those of the Judiciary. But what have they done? In 1814, they passed a law "declaring and regulating the practice of suing out and prosecuting writs of scire facias to repeal letters patent." Any person wishing to prosecute a scire facias, to repeal letters patent for lands, &c. either because they had been obtained by false suggestions, had issued contrary to law,

512 or to the prejudice of his private rights, shall apply by petition to the Court or Judge, who shall direct the clerk to issue a writ to the Register, commanding him to certify the grant, &c. On the return of this writ, the grant is to be recorded, the scire facias issues, and the case proceeds according to the directions of the act, which are very special. Now, surely, it need hardly be observed, that this act can apply only to cases brought under it: that it can have no influence on a bill addressed to the general jurisdiction of equity, even since its passage; much less, on a bill filed long before, and depending in Court when it became a law.

In the revision of 1819, the law, after repeating what former statutes had enacted on the subject of caveats, has these words: "The omission, however, of any person claiming such better right to avail himself of the remedy by caveat, hereby given, shall in no wise be construed to bar or hinder such person, from asserting such better right in law or equity, in the same manner as if no such remedy by caveat had been given him." The whole frame and structure of this sentence shew, that it is prospective entirely. It is one of a large class of cases, in which the judicial decisions point out to the Legislature what they consider an evil, and they apply the rem-

*See principal case cited in foot-note to *Noland v. Cromwell*, 4 Munf. 155: *Beckwith v. Thompson*, 18 W. Va. 124; *McClung v. Hughes*, 5 Rand. 461, 492.

†The PRESIDENT and JUDGE CABELL, absent.

edy. But, the remedy always looks forward. The Legislature do not mean to say to the Judges, "You must decide thus and thus, in cases now depending before you." This would be usurpation. This act, then, while it acknowledged the rule established by *Noland v. Cromwell* to be, at that time, the existing law, did not intend to affect its operation in past or depending cases, but merely to provide for the future; and if any thing further were necessary to prove this, the saving at the end of the act, is conclusive to that purpose. *Noland v. Cromwell*, then, gives the law to the case before us; and we must examine whether under this law, the plaintiff has suggested and proved a sufficient excuse for failing to caveat. The excuse is, that instead of an actual survey by running over the ground, the notoriety of which

513 "would have put the opposite party on his guard, the surveyor merely protracted the lines of the last surveys from the courses and distances of the survey made for Razor. I will not consider what weight this allegation would deserve, if proved; because, to my mind, it is wholly disproved by the answer, which denies it; by the plat, which shews that the lines in the first and second surveys are not the same; and by *Newell*, the surveyor, who swears that he actually ran every line in the last surveys but the closing line, which is always protracted. The plaintiff states that Razor lived more than fifty miles from the surveyor's office, and that both he and the plaintiff were entirely ignorant of the interference, until the defendant's patent had issued; and this ignorance the Chancellor considered as giving him clear jurisdiction of the cause. But surely, this was in the very teeth of *Noland v. Cromwell*. It is there said, that the caveat law meant to prevent and cut up the numberless doubts and disputes, as to notice or no notice, and to establish a general criterion: that the notice principally established by the act, is the entry in the surveyor's book, which is open and accessible to all: that the entry, when followed up by a survey, which the law also provides, shall be made shortly after, affords complete notice of the claim thereby set up, and operates as an invitation to persons having prior pretensions, to bring them forward by way of caveat. Of this survey, (the Court add) it is not competent to adjacent adventurers, to aver an ignorance.

If it be said, that there was fraud in making the surveys of the defendant, I answer, 1st, that the only fraud suggested is the protracting, instead of surveying, the last surveys, which is disproved; 2d, that the existence of fraud will not take the case out of *Noland v. Cromwell*, unless it be also suggested and proved that the party was prevented from prosecuting a caveat; or, that upon the trial of such caveat, he could not have brought forward the fraud.

514 "The whole ground, then, taken by the amended bill, to excuse the failure to caveat, is taken away; and under the authority of *Noland v. Cromwell*, I must hold that the decree be reversed, and the bill dismissed.

JUDGE GREEN.

In the case of *Hughes v. M'Clung*,* I stated the reason of my opinion, that after grant issued, any one claiming a prior equity against the grantee, can in no case have relief in equity, unless upon the ground of actual fraud in the acquisition of the legal title, or unless the party was prevented from prosecuting his caveat, by fraud, accident or mistake.

In this case, the plaintiff alleges, that Razor, under whom he claims, was prevented from filing his caveat, by reason of a fraud in the surveyor, and the party under whom the defendant claimed, in returning a survey not actually made upon the ground, but made out by protraction; and that Paul Razor, being an ignorant man and residing more than fifty miles from the surveyor's office, did not discover the interference of this survey with his, until after the patent issued upon it. The suggestion of fraud in protracting the survey, for the purpose of keeping Razor in ignorance of the fact of the interference, is disproved by the surveyor, who testifies that he actually surveyed all the lines, except the closing line, and they were marked. The allegations as to Razor's ignorance and residence, are neither confessed nor denied by the answer, and are not proved. Both these facts were capable of proof; and if they were of any consequence in the cause, cannot be taken to be true, without proofs. Razor's entry was made on the 11th of November, 1782; his survey, on the 10th of February, 1783; and the other survey was made on the 6th of

515 June, 1783. His entry describes the land located, as "that upon which he resided; and both surveys being made early in the year succeeding Razor's location, and within four months of each other, there is the strongest reason to believe, that he resided on the land in controversy when the survey under which the defendant claims was made, and had actual notice thereof. The plaintiff, therefore, is entitled to no relief, unless the legal title, under which the defendant claims, was tainted with actual fraud.

The surveyor, who made the survey of the 6th of June, 1783, (under which the defendant claims) and the persons entitled to that survey, had actual notice of Razor's prior entry and survey; and if the party entitled to the warrant under which that survey was made, had no just and equitable right to appropriate the land, notwithstanding the prior entry and survey, his doing so with full notice, was an actual fraud.

The plaintiff claims under a treasury warrant; the defendant, under a settlement and pre-emption warrant. Razor's entry and survey were made before the pre-emption warrant issued, and before the settlement right was surveyed. But, the existence of the settlement right was known; for, Razor's entry calls for it as the Pasture Settlement.

At the time of Razor's entry and survey, the state of things, in respect to the lands in the neighbourhood, was this: On the

*See the last case.

south side of New river, was a tract of land already surveyed, called Burgaman's Bottom; a corner of which is called for in Sayers' subsequent survey, under his pre-emption warrant made June 6, 1783, under an entry of December 10, 1782. Far below, in a deep northern bend of the river, Robert Sayers had a settlement right, surveyed the 31st of January, 1782, as the record is; probably in 1783. The intermediate land on the river was entered for by Sayers, under a pre-emption warrant, on the 10th of December, 1782. This entry surrounded Sayers' settlement survey, on three sides, (the river being on the other side;) and, besides taking all the land between his settlement and the tract

called Burgaman's Bottom, extended
516 *down the river, to the settlement called the Pasture. The settlement, and the pre-emption thus located and surveyed, were called the Lead Mine tract. Next below this tract on the river, lay the Pasture Settlement. Next below the Pasture, and at the point where the river takes a great southern and southeastern turn, lay Samuel Ewing's settlement already surveyed; beginning on the river at the lower corner (or rather, what was afterwards the lower corner of the Pasture Settlement) and running southeasterly to the river, a great distance below, including the whole tract by one line and the river. This line ran nearly parallel with the lower line of the Lead Mine tract, leaving for the Pasture Settlement, between these two lines, only a space about 250 poles wide.

In this state of things, Razor located his treasury warrant, calling for both the Pasture Settlement and Ewing's line, and surveyed before the Pasture Settlement was surveyed; and if he had surveyed according to his entry, there would not have been one inch of land unappropriated, adjoining the Pasture Settlement, upon which the pre-emption warrant, attached to the Pasture Settlement, could be located; for, it could only be located on lands adjoining the settlement. The Pasture Settlement was bounded by S. Ewing's settlement on the west, by the river on the north, by Sayers' pre-emption on the east, and by Razor's entry on the south. The pre-emption warrant was not issued when Razor entered and surveyed; but, his entry was liable to yield to the pre-emption, if the warrant should issue at any time within the period allowed by law, and which was from time to time enlarged, until long after the period when these transactions took place. The pre-emption warrant was issued on the 18th of February, 1783; and the holder had a right to locate it upon the land entered and surveyed by Razor, under a treasury warrant, even if all the other adjoining land had been unappropriated.

517 *The owners of the pre-emption warrant, however, located their warrant on the 30th of April, 1783, to adjoin the Pasture Settlement, and the land called Burgaman's Bottom. They intended to take the very land covered by Sayers' pre-emption warrant already surveyed. Without taking this, the survey could not be made in the proportions prescribed by law.

For although, in consequence of Razor's survey not being made according to his entry, there was a narrow space left between his survey, and that afterwards made of the Pasture Settlement, through which opening the pre-emption warrant might have been surveyed, so as to run from the south side of the Pasture to Burgaman's Bottom land in the rear of Sayers' survey, and in a long narrow slip, probably ten times as long as it was wide; the locator certainly did not intend to lay off the land in this way. It would have been contrary to law, and the land of no value to him. The locator of the pre-emption warrant, either was ignorant that this land was previously occupied by Sayers' pre-emption survey, or intended to contest with him the right to pre-emption in this very land. Probably, this latter was the fact; for, on the 6th of June, 1783, the parties met, and Sayer exchanged his settlement and pre-emption for the Pasture Settlement and pre-emption; and it was agreed, that the lands should be surveyed according to the lines then agreed on. The balance, and more than the quantity of the balance of Sayers' pre-emption, was thereupon surveyed under his entry of December 10th, 1782, adjoining the Burgaman's Bottom land and the Lead Mine tract; and the Pasture Settlement was surveyed, and the pre-emption belonging to it, to the amount of 858 acres, was surveyed in three surveys; including the whole of Razor's survey, except about 66 acres, which have been since located under the same pre-emption warrant, but is not patented.

I have already said, that notwithstanding Razor's entry and survey, the pre-emption warrant might have been located upon the same land, in the first instance;
518 and the *question is, whether the right to locate it on that land was forever lost, by locating it elsewhere. I think not; especially as to one locating before the issuing and entry of the pre-emption warrant; however, it might be as to one induced to locate the adjoining land, by the fact of the party entitled to the pre-emption making his election by entry of other land. I incline to think, that as the owner of a treasury warrant might withdraw his entry and locate it elsewhere, the owner of a pre-emption warrant might shift his entry from one piece of land to another, falling within the terms of his entry, at any time during the period allowed by law for entering the pre-emption warrant, however this may be, when the first entry is upon land, to which no other has a better right. If the first entry is upon land to which another has a better right, and the entry could not be withdrawn and re-entered, the party would lose the benefit of his pre-emption; and in that case, he has, I think, a clear right to transfer his entry, having, by mistake, entered land, which he could not acquire; and this, particularly, against a locator under a treasury warrant, entering before the pre-emption warrant was issued.

Sayers' warrant, entry and survey, all preceding the issuing of the Pasture pre-emption warrant, the presumption is, that

his right to the land first entered, under the Pasture pre-emption, was the best; and after a lapse of upwards of twenty years, arising from the laches of Razor and the plaintiff, this presumption cannot be overruled upon surmises not amounting to proofs, that the contrary was the fact. The owner of the Pasture pre-emption warrant might have withdrawn his original entry, and entered it upon the land, which was actually surveyed under it; in which case, his preferable right would have been unquestionable. The only difference in justice, between a survey of this land, with or without such a previous entry, is, that an entry would serve to give notice to Razor, so that he might, as it is said, withdraw his entry, and locate the warrant elsewhere. But this he could not

519 have done. The *warrant was merged in the survey; and it was his own folly to proceed so far as to survey, with the possibility of a pre-emption right displacing him. *Taylor v. Myers*, 7 Wheat. 24.

But, if such notice could have benefited Razor in any way, I am satisfied he had it in fact. He lived upon the land when it was surveyed, and no doubt was satisfied, that the other party had, in substance, a right to take the land, whether he proceeded strictly in conformity with the forms prescribed by law, or not, and acquiesced until after the patents issued in 1788, and then sold to the plaintiff; who, I have no doubt, purchased a chance, as the answer alleges, for a trifle, and was one of those hunting up stale claims to disturb the titles of others. He himself did not pursue his claim so acquired, until upwards of twenty-three years after the survey, when the parol evidence, which might have a decisive influence upon the equities of the parties, is probably lost.

I do not think that there was any actual fraud, which could affect the conscience of the party, and deprive him of his legal advantage. The decree must be reversed, and the bill dismissed with costs.

JUDGE COALTER.

How far the case of *Noland v. Cromwell*, will operate on this case, seems to me to depend very much on several matters of fact, arising on the consideration of the merits of the cause; and I shall therefore proceed, first, to examine them as if they were open to examination, notwithstanding that case.

The first, and a very important enquiry is, what lands were covered, or intended to be covered, by the following entry; for, it is under that entry, that the lands in dispute have been surveyed and granted to the appellant, or those he claims under.

520 *1783, April 30th, Thomas Madison & Co., by virtue of a pre-emption warrant of 1000 acres, No. 2373, dated 18th of February, 1783, enters the same adjoining his settlement called the Pasture, and the lands called Burgaman's Bottom."

Although Thomas Madison & Co. are not called the Lead Mine Company in this entry, they are so denominated in the survey of their settlement right, and in the surveys made under this entry. They were a company, who had it in view to procure, and probably to work, a Lead mine, which

it was supposed lay in that tract of country, between the Pasture Settlement and Burgaman's Bottom. One of the surveys, to wit, that made for Robert Sayers for 794 acres, (hereafter mentioned) calls for the head of Lead Mine branch, in the direction aforesaid; and the contract made between the company and Sayers (hereafter also mentioned) describes this tract of country as the Lead Mine hills. The Lead Mine tract of land, then, was doubtless the object of the Lead Mine Company.

But, one Robert Sayers had procured certificates of settlement and pre-emption, by which he had covered a considerable portion of this territory, before the entry in question was made. It appears by the certificate of survey of his settlement right, made on the 8th of November, 1782, that his certificate of settlement was obtained on the 13th of September, 1782; but, whether that of the company, for their settlement, was obtained before or after this, does not clearly appear; nor which was the earliest settlement, does not appear in this record. This settlement right, however, was surveyed by Sayers in November, 1782, six months or more before the entry of the company aforesaid.

Robert Sayers also, on the 28th of January, 1783, by virtue of a pre-emption warrant of 1000 acres, dated the 10th of December, 1782, No. 2356, enters the same joining his entry and survey on his settlement, on the east side of New river. As well this entry as the warrant,

521 it is true, are dated before the date of the pre-emption warrant *of the company, and even the survey for 794 acres, made by virtue thereof, is anterior both to the date of the warrant, and the entry thereon by the company. Yet nevertheless, it may have been, and probably was, the intention of the Lead Mine Company, to claim the Lead Mines against Sayers' pre-emption claim at least, if not his settlement, either by contesting his settlement right, or by shewing their settlement to be the oldest, and to carry with it priority of pre-emption right; or, they may have intended to dispute the matter on the ground that Sayers' location of his pre-emption warrant was too vague, inasmuch as it does not state on what side of the settlement survey it was to join, and left the matter as open in that respect, as the warrant itself, so as to join on any part of the settlement survey he might thereafter select; or finally, which is not very probable, they may have been ignorant of Sayers' claim, and made their location, so as to cover the Lead Mines, believing that tract to be vacant.

But, supposing them to be well acquainted with Sayers' claim, and that it was the best, they may still have made their entry or location in the direction of Burgaman's Bottom, with a view of covering some four or five hundred acres of the Lead Mine hills then vacant, and not included in Sayers' pre-emption survey.

I have endeavoured, therefore, to discover where the settlement and pre-emption surveys of Sayers, above referred to, lie in the Lead Mine survey, as laid down in the connected plat in the cause; and by com-

paring the various surveys, and notorious and common corners together, I have discovered that Sayers' settlement survey begins on or near the river, about as far above little a, as the length of the line a, b; to wit, 100 poles; that it runs around, and again comes to the river, at a point about 250 poles below the letters J. H.; and then down the river, to the beginning. I find also, that the pre-emption survey of 794 acres aforesaid, begins on the river, where the settlement survey calls to strike

522 it, and reversing the courses *of that survey, runs back with it, to or near the river; thence 100 poles to the point a; thence to a hickory corner at c, on the west side of Burgaman's branch; thence two courses up that branch, in all 114 poles. It then leaves the branch, and finally arrives at the point m; which is a notorious one in several of the surveys; and so goes round to the river, and down it as aforesaid; leaving out vacant land towards Burgaman's tract, to the amount say of 470 acres, afterwards surveyed by virtue of Sayers' pre-emption warrant, as will be hereafter more particularly noticed. Thus the company may at least have had this minor object, or this portion of the mine tract, in view, if not the whole. Or, there may have been, and probably was, other vacant land lying in that direction, and which was afterwards covered by the survey of 573 acres; of which particular notice will be taken hereafter. But I incline to think, that they had the whole mine hills in view, either through ignorance of Sayers' claim, or intending to contest it. For, if they knew of it, and intended to submit to it, nothing would have been more natural than to have called for it, as well as Burgaman's Bottom, in making their location. The 470 acres of Lead Mine hills, were surely no small object to the Lead Mine Company. Suffice it to say, that from all these reasons, I am well satisfied that the calls of their location, not only cover the lands lying in a direction almost opposite to those now in controversy, but that that land was the real object of the company; and that it would be very natural for every other adventure to suppose, that the Lead Mine Company would wish to acquire the Lead Mine tract, or as much of it as they could, must be apparent to every one.

Their location, then, of their pre-emption warrant, did not cover the land in controversy, but lay entirely in an opposite direction.

How then did these parties stand at this period of time?

Robert Sayers, on the 13th of September, 1782, had obtained from the commissioners a certificate for 400 acres, *on 523 the S. E. side of New river, including J. Castell's improvement; and on the 8th of November, 1782, he obtained a pre-emption warrant for 1000 acres on the S. E. side of New river, and adjoining his survey on his settlement. This he enters, as aforesaid, giving no further notice of the manner he intended to survey, than his warrant prescribed. But shortly afterwards, to wit, on the 31st of January, 1783, he proceeded to survey 792 acres

thereof, binding all round on the settlement survey, as is above stated, leaving 208 acres unsurveyed of that warrant, and leaving also, other vacant land in the direction of Burgaman's Bottom, to the amount, in all, of 470 acres. At this time Sayers lived on what was called the Pasture tract, a considerable distance above his settlement right above mentioned.

On the 11th of November, Paul Razor, by a State warrant, enters 500 acres on the south side of New river, opposite the upper end of Samuel Ewing's land, to join his patent line, and the place Sayers lives on, called the Pasture, to include the improvement said Razor lives on, and those made by William Burke and Samuel Byrd; and he proceeds, on the 10th of February, 1783, to survey 274 acres of this entry. This is the land in dispute.

So far it seems, that this entry did not conflict with Sayers' claim on his settlement and pre-emption; nor did it interfere with the Pasture tract, or any settlement right that then was obtained, or might thereafter be obtained for it. Razor was a settler in the country, had purchased his warrant, and promptly surveyed his lands; his settlement, I presume, not being of a date old enough to entitle him to a settlement right from the commissioners. But it was surely enough to shew, that he was no speculator, but equitably entitled to the land, unless against those having superior equity. This could only be in relation to any pre-emption right, which might attach to the Pasture settlement. It would probably have to give place to that, but to nothing else.

524 *I am not entirely satisfied, that a pre-emption warrant will over-reach an entry made by a common treasury warrant, made before such certificate of pre-emption was obtained. The original act of May, 1779, chap. 12, sec. 5, directed the pre-emption warrants to be entered within twelve months, or the right of pre-emption would be forfeited; and the act of the same session chap. 13, sec. 3, provides, in order to prevent interferences, that no entry or location by a treasury warrant shall be made before the 1st of May then next following. See also what is said by this Court in the case of Jones v. Williams, &c. 1 Wash. 231, and in 2 Wash. 47.

But, it is not necessary to settle this question in this case; and I am not to be considered as deciding it, one way or the other. It may be too, that Razor had a settlement right made after 1778, which would have entitled him to a pre-emption of 400 acres; and which, as I understand the act, would have taken precedence of the pre-emption attached to the Pasture tract; but that he preferred taking it under a treasury warrant, to save the trouble of going before the commissioners.

Neither the certificate of settlement for the Pasture tract, nor that for the pre-emption thereto attached, is in the record; so that it does not appear when they were obtained. Most generally, I believe, they were obtained at the same time; the one following as incident to the other, if demanded, as we may well presume it was in this case. For, the Lead Mine Company

could only acquire any portion of the Lead Mine Hills, by their pre-emption, as the Pasture Settlement did not extend to them. As to them, the pre-emption right was the main object. But the pre-emption warrant, as above described in the entry, was obtained on the 18th of February, 1783, and entered on the 30th of April following; and both of them, posterior to the entry and survey of Razor; and thereupon the party, with a full knowledge of Razor's actual residence on his land, under his prior

entry and survey, proceeds to locate
525 his *pre-emption warrant, so as to call for lands not at all interfering with the land in dispute. If we confine our enquiry to this point of time, how would the parties stand? Suppose Razor had obtained his warrant; but believing his settlement must be taken, if the Lead Mine Company should elect to locate their pre-emption warrant in that direction, had waited to see what they would do; and finding they had located on the other side, had then made his entry. Would it have been competent for the company, after having thus made their election, to change their location and make another on the other side, after finding that the lands they had located were either claimed by superior rights, or were of inferior quality? It seems to me, that they could not. It was enough surely, to hold all the community in suspense as to what side of the settlement the pre-emption was to join, until the election was made; but that once made, it could not be necessary that the whole country should still stand in suspense, until a survey was made, in order to see whether the election would not be changed. If Razor had returned his plat, and it had been caveated on the ground that the company might change their election, and re-locate on that side, or until they might peradventure survey on that side, as they afterwards did by virtue of this same entry, what would have been said to them as to this matter?

The posterior laws, extending the time of making entries on pre-emption warrants, only extended to cases where they had not been entered at all, and were not intended to enable the party who had made his election, to change it and make a new entry. These pre-emptions were not so highly favoured as that. The party was to pay for the land the same price as for a treasury warrant; was to locate promptly, or forfeit his right to pre-emption; but then he might use it as a treasury warrant, either to cover the same land, if not before entered for by another; and if that was done, then he might take other lands elsewhere, as by any other warrant. May
526 Session, 1779, *ch. 12. The short time thus limited for its original entry, and the other provisions in the act of 1779, Ibid. ch. 13, sec. 3, and subsequent acts, October, 1779, ch. 27, sec. 2; May, 1782, ch. 49, sec. 7; October, 1784; clearly shew, that such location once made, bound the party, so that he could not change it from time to time, as it might suit him to do so. Surely, if his failure to enter deprived him of the privilege intended by the act, so as to let in other adventurers, his election to take it in a particular direction,

would let them in on the residuum. Nor will Razor stand in a worse situation, than if he had not made his entry until after this election had been made. That election shews that the party did not choose to interfere with him, and was no notice to him to lift his warrant, and enter it elsewhere, but the reverse. Taking the case up then at this stage, and there can be no question as to whom the land in controversy then belonged.

It remains to see what followed afterwards, and whether it has varied these rights.

No survey had been made by the company at this time. A survey of their settlement right could not possibly interfere with Razor's survey; and had they proceeded to survey their pre-emption right according to its location, there would have been no interference. It surely cannot be contended, that if the entry is discovered to be made on another's land, that circumstance would justify surveying that entry wherever vacant land can be found, and entirely in an opposite direction, even without making a new entry; but in that case, the warrant only stands as other warrants, although he might originally have elected to take that land. Much less, would it authorize a survey of that other land, without any entry for it. All the cases, *Johnson v. Brown*, 3 Call, 259; *Hunter v. Hall*, 1 Call, 206, &c. prove, that the location must be pursued where it designates with certainty the lands intended to be covered; and also, that it must have reasonable certainty. Here, there is no doubt as to the land intended, which too, were
527 then unpatented, *and for aught that appears, may have been subject to this location. For they may, and probably did, locate that identical land, as aforesaid, with a view of contesting Sayers' survey, on the ground that their settlement was the oldest, and drew to it the oldest pre-emption. There were also 470 acres of vacant land in that direction, not surveyed by Sayers; and when there are two entries on the same land, and the first locator proceeds to survey, if he does not take all, then I presume, they had a right to survey what was left. For, there is no case in this Court, going to say, that the second locator is not entitled to the residue, in such case; but, the reverse seems to be pretty strongly indicated. *Currie v. Martin*, 3 Call, 28, 36; *Johnson v. Brown*, Ibid. 260, 268. The policy of the law was to have the lands granted, so as to derive revenue. It may be, if the first locator supposes that he has gotten his quantity, and if on calculation, (which can generally be made in an hour by the surveyor,) he finds that he has not, he might open his lines, and take in more land, before closing the survey, as he may wish to have his land in several tracts. But it must be, I conceive, one continued act of surveying; otherwise, it will be considered an abandonment. If he can suspend, without abandoning, for months, he can for years, and as long as the Legislature continues the time to survey; and thus keep the second locator out, even so as perhaps to forfeit his entry. The laws giving further

time to survey, were never intended to produce this effect. No further time was necessary, to one who has made his survey. The act only provides too, that warrants may be carried into effect by one or more surveys, and may be exchanged, &c., not that entries are to lie open in this way. If the party does not survey all the land he enters by his warrant, he may get an exchange warrant, and locate elsewhere. This the law provides for.

This is my present impression of the law. If I am right in this, it then appears that, exclusive of the Pasture, or
528 *Settlement tract, there was then even vacant land, answering to the calls of the entry, to the amount of 470 acres; and if, after surveying this, they had been allowed to run in a different direction, and to take all the vacant land, so as not to interfere with that in dispute, there would have been, in addition to the above quantity, all that part of survey No. 2, and No. 4, which lies outside of the land in dispute, to the amount of at least 360 acres, and the whole of survey No. 5, of 240 acres; in all, 1070 acres.

But, instead of the Company proceeding to survey according to their entry, and contesting the matter with Sayers, or at farthest, proceeding to survey in the manner last mentioned, they enter into an agreement with Sayers, on the 6th of June, 1783, by which he gives up all his right, title and pretensions, he has or may have, to the Lead Mine hills, the 1000 acre survey, (what survey this is, does not appear in the record,) and the Bottom, called Buchanan's Bottom, (perhaps a misnomer of Burgaman's Bottom,) to the Lead Mine Company, for and in consideration of a tract called the Pasture tract; which is given in exchange, according to lines and courses now agreed on by both parties, and to be surveyed. It would seem by this, that the Pasture tract, or settlement right, was alone given in exchange; but the fact was otherwise, as appears by letter from Lynch, who negotiated this business, to Thomas Madison, another of the company, and their agent, dated 21st of July, 1795. What lines were agreed on, is not specified in the agreement; but the after acts of the parties shew, that Sayers was not to survey the pre-emption entry, according to its calls, on the Lead Mine hills towards Burgaman's Bottom. His pretensions thereto, under his original rights, were abandoned and transferred; and he was to survey the company claim, according to lines then agreed on. This part of the agreement shews that a conflict between these parties, as to the Lead Mine hills,
had before been contemplated, which

529 *was thus put an end to. The parties then proceeded thus. Instead of assigning the entries and surveys, as they then stood, they used each other's names in making the surveys, and those surveys were afterwards assigned; and those surveys are all made, or rather purported to be made, (for the fact could not be so) on the same sixth of June, 1783. When they were in reality made, and which was made first, does not appear. A survey is recorded as of that date for Robert Sayers,

though in fact for the company, by virtue of his pre-emption warrant, for 470 acres, although this same surveyor, James Nowell, had shortly before surveyed 794 acres, by virtue of this same warrant; thus giving to the company 264 acres surplus, and for which there was no warrant; and which is within ten acres of as much as the land now in controversy. So that if, instead of this fraud on the public, as well as on this individual, they had even left that much of the Mine hills to be covered by their entry, now belonging to Sayers, this controversy need not have taken place. Sayers, on his part, under this agreement, though in the name of the company, proceeds to have the Pasture survey of 322 acres made, No. 1. He also proceeds to have made, or recorded rather, as of that date, the following surveys, by virtue of their pre-emption warrant, to wit; survey No. 2, of 214 acres; No. 9, of 338 acres; and No. 5, of 240 acres; in all 792 acres. And afterwards, to wit, on the 18th of October, 1789, another of 66 acres, No. 3; in all, 858 acres; No. 2 and No. 4, interfering with the land in dispute, and No. 3, taking the residue of it.

It is charged in the bill, that there was also a survey made by virtue of this same pre-emption warrant, on the 12th of June, 1783, for 573 acres. This, added to the 792 acres, (the amount of the three surveys above mentioned, and purporting to be made on the 6th of June,) would make 1365 acres; or 365 acres more than the warrant. And if the 66 acres are added, it will make 431 acres more.

530 *On this subject, the answer says, "that the respondent has heard and believes, that a survey made for the Lead Mine Company, of 573 acres, was found on the records of the surveyor, dated the 12th of June, 1783, purporting to be made by the same pre-emption warrant as the surveys before described, (to wit, those above mentioned, including that of 66 acres;) but that it was an error, which was rectified by returning that survey, by virtue of another warrant; and he insists, that no act done by the Lead Mine Company, on the 12th of June, could affect the surveys made on the 6th. For, on the 6th of June, the company exchanged the said pre-emption warrant, and the settlement also, with Sayers. Now, it is apparent, that all these surveys were made after the 6th; though this convenient surveyor makes them all bear that date. For, the very agreement of transfer and exchange says, the surveys were to be made according to lines then agreed on; that is, I presume, division lines, so as to save the Lead Mine hills to the company. All these surveys, then, though in the name of the company, were, in fact, afterwards made for Sayers; this one of 573 acres being one of them.

Mark these transactions. The Pasture land, and the pre-emption attached to it, were no object to the Lead Mine Company, unless they could, by the latter, get the Lead Mine hills. But to Sayers, who went for agricultural and pasture lands, and who lived on, and was doubtless attached to, the Pasture tract, the Lead Mine hills were of no value, except as an object of speculation. He would easily be persuaded to give

them up, and get other lands, such as he wanted; and thus the location was to be changed.

But, it was a mistake. What mistake? If, by including more than the warrant, it seems to be one familiar with that surveyor. But it may be, that the first surveys were intended to exclude the lands in dispute, and ran round them; but, that it was afterwards concluded on to take

531 *these lands, and to secure the 573 acres otherwise. But, where does this tract of 573 acres of land lie? We know not; but very probably, more within the bounds of the location, than the land in dispute.

But, that survey stands on the records, as made by this warrant. How then could it be returned as made by another? It is true, this surveyor had the physical power to do so, much more than he had to make all these surveys on the after-part of the day, on which this contract was made. But, has he even done so? And who persuaded him to commit that crime of falsifying a record, or giving an untrue copy of it? Not the Lead Mine Company; for, the warrant did not then belong to them. But, where is the proof, that this survey has not been carried into grant, on this very pre-emption warrant? It is charged in the bill, that a grant has issued on it; and that seems admitted in the answer. But there is no proof, that it was by another warrant. It also charges, that Sayers sold the whole of the surveys to Jackson.

Badly as this surveyor appears in this case, we cannot impute to him such a fraud and crime, as returning an untrue record; and if we could, who had a right to control him in that business, but Sayers, for whom that survey must have been made, or those claiming under him?

In this view, then, this warrant has been more than filled up without the 214 acres in controversy, and we know not which of all these surveys was actually made first. Surely, if all this, or half of all this, had appeared on a caveat, there can be no doubt how it would have terminated. And the only question is, whether the case of Noland v. Cromwell, 4 Munf. 155, is to deprive this party of his most just and equitable rights? If that case is to sanctify such proceedings, and to deprive a Court of Equity of their original jurisdiction to relieve against frauds of this description, we ought to pause before we give it that effect. All the preceding, as well as subsequent cases, it seems to me, would be in opposition to it.

532 *The bill in this case, it is true, does not say in express terms, that the party was ignorant, and therefore could not file a caveat. It was filed in 1806; and until the above case in 1814, this allegation was not deemed as important as it possibly may be now. But he says, that certificates of surveys had been made out, purporting that the lands had been surveyed; but, whether they were actually surveyed or not, he does not know; and on these certificates, purporting to be dated so and so, grants have issued, and amongst others, for the 573 acres, all by virtue of that warrant: that Razor, by his attorney

in fact, transferred his survey to the plaintiff, who has obtained a junior patent, &c. He, however, insists, first, that more lands are covered by the defendant's patents, than his warrant justifies; and that the survey does not correspond with the entry; otherwise, it would not have touched the land in controversy.

As to there being more land covered, &c. the defendant, in his answer, after giving the account above mentioned of the 573 acres, says, even if that were not so, still the surveys, which cover the plaintiff's lands, were made prior to that; and if any was void, it would be that for the 573 acres. But, it is no where pretended, that these 573 acres were not within the limits of the location, though where they lie, is not stated or laid down in the plat; and it may have been in reality the first survey, though purporting to be on the 12th; for it is apparent, that those said to be made on the 6th, were not made on that day. As to not surveying according to his entry, he says, that it was necessary to join the settlement right; and if he could not do that, and join Burgaman's Bottom also, that part of the entry will be rejected, and the entry not void. In other words, he may then run in an opposite direction. But he says, it is practicable to lay off the 1000 acres, so as to join the bottom, by running out the 142 acres, still left of the warrant, in a narrow slip, so as to touch it; which would be good, after a patent, &c. This last 533 position is undoubtedly *true, if it is also true, that a patent covers and sanctifies every manner of fraud.

But it would look better, I think, to take it, as was done in this case, even without this finger reaching out, and as it were, pointing to the fraud. There was no objection in the answer to the jurisdiction of the Court, on the ground that a caveat had not been filed, as in the case of Preston v. M'Kinney, hereafter referred to. At this time, such objection was not thought of, where circumstances of fraud, &c. were relied on, and the party satisfies himself by answering to these objections.

Does the case of Noland v. Cromwell sanction all these actings and reasonings? Such an admission, I think, would go far to shake the authority of that case. I think it could not have been intended to go this far; and if it does, it may be remarked, that on this point, it was by a divided Court, two to two, so far as Judges were present in Court; and if it be taken two to three, it is admitted, that as to this matter of implied notice, arising from surveys of lands made at a different place from that called for by the entry, it was a new point, and did not exist in that case, though argued on by way of analogy; and if it did exist, could at most only be considered a single decision by a divided Court, on that point. In Witherington v. M'Donald, 1 Hen. & Munf. 306, Judge Lyons says, "The law has never been deemed to be settled on one decision, where there has been nearly an equal division of the Court." This is giving it all the authority to which any such decision is entitled.

But, several cases have been decided since, to say nothing of those before,

which seem to me to settle this matter otherwise, and at any rate, to leave it as a matter open to enquiry and more solemn decision. Amongst these, the case of Preston v. M'Kinney, which was decided by Chancellor Brown of Staunton, in July, 1814, just after Noland v. Cromwell, and in this Court, in 1820, seems most like the present case. That case is not reported;

534 *and I may therefore be excused for stating it pretty much at length. It was this.

M'Kinney had the oldest entry, but Preston's survey and patent were older than his. Douglass, under whom M'Kinney claimed, made his entry for 500 acres in 1780, on a treasury warrant, which was surveyed on the 28th day of November, 1797, and was patented on the — day of — by John Balfour, as assignee of the entry or plat; and he conveyed by deed to M'Kinney, in February, 1802, who brought this suit in March, 1802.

The bill further alleged, that in the year 1782, an entry was made, in the name of James Dysart, for 300 acres, which was shortly afterwards surveyed, and interferes with the plaintiff's land upwards of 200 acres. The objection that the surveyor, Preston, had used the name of Dysart, instead of making his entry in the clerk's office according to law, was insisted on, and was answered by saying, that it was made for the benefit of the son of the surveyor, &c. and to whom the patent issued. It seems that this survey was made about December, 1785, and that the patent issued about August, 1792.

Various objections are made to the claim and proceedings of the defendant, in order to show the superior equity of the complainant; and amongst others, that his entry, survey and patent, were entirely different land from that called for in the entry.

The answer admits, that the complainant's entry is prior, but that the defendant has the oldest survey and patent; and also denies that the complainant's entry covers the land in dispute. And in an answer to an amended bill, the defendant insists that the Court can give the complainant no relief, "as he has not shewn why he could not enter a caveat," &c. After this, viz.; at July term 1811, the plaintiff has leave to amend his bill, in which he states, that he, and those under whom he claims, were prevented from entering a caveat against Preston's grant, by the following circumstances: that Douglass, in whose fa-

535 vour the entry *was made, lived at a considerable distance from the land in controversy, had actually removed to Kentucky before Preston's survey was made, and neither knew of the interference, or of the necessity of a caveat, if he had: that Balfour, his assignee, lived also at a considerable distance from the land; was never on it in his life, and did not know of the interfering claim, until after the patent issued; or did the plaintiff know of it, until long after

In 1813, Preston answers this bill: He says Douglass lived within five or six miles of the respondent at the time the survey was made, (the respondent was surveyor of the

county) in December, 1785, on which a grant issued in August, 1792. He cannot say whether Douglass knew of the interference of his claim, but if it did interfere, presumes it was his duty to acquire that information and arrest the title, and his negligence cannot operate in his favour. He verily believes, that before his grant issued, Balfour understood and believed that his survey interfered with the entry, which in September, 1791, he purchased of Douglass; and thinks she had a conversation with him on the subject. He however thinks, that the mere negligence of the party to enquire, will not be a ground of relief. It was his duty to perfect his title with all convenient dispatch. There was no surprise, as six years elapsed between the making of his survey and patent; no fraud or concealment on his part; and the interference could easily have been discovered, and Douglass and Balfour resided but a few miles farther from the land than the defendant: that ignorance of law will not excuse; and he does not believe that any thing exists to take the case out of the general rule, which has been laid down as to the necessity of entering a caveat in such a case.

Much testimony was taken pro and con, on the various objections on both sides, made by the pleadings; and the counsel filed each a written argument.

In that filed by the complainant, the following observations were in substance made, as to the point now under consideration.

536 *On the caveat question, we contend for the plaintiff, 1st, that we have a right to come into Court for relief, because the defendant, Preston, gained his priority at law by bad faith. First, it is bad faith for a surveyor to enter and survey lands, under cover of another name, &c.: that even if this was matter for a caveat, Courts of Equity have concurrent jurisdiction in all matters of fraud, &c. Secondly, it was bad faith in him, not to survey for the plaintiff in due time, but to survey the land entered by him for another, by a junior entry, and especially when it did not cover the land, &c.

II. We could not enter a caveat, because we did not know of the interference. The answer does not deny this allegation. If it did, it will appear clearly that M'Kinney had no notice, until long after the patent issued. Had Balfour notice? It appears the entry was transferred to him in 1791. The patent to Preston issued in 1792, upon a survey made in 1788. When Balfour purchased, no one was settled on the land. There was no clearing, except Hoover's small improvement. The lines of Preston's survey did not run near that place, &c. Balfour then had no survey, and was never informed of the interference by oral communication. How then, was he to know it? Suppose he had gone on the land, and looked for the lines. Could he have found them? And if he had, would he have known whose lines they were? Suppose he had gone to the surveyor's office. Could the plat have informed him of the interference? There is no probability that it would. Besides, he had no right to see

the book of surveys, or to have a copy of the plat; and he might have searched the Register's office in vain, &c. The plat does not call for any lines or courses of the plaintiff's land; nor for Hoover's improvement. Had Douglass notice? All the above observations apply to him.

The counsel for the defendant replies to this. 1st, He repels the argument of illegality, because the entry was
537 *not made with the clerk, &c. 2d, He repels the charge of a failure of duty in not surveying, &c.

As to ignorance, the defendant denies the fact, and if it was so, the law will not warrant the inference drawn. As to the fact: It is proved that Balfour had notice of Preston's claim, because he would not make a general warranty for that reason. There is no proof that this knowledge was imparted to him after Preston's patent had issued; and it is incumbent on the plaintiff to prove their ignorance. But, it is denied that positive notice is necessary; implied notice is enough. When an entry is regularly made, embracing land which another has previously located, it is the duty of the first locator to take care that such second entry is not carried into grant. The entry book is intended as a notice to all persons interested, and every person is to take notice at his peril. When the entry does not embrace the plaintiff's land, but a survey is made thereon, which does embrace it, the case is different. This was the principle on which the Court determined the case of Unerbarger v. Walton's heirs. But, why shall the entry book be notice to a posterior locator, who intends to commence a title, and not be notice to one who has made a location, until his title is perfected? So that, abandoning the idea of a notice by the survey, he contends that the entry covered the land, and that a prior locator was bound to notice it.

The Chancellor, after disposing of the other points in the cause, says, "But there is a fifth ground of defence relied on, on which I am unable to form an opinion perfectly satisfactory to myself; viz: that the plaintiff has shewn no good cause why a caveat was not issued. He swears that neither he, nor those under whom he claims, had any knowledge of the interference of the surveys. The defendant Preston, in his answer, swears, that he cannot say whether Douglass had any knowledge of the interference, but believes that Balfour knew of it, before the patent issued: that

Balfour purchased of Douglass in
538 *1791, and the patent issued in 1792; and thinks that he had a conversation with him on the subject, but when the supposed conversation was, he does not say; but he seems to rely principally on the implied notice, which every locator is presumed to have, by the entry, and contends very properly, that it is the duty of every one interested to seek for the information necessary to protect his rights. There is evidence to shew, that both Balfour and the plaintiff had notice, at the time of the plaintiff's purchase from Balfour, which was about the year 1797, (several years after the patent issued;) but there is no positive evidence to shew, when that knowl-

edge by either was first acquired. Balfour is dead; and his answer cannot be had; and we cannot expect proof of a mere negative from the plaintiff, nor dismiss his bill for want of it; more especially as the charge is not expressly denied. But, the implied or presumptive notice afforded by an entry, and which every one has a right to inspect, must be considered sufficient notice to all interested, of the facts stated in that entry. Now, what are the entries here, and what notice is afforded by Dy-sart's entry, of an interference with the entry of Douglass?" He then goes into a comparison of the entries, to shew that they appear not to cover the same land, and could not interfere; which brings the case, in his opinion, within the principle laid down in this Court, in the case of Unerbarger v. Walton's heirs. "That case," he says, "is now before the Court of Appeals, not acted on, to his knowledge. Indeed, this case is stronger; for in that case, there was no caveat, nor any reasons assigned why one had not issued. But, the principle of implied notice is the same. On the whole, believing the justice of the case to be with the plaintiff, I must decree in his favour, leaving it with a more enlightened Court to correct any error which I may commit." This decree was affirmed here in June, 1820. The case of Unerbarger v. Walton's heirs never came here; and therefore, was acquiesced in by the parties. In-

deed, it was admitted by the counsel,
539 *a very able land lawyer, who argued this case below, that that case was well decided. As to implied notice by a survey, as a matter of record, even if the parties have access to the book of surveys, I never could perceive its force. It does not, like an entry, give a succinct and general description of the land, the water-courses, adjoining lands, entries, &c. where it is to begin, and in what direction to extend, &c.; but may begin at a tree in the forest, and run to another tree, &c. without designating any notorious landmark, or, as in this case, even other surveys which it actually adjoins. As to its being notice as an act in pais, that will depend on whether the party, whose title it interferes with, was present, or whether the line ran near his improvements, or around them, so that the chain-carriers, and other disinterested persons present, could discover the interference, and give notice. But where an open line is left, as in this case, and in that of Hughes v. M'Clung, how are they to know in what way the line is to be closed?

Suppose survey No. 4, had not been made before survey No. 2. When the surveyor got to the point D, he might have protracted a line to W, a course of No. 5, and would then have had lines of other surveys, conducting him to his beginning, and it would have been a lawful survey, with only one open line in it. The surveyor himself does not know which of these surveys was made first; why even those various surveys, made about the same time perhaps, joining though not calling for each other, were so made, unless it was to keep the thing as private as possible. No opinion is given, so as to shew on what point this

Court decided the case of *Preston v. M'Kinney*; and it may be said that it went off on the ground of improper conduct in the surveyor, in entering land in the name of another, for the benefit of his son, instead of making the entry in the clerk's office. But I think this cannot well be supposed. The Chancellor did not decide on that ground. It was not an entry
540 for the survey; (and he gave "a reason for that course, which was doubtless considered satisfactory;) but, on the one now under consideration, and on which he had decided another case, and appeals, as were, to this Court, to say whether those decisions were correct. His Courts lay in a part of the State, to which these cases peculiarly belong; and in cases where the inferior Courts decree on particular grounds which are not thought here to be tenable, though the decree may be supported on other grounds, it is usual for us, (especially when the ground assumed is an important one in point of principle,) to say, that the decree is affirmed, but not for the reasons assigned by the Chancellor, &c. It is an undoubted fact, that the case of *Noland v. Cromwell* was not approved by that portion of the country peculiarly interested in the principles of that decision; and an attempt was made in the Legislature to obviate its effects. There was good ground, therefore, for this Court to pause, and at all events, not to carry that case beyond the points really arising in it. The merits of that case, too, were with the decree.

If the Chancellor's opinion, then, was approved of on this point, (as it seems to me it was,) it would be decisive of the case before us. But, if it went on the ground of improper conduct in the surveyor, either in making an improper entry as aforesaid, or in surveying lands not covered by the location, but in a different direction from it, and without giving notice to the party whose land he was surveying, which exists also in this case, (to say nothing of the other improprieties before noticed,) it seems to me that there is abundant ground in this case, to bring it within even that principle of decision. A public officer ought to stand indifferent, and do justice as far as depends on him. He had no authority by law to survey land, so entirely variant from the location, and might have refused to do so; at least so far as he was required to survey lands he had shortly surveyed for another, on a prior and regular entry. His duty, by law, was to be bounded by the lines of other surveys: and at all
541 events, he was inexcusable "in not notifying that other. His deposition is taken in the cause; and he does not pretend to say, that he gave any such notice, or any reason for thus violating his duty.

Under all these considerations, I cannot yield my assent to carry the case of *Noland v. Cromwell* any further than I am imperiously bound to do, and think that it does not, in any view of it, require that this decree should be reversed. The cases of *Guerrant v. Bagby*, 6 Munf. 160, *Christian v. Christian*, Ibid. 534, and *Lyne v. Jackson*, and *The same v. Wilson*, 1 Rand. 114, have also been since decided, and the case

of *Noland v. Cromwell*, pressed on the Court, without effect.

The presumptive notice, in consequence of an actual survey on the land, I think cannot be maintained by the deposition of the surveyor. It is true, he says, that he ran the lines of the 214 acre survey, except the last line. But, whether he ran the lines L. P. O. which are common to the two surveys of 214 and 338 acres, when he ran the 338 acre survey, or the other, he does not know; for, he does not know which of them he made first; and he did not run them more than once. But, he ran the lines of *Razor's* survey on to D. I believe he did, when he ran them for *Razor*; but, I think he is mistaken, if he intends to say so, that he ran them again, when he made the 214 acres survey. Had he done so, he would have found that he had not reached *Ewing's* line, and of course, would not have called to run with it the last course. The surveys were made 38 years before his deposition was taken, and he had forgotten what happened. It was afterwards discovered, that they had not gone to *Ewing's* line; and the 66 acre survey was made, so as to cover all *Razor's* survey. When that survey was made, running probably near the improvements, the party gets notice, and files his caveat as to it. That survey was made in 1789. But, a patent had issued in 1788 for the 214 and 338 acres. So that no caveat was, or could be filed as to them; the party, as we may well presume, not having notice, or he would have caveated them as well as the 66 acre survey.

542 *As to the objection, taken on the trial, to the want of description of *Razor's* warrant in his entry, I think there is nothing in it; and that it comes too late. If he deposited his warrant with the surveyor, (which we must presume,) all he had to do, was, to direct the location specially, so as to designate the lands intended; and if the surveyor failed to take due notice of the warrant, his neglect could not prejudice the party. But, if the surveyor holds the warrant, and duly notes it on his book of survey, from which, and not from the book of entries, it is to be certified, it is enough to justify the patent. True, if there is any fraud or collusion with the surveyor in entering lands when no warrant is produced, so as to cover them until one is presumed, or withdrawing warrants once entered, and afterwards filing others, it is a fraud; which, if made out, ought to vitiate the proceedings. But, there is no such allegation here; and such misconduct in a public officer is not to be presumed. On the contrary, the warrant and all are returned, and a grant obtained.

There is no ground to say, that *Razor's* entry and survey were void for these reasons. They were good, were originally preferable in law and equity to the pre-emption right of the company, at least from the moment they made their location in a different direction; and that equitable right remains unimpaired to this day, and ought to prevail.

If my view of the facts is correct, (in which I think I cannot be mistaken,) it

seems to me, there can be as little doubt of the law as of the justice of the case.

I think, therefore, the decree ought to be affirmed.

Decree reversed.

543 *Brown v. Toell's Administrator.

August, 1827.

Equitable Relief—Usurious Judgment—Bill.—Where relief is sought in equity, against a judgment at law, on the ground of usury, the bill must put that matter directly in issue.

Notes—Agreement to Pay Usurious Interest—Effect.—An agreement, subsequent to the execution of a note, to pay more than legal interest, in consideration of delay of payment, will not affect the note, although it may entitle the debtor to relief for all beyond legal interest.

Judgment—Relief of Bail.—Bail cannot be relieved in equity against a judgment at law by default, without assigning some good cause why he did not defend himself at law.

This was an appeal from the Lynchburg Chancery Court.

The following opinion gives a full view of the case, which was submitted without argument.

August 21. JUDGE CABELL.

Benjamin Perkins executed to Peter Toell his negotiable note for \$500, on which Humphreys, administrator of Toell, brought suit in the Superior Court of Law for the county of Campbell, and Brown became common bail. No defence being made, judgment was rendered against Perkins and Brown for the amount of the note, with interest. Brown filed his bill in the Court of Chancery for the Lynchburg District, in which he stated, that shortly after the institution of the suit, he removed to the county of Nelson, "and taking it for granted that Perkins would attend to the said suit, and on the trial thereof, procure evidence of all the credits to which he was entitled, he gave himself no farther trouble about the matter;" but that Perkins, although entitled to large credits, failed, from the extreme derangement of his affairs, and other circumstances, (not specified,) to prove the credits; in consequence whereof, judgment was rendered, as aforesaid, for the whole amount of the principal of the said note, with interest thereon. He alleges as a fact, (which he says he will be able to prove,) that Toell was indebted to Perkins for various dealings, in a sum equal, or nearly equal, to the amount of the note; for none of which had Perkins been paid: that Toell acknowledged,

544 "in his life-time, that there was a very small balance, if any, due on

the said note; and moreover, that since the death of Toell, Perkins had paid to his widow, with the knowledge of his administrator, \$100; which payment was intended to be on account of certain extra interest upon the said note, agreed by the said Perkins to be paid to the said Toell. He prayed an injunction, which was granted.

Humphreys answered, denying all knowledge of the credits claimed, of the payment to Mrs. Toell, and of any agreement to pay usurious interest.

Brown filed an amended bill, and without making any new charge, made Perkins a party, calling on him to say, among other things, what excess of interest was demanded and received by the said Toell, of him the said Perkins.

The only evidence that could, in any aspect of the case, be relied on as a material, is that of Nicholas Harrison, who testifies, that Toell told him, a short time before his death, that the note in question had been given for money lent at an interest of $2\frac{1}{2}$ per cent. a month: that the interest had been paid in goods; and that he was then dealing with Perkins, and would endeavour immediately to collect his whole debt; and that about \$200 were then due.

The questions are, whether any relief is to be granted, either on account of the alleged usury, or of the credits claimed for Perkins?

1. As to the usury.

It is competent to a party to an usurious contract, to go into equity for relief as to the interest, even after a judgment at law, and without assigning any reason for having failed to defend himself at law. But, this can be done only on a bill properly framed for the purpose.

If the bill in this case had impeached the transaction as usurious in its origin, and had sought relief on that ground, the testimony of Harrison might have been relied on in support of a claim to be exempted from paying any interest whatever. But, there is no such allegation in the bill; and, therefore, the testimony of 545 Harrison as to the usury, *relating to a matter not in issue, is irrelevant, and ought to be disregarded.

The only part of the bill that relates to the question of usury, is that which states that since the death of Toell, Perkins had paid his widow, with the knowledge of the administrator, the sum of \$100 for extra interest on the note, agreed by Perkins to be paid to Toell. But, this is not stated to have been originally agreed, when the note was executed. It may have been a subsequent agreement, in consideration of delay of payment, after the note became due; in which case, it would not have affected the note, and the legal interest upon it, although, if supported by testimony, it might have entitled him to relief for all beyond legal interest. But, the allegation, as made in the bill, is denied in the answer; and is not supported by Harrison's testimony, nor any other in the cause.

The appellant was, therefore, rightly dismissed from Court, so far as relates to the question of usury.

2. We will next examine his pretensions,

***Chancery Practice—Allegations and Proofs Must Agree.**—In a court of equity as well as in a court of law, the allegations and proof must agree. A recovery will not be allowed upon a case, although proved, which differs essentially from that alleged in the bill. *Wren v. Moncre, 95 Va. 375, 28 S. E. Rep. 568*, citing the principal case as authority. To the same effect the principal case is cited in *Smith v. Nicholas, 8 Leigh 364*.

Usury.—See monographic note on "Usury" appended to *Coffman v. Miller, 26 Gratt. 698*. The principal case is cited on the subject of usury in *Moseley v. Brown, 76 Va. 426*, and on the subject of equitable relief from a usurious judgment in *Snyder v. Middle States, etc. Construction Co., 62 W. Va. 665, 44 S. E. Rep. 252*.

***Judgment—Relief of Bail.**—To the point that bail cannot be relieved in equity against a judgment, without assigning some good cause why he did not defend himself at law, the principal case was cited with approval in *Mann v. Drewry, 5 Leigh 304*.

on the ground of the credits to which, it is alleged, Perkins was entitled.

It may be admitted that, as to these credits, Harrison's testimony is relevant, and even satisfactory. But the appellant will, nevertheless, be entitled to no redress. The bail had a right to make any defence at law, which the principal himself might have made. He might have defended himself on the ground of these credits. There is no allegation of a defect of testimony; for, even in his bill, he declares his ability to prove them. He ought to have defended himself at law; and as he assigns no good reason, why he did not do so, the door of the Court of Equity ought not to have been opened to him.

The decree of the Chancellor should be affirmed.

JUDGES CARR and GREEN concurred, and the judgment was affirmed.*

546 *Commonwealth v. Winstons.

August, 1827.

Judgment—Interest—Error—Amendment—Method of.†—A judgment is rendered by default in the General Court, upon motion, on a bond due to the Commonwealth; but the clerk, in entering the judgment, only allows interest from a date posterior to that, from which, by the terms of the bond, interest was to run. This error may be amended, upon motion to the General Court, at a succeeding term. 1 Rev. Code, 612, sec. 108.

Same—Amendment—Motion.†—This power of amendment applies to a motion as well as to an action, and extends to the General Court.

This was an appeal from the General Court.

The whole case is so fully discussed in the opinions of the Judges, that any other report would be unnecessary.

The Attorney General, for the appellant.

Copland and Johnson, for the appellee.

August 21. JUDGE CARR.

In June, 1818, the Commonwealth obtained a judgment against George Winston in the General Court, for \$17,993 24 cts. with interest from the 19th of April, 1817. As to \$5,631 80 cts. part of this judgment, Winston appealed, leaving \$12,361 44 cts. for which there was an undisputed judgment against him. For this last sum Winston obtained an act of Assembly, passed the 2d of March, 1819, allowing him five, six and seven years to pay it off by equal instalments. To secure these payments, he executed a bond, dated June 21st, 1819, with two sureties, for the sum of \$24,792 88 cts. conditioned to pay \$4,120 48 cts. on the 2d of March, 1824, and the same sum on the same day of the two following years, with interest on each instalment from the 19th

of April, 1817. The time for the payment of the first instalment having passed, the Auditor gave Winston and his sureties notice, that a motion would be made in the General Court, on the 15th of June, 1824, for judgment against them for that 547 instalment, with interest *from the 19th of April, 1817. On the hearing

of the motion, the defendants not appearing, judgment was rendered for the penalty of the bond, to be discharged by the payment of \$4,120 48 cts. with interest from the second of March, 1824, and such other sums as should afterwards appear due, on scire facias being sued out. A notice was given by the Auditor to the defendants, that a motion would be made to the succeeding General Court, to amend this judgment; it being erroneously entered, in this; that it is made to carry interest from the second of March, 1824, instead of the 19th of April, 1817, as called for by the bond.

The General Court overruled the motion to amend the judgment. The Attorney General, for the Commonwealth, excepted to the opinion, spreading the facts upon the record, and took an appeal.

We are to consider, whether in this judgment the General Court erred.

At the common law, an error committed by the Court, not in a point of judgment, but such as might be called a misprision of the Court, could be amended; but, no misprision of the clerk was amendable after the term. 8 Co. 157, Blackmore's Case. By the 14th Edw. 3, chap. 6, (which was the first act of amendment) it is enacted, that by the misprision of clerks in every place wheresoever it be, no process shall be annulled or discontinued, by mistaking in writing one letter or one syllable too much or too little, &c. but shall be hastily amended in due form. Upon this statute, many doubts seem to have arisen; among others, whether a word might be amended; as the statute speaks only of a mistake in writing a letter or syllable too much or too little; and it was determined, that under the statute, words, as well as letters and syllables, might be amended.

The most important English statute on this subject, is 8th Hen. 6, chap. 12, by which Judges had power to examine records, and in affirmance of judgments, 548 to amend *all that to them, in their discretion, should seem to be the misprision of the clerk.

In 1753, 6 Stat. at Large, 339, it was enacted, that all the English acts of jeofail and amendment, shall be in full force in this Dominion also. Under the statute of 8th Hen. 6, many decisions have taken place in England, drawing the line of distinction between misprisions of the clerk, and errors in judgment. See *Petrie v. Hannay*, 3 Term Rep. 659; *Manners, qui tam v. Parten*, 3 Bos. & Pull. 343; *Newcomb v. Green*, 1 Wils. 33; 2 Vin. Abr. 346, pl. 11; 372, pl. 11; 373, pl. 16; 374, pl. 20; *Dunbar v. Hancock*, 3 M. & Selw. 591; *Short v. Coffin*, 5 Burr. 2730. In this last case, the suit was against A. as executor, and a general verdict; but the judgment entered *de bonis propriis*. After a writ of error had been brought in the Exchequer, and in

*The PRESIDENT and JUDGE COALTER absent.

†Amendments.—In *Shipman v. Fletcher*, 91 Va. 489, 22 S. E. Rep. 458, RILEY, J., who delivered the opinion of the court, referring to § 3451 of the Code, said that the errors authorized to be corrected by this particular provision are misprisions of the clerk and what may be termed clerical misprisions of the court, and cites the principal case to sustain the proposition. The principal case is also cited on this subject in *Eubank v. Ralls*, 4 Leigh 317, 319, 820; *Powell v. Com.*, 11 Gratt. 824; *Barnes' Case*, 92 Va. 800, 23 S. E. Rep. 784; *Vance v. Ravenswood, etc.*, Ry. Co. (W. Va.), 44 S. E. Rep. 402; *Alston v. Munford*, 1 Fed. Cas. 581. See further on the subject, *foot-note* to *Halley v. Baird*, 1 Hen. & M. 25; *foot-note* to *Compton v. Cline*, 5 Gratt. 187; *foot-note* to *Price v. Com.*, 88 Gratt. 820; monographic note on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300.

nullo est erratum pleaded, it was moved in the King's Bench to amend; and the Court were all clearly of opinion to amend the judgment, by making it *de bonis testatoris si, &c.* It was objected, that this was a mistake in law, and cases cited to shew that it could not be amended. But, Lord Mansfield delivered the opinion of the Court, "That this is not an error in the judgment of the Court in point of law, but a mere mistake of the clerk;" and he repeated at large the case of *Chapman v. Gale*, from 2d Lev. 22, which was debt against an executor, who pleaded fully administered, and verdict and judgment for the plaintiff, which was entered generally; and thereupon error was brought, and it was assigned, that the judgment should have been *de bonis testatoris si, &c.* But, upon the affidavit of the attorney, that he gave the clerk instructions to enter it up according to the plea, and that it was a mere mistake of the clerk, "it was amended as a misprision of the clerk."

If the case at bar were to be decided under the English statutes, there could be no doubt that the case just cited would be considered a full and clear authority; indeed, a stronger case than ours. There, the whole effect of 549 the "judgment was changed by the amendment. Still, as the record shewed that the suit was against the defendant as executor, and the verdict in the same character, and the attorney swore that his instructions were to enter the judgment according to the plea, it was apparent, that the mistake was the clerk's, and as such, it was amendable.

In the case before us, it was contended, that the doctrine of amendments did not apply, because this was a motion, and not an action. But I can see no ground for the distinction. The questions in such cases always are, whether the mistake is clerical, and whether there is any thing in the record, by which the error can be safely corrected; and if these be answered affirmatively, whether it be a suit or a motion, the reason and the law are the same. In our case, there was a bond for the money, with interest from the 19th of April, 1817. The notice informed the defendants, that a motion would be made for judgment on the bond, with interest from this date. The defendants made no defence; thereby admitting the justice of the claim. The judgment is entered for the penalty; but, when the clerk came to state the sum by which it might be discharged, he sets it down as \$4,120 48, with interest from the 2d day of March, 1824, instead of from the 19th of April, 1817; and evidence was offered to the Court (and improperly rejected by them, I think) to prove by the oath of the Auditor and the clerk, that instructions were given to enter the judgment agreeably to the condition of the bond, with interest on the instalment from the 19th of April, 1817, and that the entry actually made, was so made through the inadvertency and mistake of the clerk. These facts leave no rational ground for doubt. They shew the mistake to have been clerical; and they give the safe and

sure guides, by which to correct the misprision.

But, it is said, that the English statutes were not in force here, when this case arose; and that is very true. I consider, however, that by the statute of 1753, they were incorporated into our laws, as 550 much as if they had been "repeated verbatim; and that they were not repealed by the subsequent declaration, that British statutes (as such) should no longer be in force here; but that they were repealed by the clause in the revival of 1819, declaring that all laws, not included in that revival, should be repealed. It was by no means, however, the intention of the enlightened board of revisors, to take away, or to curtail, the salutary power of amendment, so long exercised by the Courts. Accordingly, they inserted in the revival a clause to the following effect: "Where, in the record of any judgment or decree of any Superior Court of Law or Equity, there shall be any mistake, miscalculation, or misrecital, of any sum or sums of money, tobacco, wheat or other such thing, or of any name or names, and there shall be among the record of the proceedings, in the suit in which such judgment or decree shall be rendered, any verdict, bond, bill, note, or other writing of the like nature or kind, whereby such judgment or decree may be safely amended; it shall be the duty of the Court in which such judgment shall be rendered, and of the Judge thereof in vacation, to amend such judgment or decree thereby, according to the very truth and justice of the case; the opposite party having notice, &c." 1 Rev. Code, 512, sec. 108. This is the law by which we must decide this case.

It is objected, first, that the General Court is not within the words of the law. Secondly, That the misprision is not one of those declared amendable by the law.

With respect to the first, the statute itself declares, that for removing all doubts concerning the Courts to which this act may apply, all things herein contained, not restricted by their nature, or by express provision, to particular Courts, shall be the rules of decision and proceeding in all Courts whatsoever within this Commonwealth. We must enquire, then, whether the clause concerning amendments, either by its nature or its express words, be so restricted as not to embrace the General Court.

551 *It was not, and it could not be contended, that there was any thing in the nature of the power of amendment, which rendered it inapplicable to the General Court. On the contrary, if there be one Judicial tribunal, to which this power is more necessary than another, I should think the General Court would be that very tribunal. I must be understood to say this, not in reference to the members of that Court, (for whom I have the highest respect,) but to its constitution, the nature of the business before it, the dispersed situation of the Judges, and the shortness of the sessions, &c. It was strongly contended, however, that by the express words of the law, the General Court was excluded; "any

Superior Court of Law or Equity." Our laws divide the Courts into two classes, as to grade, Superior and Inferior. To one or other of these classes, every Court in the Commonwealth must belong. The County and Corporation Courts are called in various acts, the Inferior Courts, and all above them, the Superior Courts. That the General Court is above them, no one will deny. Thus, in the general classification, the General Court, so far from being excluded, is expressly included by the terms, "any Superior Court of Law." But, there are many particular laws, which, in their provisions, most clearly take in the General Court, by the terms Superior Courts. Thus, the act concerning counsel or attorneys, passed in 1792, long before the existence of the Circuit Court system, enacts that before any person shall be licensed to practice law, he shall produce to those authorised to examine, &c. a certificate, &c. and three of the Judges of the Superior Courts, upon, &c., may grant to such person a license to practice law, in the Superior and Inferior Courts of this Commonwealth. Again, "Counsel who prosecute in an Inferior Court, shall not be permitted to appear in a Superior Court," &c. Again, "If any suit shall be dismissed for non-attendance of an attorney practising either in the Superior or Inferior Courts," &c. Now, surely, it will

not be for a moment doubted, 552 "that in all these cases (and many others might no doubt be cited,) the General Court and its Judges are comprehended in the terms Superior Courts of Law. We see, then, that both by the nature of the power, and the words of the grant, the General Court so far from being excluded, is directly included. Nor does it render this construction at all doubtful, that in another part of the clause, the power is given to the "Court in session or the Judge thereof in vacation." Reddendo singula singulis, all appearance of obscurity or absurdity is avoided. The General Court, the Circuit Courts, and the Chancery Courts, may amend; and every Judge who has a particular Court or Courts, may, for errors in his Courts, amend in vacation.

But, secondly, it is contended, that the misprision here, though clearly (as has been shewn) clerical, is not within the law, because it is neither a "mistake, miscalculation, or misrecital, of any sum or sums of money, tobacco, wheat, or other such thing, or of any name or names."

We must recollect, 1st, that this is a law of jeofails and amendment, and therefore to be liberally construed. 2d. That whereas, under the English statutes of amendment, misprisions of the clerk only could be amended; under ours, mistakes of the Court also in every thing except matters of judgment may be amended; which is strong to shew, that the law did not mean to curtail the power, which had so long existed. For, it would be most strange to suppose, that the Legislature, while extending the power to mistakes of the Court, could mean to withdraw from it any mistake of the clerk. The clear meaning of the law, then, in my judgment, is, that any mis-

prision of the clerk, (or mistake of the Court, not touching a matter of judgment,) may be amended, provided the record furnishes the means, whether bond, bill, note or other thing, by which the amendment may be safely made; and the terms mistake, miscalculation or misrecital, &c., are put rather for example, and as comprehending those misprisions which commonly

happen, than as restrictions on the 553 power of the Court. If the clerk, in this case, had mistaken the name of a party, or the sum, there could be no question of the power of the Court to amend. Has he not, in effect, and in reason, mistaken the sum? By the bond and the notice, the judgment should have been for the instalment of \$4,120 48, and \$1,000 (within a trifle) for interest prior to the date of the bond. By the error of the clerk, this \$1,000 is omitted. Is not this a mistake, and a capital mistake too, in the sum? To say that such misprision, is not within the meaning of the law, is to stick in the letter, to disappoint the intention of the Legislature, and to construe this statute as strictly as if it was a capital offence, instead of a misprision of the clerk, which was the subject.

I am of opinion, that the judgment of the General Court be reversed, and such judgment entered as they should have entered.

JUDGE GREEN.

Amendments after the term were allowed in very few cases at the common law. In a few cases, however, they were permitted, as in case of a mistake in the recital of a writ, the entry of an essoin, or of a continuance; all of which were palpable mistakes, amendable by other parts of the record susceptible of no doubt. These were allowed to be amended, because they were considered to be the misprisions of the Court. Blackmore's Case, 8 Co. 156, b. Such an amendment as is proposed in this case, whether it was considered as misprision of the Court or of the clerk, could not, after the term at which the judgment was rendered, be amended at common law. Before the statutes of amendment, no misprision of a clerk could be amended; and those statutes applied only to the cases of clerical misprisions. The first of those was that of the 14th of Edw. 3, ch. 6; and the most important, that of 8th Hen. 6, ch. 12. It was under the authority of these statutes, and not 554 by force of the principles of the common law, that amendments were made in the cases cited by the Attorney General, although the statutes are not directly referred to.

In 1753, 6 Hen. Stat. at Large, 339, the Legislature of Virginia adopted in mass all the statutes of jeofails and amendments in force in England; of which, those in force in England before the 4th of James 1, were, before the passing of this act of Assembly, in force here; and all those statutes applied to the proceedings in all our courts of record. These statutes of England, so adopted by our act of 1753, although not re-enacted in form by the General Assembly, continued in force here, until the 1st of January, 1820. The act of

1792, declaring that no act of Parliament should have any force here, was only intended to abrogate the acts of Parliament passed before the 4th of James I; which were, until abrogated by the act of 1792, always in force here, as declared by the resolution of the Convention of 1776. But, the act of 1792 did not abrogate the statutes which had been adopted and virtually incorporated into our code of laws, by an act of Assembly. These statutes of amendment, however, ceased to operate here on the 1st of January, 1820, when the laws enacted at the last revisal took effect, by one of which, all laws, not published in that Code, were repealed; and consequently the act of 1753, was thereby repealed. The only statute of amendment, therefore, now in force here, is that of 1819, ch. 128; the 108th section of which contains the only provision which can apply to the case at bar. That provides, "When in the record of any judgment or decree of any Superior Court of Law or Equity, there shall be any mistake, miscalculation, or misrecital of any sum or sums of money, tobacco, wheat, or any other such thing, or of any name or names, and there shall be among the record or proceedings in the suit in which such judgment or decree shall be rendered, any verdict, bond, bill, note, or other writing of the like nature or kind, whereby such judgment or decree may

be safely amended, it shall be the
555 *duty of the Court in which such judgment shall be rendered, and of the Judge thereof in vacation, to amend such judgment or decree thereby, according to the very truth and justice of the case; provided the opposite party have notice," &c.

The statute does not, (as did the former laws) confine the power to amend, to mistakes, &c. made by the clerk only; but, extends to those also made by the Court, if they be not errors in the judgment of the Court, but only in the sum, name or quantity, which indeed would be properly clerical mistakes, in the Court reducing its judgments to writing. The questions, in this case, are, whether this statute extends to judgments of the General Court; and if it does, whether the mistake in question is such as can be amended under the statute.

The terms "Superior Court of Law or Equity," seem to me to embrace, in their natural import, all the Courts, except the County and Corporation Courts, and were probably used as the most comprehensive expression to distinguish these Superior from those Inferior Courts. The provisions that it shall be the duty of the Court, and of the Judge thereof in vacation, to amend, does not necessarily contradict this construction; for, taken distributively, it applies to all the Superior Courts, when in session, and to the Judge thereof in vacation, where the Court consists of one Judge. In the latter case, the amendment may be made as conveniently and as safely in vacation, as in term time; but not in the former. I am the more induced to adopt this construction of the statute, by the consideration, that when it was enacted, the former laws authorising such amendments, then in force and applicable

to all Courts, were repealed, and the effect of many statutes condensed into this one, only a little enlarged in some respects, and restrained in others. I cannot think it was intended to take from the Courts, consisting of many Judges, a power which they before had; and to refuse to the General Court in term, a power to amend
556 their judgment, "confided to a single Judge of that Court in vacation, in respect to a judgment in a Superior Court of Law for a county.

I do not think that the admission of the Attorney General upon the record, that the judgment was satisfied, can receive the construction contended for by the appellee, and be a bar to the motion to amend. It was an acknowledgment, that all which could be claimed under that judgment as it was, had been paid; but whether voluntarily or coercively, does not appear. If a coercive payment would bar any further remedy upon the judgment, the fact should have been alleged and proved by the appellee.

Under the statutes in force before the 1st of January, 1820, the mistake made in this judgment, being a misprision of the clerk, might have been amended, 8th Hen. 6, ch. 12, sec. 2; and although the entry of the judgment was signed by the presiding Judge, it would have been considered as a clerical mistake. The statute of Hen. 6th, above cited, authorises the Courts "to amend, in affirmance of judgment, all that in their discretion seemeth to be misprision of the clerks." Under this act, a judgment entered on the records of our old District Courts, and signed by the presiding Judge, was amended by the Court at a subsequent term, and the amendment sanctioned by the Court of Appeals. *Gordon v. Frazer*, 2 Wash. 130. This could only have been properly done, on the ground that it was a misprision of the clerk; and the paper by which the judgment was amended, was the bond on which the suit was brought, and the endorsements thereon, which were considered as a part of the bond, and the credits also endorsed upon the bond. The construction given by the English Courts to the statutes of amendment, required that there should be something to amend by; and if there were, then a judgment, as well as any other part of the record, might be amended. *Tidd's Prac.* 246-247; cases cited in 2 Vin. Abr. 309, F.

557 *Some of the subsequent cases in this Court seem to have shaken the authority of the case in *Washington*; the first of which was that of *Vaughan & Field v. Freeland*, in a note, 2 Hen. & Munf. 477; in which the judgment was reversed, because it had been amended after the term. The verdict was erroneously entered on the record book signed by the Judge; and this error was corrected by amending the entry, so as to conform to the real finding of the jury. In this case, there was a paper, not only in the record, but an indispensable part of the record, by which a palpable error of the clerk might be corrected, as by the bond in *Gordon v. Frazer*; and I cannot but think, that the case of *Gordon v. Frazer* is the best

authority; especially, as Judge Tucker, in *Cogbill v. Cogbill*, expressed his dissatisfaction with the case of *Vaughan & Field v. Freeland*.

The cases of *Halley, &c. v. Baird, &c.* 1 Hen. & Munf. 25, and *Cogbill v. Cogbill*, 2 Hen. & Munf. 478, do not conflict with *Gordon v. Frazer*. In the first, the District Court set aside in toto an office judgment, which stood confirmed, and was final at a preceding term; and reinstated the suit, and sent it to the rules for new proceedings. This was not an amendment, but an annihilation of the judgment. In *Cogbill v. Cogbill*, the Court refused to allow an amendment, by correcting the order in the record by the minutes of the clerk, a material part of the minute being omitted in the order. But it is observable, that one of the three Judges who sat in that case, dissented, and that the minutes of the clerk are not a part of the record as a bond is, at least to some purposes, and especially to amend by. I conclude, that the mistake in the entry of the judgment, sought to be amended in this case, was not an error in the judgment of the Court, but a clerical mistake in recording the judgment of the Court; and at all events, it was competent to the Court, in which the judgment was rendered, to decide upon motion, whether it was an error in the judgment of the Court, or a mistake in the entering of the judgment.

It only remains to enquire, whether this mistake, if it was clerical, could be amended by entering the judgment now, as it ought to have been originally entered, according to the condition of the bond. I have already observed, that no amendment can be made but by virtue of the statute of 1819, and in such cases as were allowed by the common law, of which this is not one. The question is, whether a mistake as to the date at which interest shall commence, is amendable under this statute.

Upon a strictly literal construction of the terms of the 108th section, compared with the 103d section, which prescribes the effect of a verdict in curing errors in the previous proceedings, it might be very well doubted, whether it authorized the amendment of a mistake "in the day, month or year;" especially if the difference in the phraseology of the two sections could be considered as designed by the Legislature. The 103d section provides for a mistake in the declaration or pleading of "the day, month or year," as well as of "the christian name or surname of either party, sum of money, or quantity of merchandize, (the name, sum, time, or quantity, being right in any part of the proceedings or record;)" and the 108th section provides only for the "mistake, miscalculation or misrecital, of any sum or sums of money, tobacco, wheat, or any such thing, or of any name or names;" omitting the case of a mistake in "the day, month or year," provided for in the 103d section. I can, however, see no possible reason to induce the Legislature to make a distinction, in this respect, between the effect of a verdict, in amending an error in the previous proceedings as to time, and the amending of such a mistake in a judg-

ment. The law requiring in both cases some authentic document in the record to amend by, I consider both sections to have intended to produce the same effect; the one, upon the proceeding before the verdict; the other, upon the judgment, by remedy in "clerical misprisions," whether committed by the clerk, the parties, or the Court, where there was any thing in the record, by which it could be safely corrected. The difference in the phraseology is accounted for by the fact, that the two sections were drafted at different times, and by different hands; the 108th being a new provision recommended by the revisors, and which was necessary to obviate the effect of the repeal of the former statutes of amendment, and of the decision in *Vaughan & Field v. Freeland*. The statutes of amendment and jeofails have always received a liberal construction; and when the judgment is for a sum of money, with interest thereon from a time past, and there is a mistake in stating the time when interest shall commence, it may be fairly considered as a mistake in the sum of money adjudged; the interest being a constituent part of the debt recovered, as much as the principal.

I think the Court ought to have amended the judgment, according to the terms of the bond.

JUDGE CABELL.

On the 21st of June, 1819, George Winston, James Winston and Pleasant Winston, executed their bond to James P. Preston, Governor of the Commonwealth, in the penal sum of \$24,722 88, with condition to be void if the said George Winston should pay the following sums of money, at the following periods, viz: \$4,120 48, on or before the 2d day of March, 1824, with interest thereon from the 19th day of April, 1817, till paid; \$4,120 48, on or before the 2d day of March, 1825, with interest thereon from the said 19th day of April, 1817, till paid; and the sum of \$4,120 48, on or before the 2d day of March, 1826, with interest thereon from the said 19th day of April, 1817.

The period for the payment of the first instalment having passed, the Auditor gave the Winstons notice, that a

motion would be made against them in the General Court, on the 15th of June, 1824, for a judgment on the said bond, because of the breach of the condition thereof, in this, that the said George Winston had not paid the first instalment, \$4,120 48, with interest thereon from the 19th of April, 1817.

The Winstons neither appeared, nor made any defence against the said motion; whereupon, a judgment was entered against them on the 16th of June, 1824, for the penalty of the bond, to be discharged by the payment of \$4,120 48, with interest thereon from the 2d of March, 1824, till paid, and the costs; and such other sum or sums of money as should thereafter appear to be due, upon suing out a scire facias, and assigning new breaches.

At the succeeding General Court, viz: on the 20th of November, 1824, and in pursuance of notice given to the Winstons, the Auditor of Public Accounts, on behalf of

the Commonwealth, made a motion to the General Court, to amend the judgment aforesaid, because it had been erroneously entered, in this, that it was made to carry interest from the 2d day of March, 1824, instead of the 19th of April, 1817.

On the trial of the motion, it was admitted that the judgment sought to be amended, had been, previously to the notice and motion, fully satisfied as to the whole amount in the said judgment specified. The Attorney General then offered to prove by the Auditor of Public Accounts, and the clerk of the General Court, that the said clerk had received no directions, either from the General Court, the Auditor, or the Attorney General, to enter the judgment in any manner variant from the condition of the bond; but that his instructions were, to enter the same agreeably to the said condition, with interest on the instalment for which the said judgment was rendered, from the 19th of April, 1817; and that the entry of the said judgment, with interest from the 2d day of March, 1824, was made by the said clerk, through inadvertence and mistake.

561 But, the Court *refused to receive the evidence of the Auditor and of the clerk to that effect; and overruled the motion for the amendment.

The correctness of that decision is now to be considered.

At the common law, as well the judgment of the Court, as any other part of the record, may be amended, during the same term in which the entry was made; for, during the term, the record is in the breast of the Judges, and not in the roll. Co. Litt. 260; 5 Co. 74, b.; 8 Co. 156, b. But, at the common law, amendments were rarely admitted after the term. They were confined to those cases, where the act complained of could be considered the misprision of the Court itself, in the form of the entry," and where the mistake was amendable by other parts of the record, which admitted of no doubt; such as "a fault of entry of a continuance, or of an essoin, or misrecital of the original writ. 8 Co. 156, b. But at common law, there could be no amendment after the term, where the act complained of was the misprision of the clerk. 8 Co. 156, b. The statutes of the 14th of Edw. 3d, ch. 6, and of the 8th of Hen. 6, ch. 12, were made to remedy this evil. The last of these statutes declares, that the Courts shall have power to reform and amend, in affirmance of judgments, "all that to them, in their discretion, seemeth to be the misprision of the clerks." 8 Co. 157. These statutes were always in force in this country; but, they were, moreover, together with all the other British statutes, "commonly called statutes of Jeofails," adopted by our Legislature, in the year 1753, (6 Hen. Stat. at Large, 339,) "for so much thereof as relates to any mispleading, Jeofail, and amendment;" and they applied to the proceedings of all our Courts of record. They were not affected by the act of 1792, (13 Hen. Stat. at Large, 234,) declaring that no British statutes should have any force or authority in this Commonwealth. For, that act was manifestly intended to apply

to such British statutes, as had been referred to by the ordinance of the 562 Convention of 1776, (9 Hen. Stat. *at Large, 127,) which were such as had always been in force here, and not to such as had, by previous acts of our Legislature, been expressly adopted, and, as it were, incorporated into our Code of Statute Law. But they were repealed by the act of 1819, (1 Rev. Code, 16,) because they were not included in the late publication of the laws.

It was not, however, the intention of the Legislature, to leave us exposed to the inconveniences of the limited powers of amendment given by the common law. In repealing the British statutes of amendment, they adopted a provision more extensive than any in the British statutes. That provision is to be found in the 108th section of the 128th chapter of the act of 1819, (1 Rev. Code, 512;) and it declares, that "where in the record of any judgment or decree of any Superior Court of Law or Equity, there shall be any mistake, miscalculation, or misrecital of any sum or sums of money, tobacco, wheat or other such thing, or of any name or names, and there shall be among the record of the proceedings in which such judgment or decree shall be rendered, any verdict, bond, bill, note, or other writing of the like nature or kind, whereby such judgment or decree may be safely amended, it shall be the duty of the Court in which such judgment shall be rendered, and the Judge thereof in vacation, to amend such judgment or decree thereby, according to the very truth and justice of the case, provided the opposite party, &c. shall have reasonable notice, &c."

The British statutes of amendment extended only to misprisions of the clerk; whereas, our new statute extends to those of the Court also; not indeed, to errors in the judgment of the Court, in point of law, but to mistakes of the Court, in the sum, name or quantity; which may be regarded as clerical misprisions of the Court, in reducing its judgment to writing.

But, before we proceed to consider the correct construction of the act of 1819, concerning amendments, which do not take effect till January, 1820, it will be use- 563 ful to consider *the nature of the error complained of in this case, and the power of amending it, under the laws that were in force here, prior to the 1st January, 1820.

The motion on which the original judgment was rendered, was a summary proceeding, in which the Court were authorised to give a judgment, without the formality of pleadings in writing. No declaration was required from the plaintiff, nor any bail, nor plea from the defendants. The plaintiff was entitled to a judgment according to the proofs adduced. The notice informed the defendants, that the plaintiff demanded the first instalment, with interest thereon from the 19th of April, 1817. The bond itself expressly bound them to pay interest from that time, and was, of itself, sufficient evidence to authorise and require a judgment for interest thereon, from that time, unless controlled

by countervailing testimony. The record states, that on the trial of the motion, the defendants "were called, but came not;" and entry which, in a summary proceeding like this, necessarily implies that they did not appear either in person or by attorney, and that they introduced no testimony whatever. There was, then, nothing for the Court to do, but to render judgment according to the evidence of the plaintiff, viz: according to the bond, for the first instalment, with interest from the 19th of April, 1817. We know, however, that on such occasions, the Court enters into no detail in pronouncing its judgment. All that is then done, is to direct a judgment according to the bond; leaving it to the clerk to extend it, in proper form, upon the order book.

If we attend to the power of amendment as exercised by the Courts of Westminster Hall, under the very laws that were in force in this country until the 1st of January, 1820, it is incontrovertible that such a mistake as that complained of in this case, would be there considered as a misprision of the clerk; and that although the entry of the judgment should be signed by the presiding Judge of the Court, it would, nevertheless, be regarded and amended as a misprision of the Court, it would, nevertheless, be regarded and amended as a misprision of the clerk.

564 *The case of Chapman v. Gale, 2 Lev. 22, was debt against an executor, who pleaded plene administravit; verdict and judgment for the plaintiff, which was entered generally; and thereupon error was brought, and it was assigned, "that the judgment should have been *de bonis testatoris si*," &c. But upon the affidavit of the attorney, "that he gave the clerk instructions to enter it up according to the plea, and that it was a mere mistake of the clerk," it was amended as a misprision of the clerk.

The case of Short v. Coffin, 5 Burr. 2730, is to the same effect. That was the case of a motion to amend a judgment against an executor *de bonis propriis*, by making it *de bonis testatoris si*, &c., et *de bonis propriis*, si non, &c. It was after writ of error brought, in nullo est erratum pleaded, and an argument in the Exchequer Chamber. It was contended by the counsel opposed to the amendment, that it was not a mistake of the clerk, but a mistake in law; and that the amendment would alter essentially the judgment. But Lord Mansfield delivered it as the opinion of the Court, "that it was not an error in the judgment of the Court, but a mere mistake in the clerk;" and it was amended accordingly.

The first of these cases, Chapman v. Gale, shews also, that according to the practice in England, the General Court ought to have admitted the testimony as to the instructions given to the clerk, which would have proved clearly that the mistake was nothing more than the misprision of the clerk; and both cases shew, that in England, it would have been amended.

I am of opinion, that the most approved decisions of this Court are in conformity with the decisions of the English Courts. A judgment entered on the order book of

one of the old District Courts, and signed by the presiding Judge, was amended by the same Court, at a subsequent term; and the power to amend was, on appeal, sanctioned by this Court, (Gordon v. Frazer, 2 Wash. 130,) on the ground that it was a misprision of the clerk, and that there was *something to amend by, viz: the bond on which the suit was brought, and the memorandum and credits endorsed thereon.

The case of Gordon v. Frazer, has never been expressly overruled; but, its authority is somewhat shaken by some subsequent cases, which seem to have been decided on principles inconsistent with it. The first of these is the case of Vaughan & Field v. Freeland, note to Cogbill v. Cogbill, 2 Hen. & Munf. 477. In that case, the clerk entered the verdict of the jury erroneously on the order book, and entered the judgment conformably to the erroneous entry of the verdict; and these entries were signed by the Judge. At a subsequent term, the same Court permitted the entries to be amended, so as to conform to the real finding of the jury. On appeal to this Court, the judgment was reversed on this ground, "that the order made for amending the record and altering the judgment entered on the said verdict, at another and a subsequent term, after verdict given and judgment thereon, fully drawn up, read and signed by the Judge in open Court, was erroneous; the said amendment, after the term, not being authorised by law."

In the case of Halley v. Baird, 1 Hen. & Munf. 25, which followed very shortly after, the same principle is declared, viz: "that the District Court had no power or jurisdiction to reverse, alter or amend the judgment given at a former term of the said Court, which had been entered on the order book, and signed by the Judge in open Court."

This last case was, no doubt, founded on the authority of Vaughan & Field v. Freeland; for, it is resorted to in the argument, and its phraseology expressly adopted by the Court. Both cases, so far as relates to the avowed principles of the decision, are in direct conflict with Gordon v. Frazer; for, in Gordon v. Frazer, the judgment had been "fully drawn up, read, and signed by the Judge in open Court."

566 *I do not think the case of Cogbill v. Cogbill, 2 Hen. & Munf. 467, can be considered as conflicting with Gordon v. Frazer. In Cogbill v. Cogbill, the question was, whether the entries in the order book, signed by the Judge, should be amended by the minutes of the clerk, as to a material fact noted in the minutes, but omitted to be carried into the order book by the clerk. This was a very different question from that which arose in Gordon v. Frazer. In Gordon v. Frazer, there was a bond, (which, to certain purposes, is a part of the record,) according to which the entry ought to have been made, and to which reference might be had, with safety, for correcting any mistake. But, the minutes of the clerk are no part of the record; they are generally taken hastily, and often inaccurately, and cannot, of themselves,

be safely relied on for correcting errors in the order book, like a verdict, a bond, bill or note. The decision in *Cogbill v. Cogbill* may be, and I am inclined to think, is correct; but it does not weaken the authority of *Gordon v. Frazer*.

I feel myself at liberty to choose between the conflicting decisions of *Gordon v. Frazer*, on the one hand, and of *Vaughan & Field v. Freeland*, and *Halley v. Baird*, on the other; and I am constrained, by the best consideration I can give the subject, to prefer the authority of *Gordon v. Frazer*. Every body knows; that although the proceedings of the Superior Courts, after having been extended and entered on the order books, are read over in Court, and signed by the presiding Judge, yet, when these entries are founded on a verdict, bond, bill or note, or any such writing, there is a confidence that the clerk has extended them conformably thereto; which, almost always, prevents any enquiry into their correctness. In such cases, the mistake, if there be one, is, in its origin, that of the clerk; and it continues to be so, notwithstanding the reading and signing by the Judge. For, no comparison is made by the Court, between the entries as made by the clerk, and the papers on which they

567 are founded. The *judgment of the Court is not exercised on the subject. I feel less hesitation in rejecting the authority of the cases opposed to *Gordon v. Frazer*, because Judge Tucker, who sat in one of them, appeared, in *Cogbill v. Cogbill*, 2 Hen. & Munf. 478, not to be satisfied with *Vaughan & Field v. Freeland*; and I reject them the more readily, because this Court, in the late cases of *Wren v. Thompson & Veitch*, 4 Munf. 377, and *Bent v. Patten*, 1 Rand. 25. adverted to the case of *Gordon v. Frazer*, in a manner indicating no disapprobation.

The principle which I extract from the British decisions, and from *Gordon v. Frazer*, is, that that which, in its origin, was a mere misprision of the clerk, does not cease to be so, merely because the entry has been read in Court, and signed by the Judge; and that it will be amended as the misprision of the clerk, provided there is any thing in the record, by which it may be safely amended.

I come, therefore, to the conclusion, that if this case were to be decided by the laws in force, prior to the 1st of January, 1820, the mistake complained of would not be considered as an error in the judgment of the Court, but as the mistake of the clerk in entering the judgment of the Court; and that it would be amended as a clerical misprision, there being a bond in the record, by which the amendment might be safely made.

It remains, now, to consider the case under the act of 1819, which took effect on the 1st of January, 1820.

It is objected, that that act does not apply to the proceedings in the General Court.

The 11th section of the act, for the purpose of removing all doubts concerning the Courts to which the act may apply, declares, "that all things herein contained, not restricted by their nature, or by ex-

press provision, to particular Courts, shall be the rule of decision and proceeding in all Courts whatsoever, within this Commonwealth."

It will not be pretended, that there is any thing in the nature of the power of amendment, or in the nature and 568 *constitution of the General Court, which should restrict the salutary power of rectifying inadvertent mistakes, miscalculations, and misrecitals, to other Courts, in exclusion of the General Court.

Is there any thing in the "express provision" of the law, which operates such exclusion?

The section giving the power of amendment, applies, in terms to every Superior Court of Law and Equity.

All our Courts are classed, as to grade, into Superior and Inferior. This classification is recognised by various acts of Assembly, to which it surely cannot be necessary to refer. In reference to this distinction, it never has been, and I presume never will be, denied, that the General Court is a Superior Court of Law.

But, those Courts which are held in each county, by a Judge of the General Court, are also Superior Courts of Law, in reference to the Courts of Law held by the justices of the County Courts; which last are expressly designated by our laws, as Inferior Courts.

The question, then, as to this point, resolves itself into this: Did the Legislature, in using the terms "any Superior Court of Law," mean to confine them to the Superior Courts of Law for the several counties, or did they mean to extend them to all the Superior Courts of Law known to our system?

The terms "any Superior Court of Law" are, unquestionably, broad enough to embrace all Superior Courts of Law; and the reason of the law clearly applies to all. Unless, therefore, we have some evidence of the intention of the Legislature to exclude a particular Superior Court, the law must apply to all.

It was contended in the argument, that such evidence is to be found in that part of the act, which declares that the power of amendment shall be exercised by the Court, and "the Judge thereof in vacation." But

I think we should construe that part of the act distributively, so as to apply it to all the Superior Courts when in ses-

569 sion, and to the *Judge, in vacation, of such Superior Courts as consist of one Judge only. We must necessarily adopt this construction, or the General Court, when in session, will be deprived of a power, which has for ages been deemed essential to the due administration of justice, and which that Court (as to clerical misprisions) always had before the passage of this law. When, in altering the former law, the power of amendment was enlarged as to all the other Superior Courts, it cannot be believed that it was intended to be taken away, altogether, from the General Court, to which it was as necessary as to any other.

The act, therefore, applies to the General Court.

It is also objected, that the mistake in

this case, even if it be a clerical mispension, is not amendable under the act of 1819, which speaks of mistakes, miscalculations and misrecitals of sums and names, but is silent as to mistakes, &c. of a day, month or year. But, the act of 1819, is a statute of jeofail and amendment, and is, therefore, to be construed liberally. A mistake of a day, month or year, is of the same character with those enumerated in the act; and it is impossible to conceive a reason for amending the latter, which is not equally applicable to the former. Besides, the power of amendment is certainly enlarged as to those subjects which are embraced by the law; for, the mistakes, &c. of sums and names, are to be amended, whether they be the act of the clerk or of the Court. We cannot, therefore, suppose, that the Legislature intended to leave mistakes, &c. of other things of the same kind, unprovided for altogether. The subjects of mistakes, &c. enumerated in the act, were given as an example; and the act, by a just construction, must be extended to all other subjects of the same character. I am, therefore, of opinion, that the mistake in this case was not only a clerical mispension, but is amendable under the act of 1819.

The right to amend is not impaired, I think, by the admission on the record, that the judgment sought to be amended, had been, previously to the notice and motion, "fully satisfied as to the whole amount in the said judgment specified." The fair construction of that admission is, that the whole amount had been paid, which the judgment, as it then stood, authorised the Commonwealth to demand, viz. the first instalment, with interest thereon from the 2d day of March, 1824. It did not admit that to be paid, the demand of which was not authorized by the judgment. Whether the payment made was voluntary or coercive, does not appear. It cannot be pretended, that the voluntary payment of that which the judgment bound the party to pay, precluded the right to amend the judgment as to that which the judgment ought to have bound, but did not bind, the party to pay. If a coercive payment would have had that effect, the fact of such coercive payment, ought to have been alleged and proved.

Upon the whole, I am of opinion, that the judgment of the General Court is erroneous, and should be reversed, with costs; and that this Court, pronouncing such judgment as the General Court ought to have rendered, should amend the first judgment, so as to make the \$4,120 48, therein mentioned, bear interest from the 19th of April, 1817, till paid.

Judgment reversed.*

571 *Mickie v. Lawrence, Executor of Wood.

August, 1827.

Lease—Words Necessary to Constitute—Rent—What Constitutes.—No set form of words is necessary to constitute a lease: and a contract between two persons that one should have, during the life of

*The PRESIDENT and JUDGE COALTER absent.

+Lease—Words Necessary to Establish.—See principal case cited with approval in *Scott v. Scott*, 18

the other, land, negroes, &c. he paying therefor a stipulated annual sum, is not a sale, but a rent. **Rent—What Constitutes.**—Such a contract does not lose its character of a rent, by slaves and other personal property being included in the contract. **Rent—Action for Recovery of—Interest.**—Interest cannot be recovered as of course, in actions for the recovery of rent, but may be given, under circumstances, to be judged of by the jury.

Appeal from the Superior Court of Louisa county; where Lawrence, executor of Sarah Wood, deceased, brought an action of covenant against Mickie, on a contract in writing, sealed with the seals of the said Wood and the said Mickie, by which the said Mickie covenanted to give the said Wood 100l. each year, as long as the said Wood lived, for which he, the said Mickie, was to have her, the said Wood's, land and negroes, &c. The breach assigned was the non-payment of the said 100l. annually.

Issue was joined on the pleas of covenants performed, and covenants not broken. The jury rendered a verdict for the plaintiff for \$2,610 62 cts. with interest on \$2,187 71 cts. from the 15th of March, 1815, till paid, and interest on \$236 98 cts. from the 15th of October, 1815, till paid.

At the trial, the defendant filed two bills of exceptions; the first of which, not being noticed by the Judges, in their opinions, need not be further mentioned.

The second states that the defendant, by his counsel, moved the Court to instruct the jury, that unless they should be of opinion, from the evidence in the cause, that there were some special circumstances in this case, to take it out of the general rule of law that interest is not recoverable for rent due, they should not allow interest in this case; but the Court refused to give the instruction, because the demand of the plaintiff in this case, as it is considered by the

Court, is not subject to any such rule, 572 but is a contract *to pay a certain sum in gross, as appears by the covenant on which this suit was brought. To this opinion, the defendant excepted, and appealed.

Wickham, for the appellant.

Stanard, for the appellee.

August 21. JUDGE CARR.

By contract under seal, it was agreed between Mrs. Wood and the appellant Mickie, that he should have, during her life, her land, negroes, &c. he paying her therefor a stipulated annual sum. After her death, suit was brought on the contract by her executor against Mickie. On the trial of that suit, the Court instructed the jury, that this was a contract to pay a sum in gross, and not a rent: that, therefore, the rule did not apply, which refuses interest or rent in arrear. Under this instruction, the jury gave interest on the sum due. The appellant excepted to the opinion of the Court, and appealed from the judgment.

There can be no question, I think, that this is substantially a lease, and not a sale. Such was clearly the intention of the parties; and no set form of words is necessary to constitute a lease. It is equally well set-

Gratt. 178: Upper Appomattox Co. v. Hamilton, 83 Va. 324, 2 S. E. Rep. 195.

†Interest—Rent in Arrear.—See foot-note to *Kyle v. Roberts*, 6 Leigh 496: monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541: monographic note on "Landlord and Tenant" appended to *Mason v. Moyers*, 2 Rob. 606.

tled, that the sum stipulated to be paid, is to be taken as rent issuing out of the land; though there were slaves and other personal property included in the lease. This is decided in *Newton v. Wilson*, 3 Hen. & Munf. 470, and other cases in this Court, and by many English cases. The simple question then is, whether interest be of course recoverable on rent in arrear?

I have felt the full force of the remarks of the counsel for the appellee, shewing the different course of decision on the subject of interest, between the Courts of Westminster Hall, and ours; that there, interest is denied in all actions for money lent, goods sold and delivered, an
573 account *stated, money had and received, &c. &c.; and that it is the same spirit which withholds it there, in the case of rent arrear: that with us, interest in all these cases, and indeed in almost all cases of a liquidated demand for money, is constantly allowed; and that, in conformity with this course, on rent arrear ought also to be allowed, where it is a monied rent, and fixed in amount.

I confess, I think this the substantial justice of the case; and if it were *res integra*, I should not feel much hesitation on the subject. But, every day's experience impresses me more deeply with the importance of the maxim *stare decisis*. When this Court has had a question elaborately and repeatedly discussed before them, and have, upon consideration and re-consideration, decided in the same way, the circumstances must be strong indeed, and of rare occurrence, which, in my mind, would justify us in disturbing and unsettling the point. It is better for the community, that being once settled, it should remain, than that every Judge should feel himself at liberty to depart from it, in order to arrive at what he may consider more exact justice. Few questions have been more elaborately discussed by counsel, or more carefully considered by the Court, than this of interest upon rent arrear. *Skipwith v. Clinch*, 2 Call, 257; *Newton v. Wilson*, and *Cook v. Wise*, 3 Hen. & Munf. 483, re-considered, 500; *Dow v. Adams' adm'r*, 5 Munf. 21, and several other cases. In this last case, (which, though briefly reported, we are told by the experienced counsel for the appellant, was elaborately argued,) the decision is, "that although interest ought not to be given as of course, in actions for the recovery of rent, it may nevertheless be given under circumstances, to be judged of by the jury," &c. Here I think it best that the point should rest, and this be taken as the law of the case.

I think, therefore, the Court below misdirected the jury, and that the judgment should be reversed, and the cause sent back.

574 *JUDGE GREEN.

The question, whether interest is of course recoverable on rent in arrear, has been repeatedly and fully considered in this Court in the cases of *Cook v. Wise*, 3 Hen. & Munf. 463; *Newton v. Wilson*, *Id.* 470, 500; *Dow v. Adams' adm'r*, 5 Munf. 21, and other cases; and the rule is established by those cases, that it is not recoverable of course, but may be allowed under cir-

cumstances justifying such allowance. It was also decided in the case of *Newton v. Wilson*, in conformity to the well settled doctrine in the English Courts, that a compensation stipulated to be paid for the use of land and personal property together, is not a sum in gross, but rent issuing out of the land. The Court below instructed the jury, that the rule in respect to interest upon rents in arrear, did not apply to the case before them, inasmuch as the contract was to pay a sum in gross, and not a rent. The contract has all the essentials of a demise by deed, with reservation of rent. The defendant was to have the lands, slaves, &c., for a stipulated sum, to be paid annually during Mrs. Wood's life; and no form is necessary to the validity of a lease. I think, therefore, the Court erred in the construction put upon the contract.

But, it is said, that upon the face of the contract, there is a circumstance which, of itself, would entitle the plaintiff to interest; since it may be inferred, that there was no personal property on the land, out of which the rent might have been made by distress, except that which belonged to the lessor, and was demised to the lessee. This may be so; and Mrs. Wood may not have had a reversion, so as to entitle her to distraint. But, whether these things were so or not, was proper for enquiry before the jury. The decision of the Court precluded any evidence from being given to the jury on these points. The judgment should be reversed, and the cause remanded for a new trial to be had therein.

575 *Upon a re-consideration of this case, with the aid of the notes of counsel, the contract is still considered as a contract of lease, and not of sale. If it were the latter, Mickie might have sold the interest of Mrs. Wood in the land, &c., for her life, to any other; and the purchaser would not have been liable in any for the payment of the sum stipulated to be paid annually to her. If a lease, he would have been responsible. If it was a sale for her life, she not being bound to warranty, if Mickie had been evicted by a paramount title, he would nevertheless have been bound to pay the annual sum stipulated to be paid. If a lease, he would have been discharged from that liability, or it would have been apportioned according to the circumstances of the case. The intention of the parties is to be considered; and the nature of the property, and the terms of the contract, shew satisfactorily that the parties did not intend the consequences of sale of the property for the life of Mrs. Wood; and that the negroes, &c. were intended to go with the land, for its cultivation.

The acts of Assembly directing an execution on an office judgment, founded on a bond, bill, or promissory note, or other writing for the payment of money or tobacco, to issue as well for interest until paid upon the principal sum due, from the time it was due, as for the principal sum, and that the jury shall, in all actions upon contracts, if interest is allowed, fix the time when interest shall commence, have no direct application to such a case as this. There could be no final judgment in the

office, in any action founded on this contract. To ascertain the sum due, it was necessarily to be shewn, at what time Mrs. Wood died; and this fact could not be determined by the clerk. The first of the acts aforesaid, only applies to cases in which a certain sum is, by the terms of the writing sued upon, payable unconditionally on a certain day. The annual sum, stipulated by this contract to be paid, was not payable unconditionally, but upon the condition that the party was not prevented by eviction, from enjoining the

576 *property. The other act supposes the jury to have, in some cases which the act does not attempt to define, a discretion to allow interest, or not.

These acts, however, with the many cases mentioned in the notes of the plaintiff's counsel, prove that the spirit of our laws is, to allow interest in almost all cases of a liquidated demand for money, and in very many cases, in which it is not allowed in England. If the question under consideration was a new one, or if the former decisions of the Court on this subject had passed without a deliberate examination of the subject, I should have inclined to think, that interest ought to be allowed, as a general rule, upon a fixed and stipulated rent; and that, more properly than in many cases, in which it is usually allowed. The cases, however, appear to have been carefully considered, and fix the rule that interest is not recoverable, of course, upon rent; but may be recovered, upon circumstances which justify the allowance. These precedents, I think, bind us, and the judgment formerly pronounced may be entered.

JUDGE CABELL concurred, and the judgment was reversed, and the cause sent back.*

577 *Jones v. Mason, Executor of Jones.

August, 1827.

Chancery Practice—Cause Set on Bill and Answer—Effect.—When a cause is set down for hearing by consent, upon bill and answer, the answer is to be taken as true.

Advancements—Satisfaction of Legacy.—Where a legacy is given to a child, and afterwards an advancement is made to that child, such advancement shall be taken as a satisfaction of the legacy; but this presumption may be rebutted by evidence.

*The PRESIDENT and JUDGE COALTER absent.

†Advancements.—See monographic note on "Advancements" appended to Watkins v. Young, 31 Gratt. 84.

‡Same.—When Satisfaction of—Legacy.—An advancement to a child, made subsequent to a will, is to be taken as a satisfaction *pro toto* or *pro tanto*, according to its amount. Moore v. Hilton, 12 Leigh 29, citing principal case as authority. And in Hansbrough v. Hooe, 12 Leigh 332, it is said, "The doctrine upon this subject so far as relates to legacies, was very concisely, but lucidly laid down by LORD ELDON in Trimmer v. Bayne, 7 Ves. 508. He says, 'The rule is settled, that where a parent, or person *in loco parentis*, gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this court will presume he meant to satisfy the one by the other.' This rule was fully considered, recognized and acted on by this court, in the case of Jones v. Mason, 5 Rand. 577. I am clearly of opinion, that this rule is applicable to, and is decisive of, this case, so far as respects the legacies of slaves and other personal property; and consequently, that the decree as to those subjects is correct." To the same effect the principal case is cited in Strother v. Mitchell, 80 Va. 154.

Same—Rule of Ejusdem Generis.—The rule that the thing advanced must be ejusdem generis with the thing bequeathed, may be controlled by evidence shewing that it was the testator's intention, that the one should be in satisfaction of the other.

Chancery Practice—Costs.—In a case of great novelty, the Chancery Court ought not to give costs to either party.

This was an appeal from the Richmond Chancery Court. The suit was originally brought in the County Court of Greenville, by Robert B. Jones against Edmunds Mason, executor of Benjamin Jones, deceased. The nature of the controversy is fully explained in the following opinions.

Stanard, for the appellant.

Johnson, for the appellee.

August 21. JUDGE CARR.

In the year 1816, Benjamin Jones made his last will, in which he seems to have apportioned his estate with great care and deliberation among his children. They were seven in number; three sons and four daughters. Three of the daughters were married and portioned. The fourth, Martha, with the three sons, Robert, Benjamin, and Thomas, were infants. It is to these infants that the bounty of the testator was principally confined. To his sons, he gave all his land, each a tract. His slaves, he seems (so far as we may judge) to have meant to divide equally. At least, this was so, with the three youngest,

Benjamin, Thomas and Martha. To 578 Robert (the eldest, *as I take it) he gives his plantation in Brunswick county, including the mill, &c., and 13 slaves by name, together with stock, horses, tools, &c.; among the negroes given, are Moses, Harry and Sam. When Robert came of age, his father put him in possession of the plantation as it stood; except that he took from it several slaves, not among those he had by will given his son, and also took away Moses and Sam, two of the slaves in the will; and left Ellick, Aggy and their child, not in the will. Harry, another slave mentioned in the will, was on the Manor plantation of the testator, when his son was invested with possession. It is stated by the executor in his answer, that the three slaves Ellick, Aggy and their child, were intended to supply the places of Moses, Harry and Sam; and that though somewhat inferior in value, that difference was more than made up by other property left on the estate, and advanced to Robert; and further, that at the time his portion of the estate was given up to him, it was a full and equal proportion of the testator's estate.

Things remained thus, till the death of the testator; when that took place, we are not told. He died without altering his will; and this bill is filed by Robert, to recover of the executor the three slaves Moses, Harry and Sam, claiming that Ellick, Aggy and child, were not given in substitution of them, but in addition to them; and that he has a right to both.

The executor, by his answer, controverts this claim, contending that when the testator put the plaintiff in possession, he

§Same—Rule of Ejusdem Generis.—See principal case cited with approval in Kelly v. Kelly, 6 Rand. 181.

‡Costs.—See monographic note on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

manifested his intention of giving off to him at once, his whole portion, by removing from the place all those slaves he did not intend for him, and leaving those he meant to give him; and that by taking away Moses, Harry and Sam, and leaving Aggy, Ellick and child, he proved that he meant these last to stand instead of the former, and not in addition to them.

The case was set down for hearing by consent, on the bill and answer, and heard the same day.

579 *A question was raised at the bar, whether the statements in the answer were to be taken as true; a question of very little moment (in my mind) as to any influence it can have on this cause. I do not consider that the case comes directly within the letter of the rule, that where the plaintiff sets down a cause on bill and answer, he takes the answer as true in all things. There he acts upon his right; here the matter is by consent. But, I think it within the reason of the rule. I have no doubt, that this whole proceeding was taken at once, without the regular steps, for the purpose of trying without delay, in a friendly manner, the rights of parties; and that the bill and answer were intended to present the whole case to the Court, there being, in truth, no contradiction between them as to facts. The two affidavits are merely as to the amount of the difference in value between the slaves, not as to the fact of difference. I think then that the answer must be taken as a part of the case agreed to by the parties; that is, so far as it states facts, and so far as any extrinsic evidence can be looked to.

The great question in the cause is, was the legacy in the will, of Moses, Harry and Sam, revoked, adeemed, or satisfied, (for sometimes one term and sometimes another is used,) by the taking these slaves from the son's plantation, when he was put into possession, and giving him Ellick, Aggy and child? This question is important, and I believe, in this State, of the first impression. In the English books, there are many cases turning upon it; and the principles, which govern it, are considered as well settled. I will cite some of those cases.

Izard v. Hurst, 2 Freem. Rep. 224. "The defendant's testator, by his will, gave his four daughters 600l. apiece, and afterwards married his eldest daughter to the plaintiff, and gave her 700l. portion. After that, he makes a codicil, and gives 100l. apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies;

580 and the plaintiff preferred his bill for the legacy of 600l. given to *his wife by the will; and the only question was, whether the portion, given by the testator in his life-time, should be intended in satisfaction of the legacy? And held that it should; and agreed to be the constant rule of this Court, that where a legacy was given to a child, who, afterwards, upon marriage or otherwise, had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise."

In Ellison v. Cookson, 1 Ves. jr. 100,

Lord Thurlow, speaking on this subject, says, "The common way of arguing this, is to forget entirely the rule of law; namely, that where a legacy is given to a child, it is deemed a portion, and therefore carries with it these qualities; that it is a deliberate distribution among his children of such portions as the testator thinks fit. Crediting him for that deliberation, if he advances in his life that sum which he has adjudged to be the due and proper portion for that child, the presumption of law is, that he has satisfied that intent, and consequently, that it is no longer a ground for any further demand."

But, though it is a presumption of law, it is not that kind of conclusive presumption, against which nothing can be said, but a presumption which the law makes upon the general facts, liable to be rebutted by evidence; and the kind of evidence for that is, any demonstration from the conduct and language of the author of both gifts, that he considered the gift by the will as still a subsisting benefit.

In Trimmer v. Bayne, 7 Ves. 508, Lord Eldon says, "The rule is settled, that where a parent or person in loco parentis gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this Court will presume he meant to satisfy the one by the other."

The same doctrine is explicitly laid down in many other cases, as the unquestionable doctrine of equity; though some of the

Judges seem rather disposed to quarrel with *the rule. See Twisden v.

Twisden, 9 Ves. 413; Hartop v. Hartop, 17 Ves. 184; Ex parte Pye v. Dubort, 18 Ves. 140; Coop. Equ. Cas. 270, and numerous other cases.

This being the established rule, let us see whether our case be within it.

That the testator meant to dispose of his whole estate, by his will, is most apparent. He does in fact dispose of it with great deliberation, and particularity, giving to each object of his bounty all that he intended such object should enjoy. Living till his eldest son came of age, he determined, as regarded him, to do at once what he had ordained should be done after his death. In the execution of this purpose, he had a full right to change or modify any part of the gift, and no man could say, "why dost thou?" The plantation which he had devised to the plaintiff, had been for some time settled as a quarter; and there were several slaves there, more than he intended to give to the plaintiff. When he invested his son with possession of the land, slaves, stock, &c. he sent from that place to his home plantation, those slaves he meant to keep himself, and left with his son those he meant to give him. Moses, Harry and Sam, though named in the will, were not left. Moses and Sam were sent from his son's place to his own; and Harry was already there. But, he gave to his son three slaves not in the will, Ellick, Aggy and their child. That these were given, the bill avers, and the answer ac-

knowledges; and they have ever since been held, and are still held, by the plaintiff, as his property. It is agreed, that they are not of equal value; but the answer states, that the difference in value was more than made up by other property, and that at the time possession was given to the plaintiff, he took a full proportion of the estate. These statements I consider as proper evidence. Now, I ask, how this proceeding is to be explained? Can we understand it in any other way, than that the father was establishing his son, setting him up

582 in the world, giving him *his full proportion to manage for himself? Why, in this proceeding, should he withhold three of the negroes which the will had designated for his son? Why send them away from his place, and leave three others there? Clearly in my judgment, because he had changed his mind in this respect, and for some reason, determined to keep these slaves himself, and give his son others. He might have many reasons for this. These slaves might suit particular purposes, important to him. He might have a particular fancy for them. His will was his law in this matter, for all were his. But, if he did not mean to change this part of his gift; if he intended these slaves still for his son; can we conceive why he should not have given them to him, when he was setting him out, and delivering to him all the rest of his portion?

But, it was insisted, that the rule as to ademption of legacies could not apply to this case, because it is an essential ingredient in that rule, that the thing bequeathed, and the thing given, must be ejusdem generis; and it was affirmed, that no case could be produced, where a legacy of a specific thing was adjudged to be adeemed by the gift of another specific thing.

We must recollect, that this whole class of cases depends upon intention. We imply from a man's acts, his meaning. When he gives 500l. to A. his child, by will; and after, on her marriage, advances this same sum of money; its being the same thing in amount and in kind, makes it more apparent that the gift was a consummation of the bequest: that he was performing, in his life-time, the duty towards his child, which he had set down in his will to be performed after his death. Every legacy given to a child by a parent, is considered a portion for the advancement of such child. In England, from the nature of their property, and the situation of society, these portions and legacies are almost always in money. With us, nothing is so usual as to advance children by gifts of slaves. They stand with us, instead of

money. If a man were to bequeath 583 *ten slaves by name to his daughter, and afterwards, on her marriage, to advance to her these same slaves, nobody would deny, I presume, that his was a satisfaction of the legacy. Suppose he were to bequeath to her ten slaves, to be selected by his executor; and after, on her marriage, he were himself to select ten, and advance to her; would anybody deny that this was an ademption of the legacy, especially when it was a full child's part, and as much as

he could give to any other? Suppose a man were to bequeath to his child \$10,000; and after, were to make to that child a deed for a tract of land, and declare in the deed, that it was in satisfaction of the legacy. All will agree, that this gift, though not ejusdem generis, would adeem the legacy; because it declares the intention; and the power of the owner being plenary, that intention must prevail. It is only a means to discover that intention, where it is not expressed, that the rule of ejusdem generis is resorted to. A reference to some of the English cases will shew that this is the ground of the rule.

Hoskins v. Hoskins, Prec. in Chan. 263. A father gave his son 750l. in his will. Afterwards, he bought him a cornet's commission, which cost 650l. It was decided, that this 650l. should be a satisfaction pro tanto for the 750l. If it be said that it was so decreed, because it was in proof, that the testator intended the 650l. should be discounted out of the legacy, and meant to have struck so much out of his will, but died before the accounts came from London, I answer, it still shews that intention is every thing; ejusdem generis, nothing. For, no one will contend, that the commission in the horse was ejusdem generis with the 750l.

Chapman v. Salt, 2 Vern. 646. S. devised 50l. to Mary, the wife of L. C. Afterwards, the testator gave L. C. a note for 50l. payable on demand. Objected, that the note was to one, the legacy to another. If the wife survived, she would have the legacy, and the executors of the husband, the note. But, it was proved, that 584 the *note was intended as a satisfaction of the legacy, and the bill was dismissed; shewing still, that intention is all.

It is laid down generally, that a residuary legacy will not adeem a portion due under a settlement; because, it is entirely uncertain what that legacy may be. But, this rule, like the rest, yields to intention.

Thus in *Rickman v. Morgan*, 1 Bro. Ch. Cas. 63; 2 Bro. Ch. Cas. 394; to which I refer principally for the powerful argument of Lord Thurlow, on the subject of the intention of the party.

The last case I shall cite, is *Bengough v. Walker*, 15 Ves. 507, where it is decided, that a request of a share in powder works, to be made up in value 10,000l., charged with an annuity of 20l. for life, was a satisfaction of a portion of 2,000l. This certainly was not ejusdem generis; but the rule yielded to clear intention.

In the case before us, I have already stated the various considerations which tend to shew the intention of the father, in the gift of three slaves, *Ellick*. Aggy and child: that it could only be, to substitute them for *Moses*, *Harry* and *Sam*. It might, I think, be very fairly argued, that they are ejusdem generis; for, they are considered only as property, and they are property of the same kind. But, I do not think it necessary to press this point.

Upon the whole, I am clearly of opinion, that the plaintiff has no claim to *Moses*,

Harry and Sam, the legacy being adeemed by the subsequent gift.

The County Court certainly were wrong in supposing this a case of election; but, as no election was made, and the bill was dismissed, no harm is done.

I rather think it was harsh in the Superior Court, to give costs in a case of such novelty. What was said by the testator in his last illness, I do not think of any avail. It is too vague and uncertain to rest a decree on.

585 *JUDGE GREEN.

Robert B. Jones filed his bill in March, 1821, against Edmund Mason, executor of Benjamin Jones, the father of the complainant, stating that the testator, by his will, dated in July, 1816, devised to him a tract of land and sundry slaves by name, (14 in number) and amongst them, Moses, Harry and Sam: that upon his coming of age, his father put him in possession of the land devised to him, and delivered to him the slaves bequeathed, except the three above named: that the time of this advancement, his father, in addition to the slaves bequeathed, (with the exception of the three above specified,) advanced him other slaves, Ellick and Aggy and their child, who were far short in value of the slaves Harry, Moses and Sam: that his father always intended to make an equal distribution of his estate amongst his children: that after the publication of the will, and the settlement and advancement of the plaintiff, his father's estate had greatly increased in value, and in his opinion, the slaves bequeathed to him, with Ellick, Aggy and their child, did not exceed a child's part; and prays that the executor may discover, "whether the testator in his last illness, did, (when the executor was reading over the clause of bequest to the plaintiff,) ask him if the negro man Ellick was not embraced in the said clause; and whether he did not understand, that the testator's extreme indisposition prevented from proceeding to alter his will?"

The executor answers, that the plantation devised to the plaintiff was settled as a quarter; and when the plaintiff attained full age, the testator invested him with the possession of the estate as it stood, except in relation to some of the negroes attached to it: that at the time of the investment aforesaid, all the negroes contained in the said legacy, with the exception of Harry, (who was on the Manor plantation of the testator) were on the quarter aforesaid, together with several other negroes: that instead of

586 *the testator (who seemed desirous to give off to the complainant his estate at once) sending Harry up there, he, amongst others, brought Moses and Sam to his own house, and left, from among the negroes already on that estate, three other negroes, Ellick, Aggy and their child, which were intended as supplying the place of Moses, Harry and Sam: that this arrangement was, as he believed, so understood by all the parties. He admits, that the testator's estate has increased in a greater ratio than the plaintiff's; yet his was, at the time when he was invested with

the possession, a full and equal proportion: that he has no doubt there was an inconsiderable difference in the value of the negroes so substituted, and those for whom they were substituted; but that this difference was greatly more than exceeded by other property left on the said estate, and advanced to the plaintiff; and he admits, that in the testator's last illness, he asked the questions mentioned by the complainant, and indicated a desire to new-model the whole will; but he did not, in that or any other conversation, express the least wish to give to Robert either of the three negroes retained at home, but expressed a wish to give him a particular boy, in lieu of one which Robert had lost among his own.

The will, besides the plantation and the negroes, gave to Robert the stock of cattle, hogs and sheep, on the plantation, two riding horses, a black and a bay, (called his.) one bay mare and colt, one sorrel mare, two beds and furniture, and all the plantation tools on the said plantation; and after various other devises and bequests, both specific and pecuniary, he gave the residue of his estate, real and personal, to be kept together for the support of his younger children and his wife, and to be equally divided between his three younger children, Benjamin, Thomas and Martha.

Two affidavits were taken by consent on the 28th of February, 1821, proving that Moses and Sam were worth \$200 more than Ellick, Aggy and their child.

587 *The bill, answer, will and affidavits, were filed together on the 6th day of March, 1821, and the cause immediately heard by consent upon these papers.

A question is made, whether, in consequence of this proceeding, the answer must be taken to be true; and I think it must. It was really bringing the cause to hearing on bill and answer. The bill and answer both stated, that the three negroes bequeathed and not delivered to the legatee, were of more value than the three delivered, which were not bequeathed; and the only purpose of the affidavits was, not to contradict the bill or answer, but to supply a defect in both, by ascertaining the quantum of difference in the values of these slaves.

Upon this case, both the Courts below decreed that the plaintiff was bound and entitled to elect, whether to take the three slaves bequeathed but not delivered to him, or the three delivered but not bequeathed to him, but could not take them all. In this respect, the decrees are clearly erroneous. If Ellick and Aggy and their child were not given, so as to vest a title in the plaintiff, then the transaction could not amount to an ademption of the legacy of the three not delivered; and in that case, he would be entitled to the slaves bequeathed, and the Court could not make it a condition upon which to give relief, that he should deliver to the executor those to which he had no title and held wrongfully; and which the executor might have, at any time, recovered by an action at law. Specific property cannot, in any case, be set off against specific property, in a Court of Equity. If, on the other hand, Ellick,

Aggy and their child, were given by the testator to the plaintiff, (as both the bill and answer virtually affirm, and therefore must be taken for true,) then it is either an ademption of the legacy as to Moses, Harry and Sam, or it is not. If it is, the will is annihilated as to them; and is as if it did not contain their names. If not, then he has a right to them under the will, and to the others under the gift. He would not, in that case, claim under and against the will: which *is the only case in which a party claiming under a will, can be put to his election.

Before I proceed to examine the effect of the facts admitted in this case, it will be proper to ascertain the general rules which have been well settled, as applicable to cases like this.

The statute now in force, passed in 1785, ch 61, sec. 7, 12 Hen. Stat. at Large, 141, is the same in effect (but in an abridged form,) as that of 1748, ch. 5, sec. 12, which was taken verbatim from the 22d section of the British statute of frauds of the 29th Ch. 2, and provides, that "no will in writing or any devise therein of chattels shall be revoked by a subsequent will, codicil, or declaration, unless the same be in writing." The object of this provision was to prohibit the revocation, wholly or partially, of a written will, by parol declarations or nuncupative dispositions, which might have been done before the statute of frauds, even as to wills of lands. The statute of frauds, however, has never been held to prohibit the revocation either of wills of land, or of personality, by implications founded upon events subsequent to the making of the will; although the prohibition by the statute as to the revocation of a will of lands, is much stronger than that as to the revocation of a will of personality; in respect to lands, the statute declaring that no will shall be revoked, in whole or in part, but by another will in writing, or by burning, cancelling, tearing or obliterating; and in respect to personality, declaring, that no will shall be revoked in whole or in part, by another will, codicil or declaration, unless it be in writing; leaving all other modes of revocation to operate as at common law. Thus in England, the subsequent marriage and birth of a child was an implied revocation of the will, both as to real and personal property; as it was with us, (*Wilcox v. Rootes*, 1 Wash. 140,) until the 1st of January, 1787, when the act of 1785, ch. 61, sec. 3, took effect, by which it is provided, that a last will and testament, made when the testator had no child living, *wherein any child he might have is not provided for or mentioned, if at the time of his death he leave a child, or leave his wife enseat of a child, which shall be born, shall have no effect during the life of such after-born child, and shall be void, unless the child die without having been married before he or she shall have attained the age of 21 years.

As, notwithstanding the statute, a revocation in toto might be implied from facts afterwards occurring, so a partial revocation as to any particular legacy might be implied from subsequent facts, and the acts of the testator. Thus, if a testator gave to

his daughter 500l. by his will, and afterwards, on her marriage, advanced the 500l. to her, this would be an implied revocation of that particular legacy, upon a presumption of law that it was intended by the testator as a satisfaction and ademption of the legacy. But, this presumption must be founded solely upon the qualities and circumstances of the fact, without regard to the declarations of the testator; for, if the circumstances and qualities of the act were not, of themselves, sufficient to justify the presumption, then to admit the declarations of the testator to be used to supply the defect of the fact, in order to raise the presumption, would be directly against the terms of the statute. But, if the fact itself be sufficient to raise the presumption, the evidence of the declarations of the testator are admissible to rebut the presumption, and to shew that he did not intend, by the act in question, to adeem the legacy, as parol evidence is in all other cases admitted to repel a presumption. These principles are well explained in *Ellison v. Cookson*, 1 Ves. jr. 100; *Trimmer v. Bayne*, 7 Ves. 508; *Hartop v. Hartop*, 17 Ves. 184. And in like manner, a particular legacy may, by implication, be adeemed in part as well as in toto, if the act of the testator be such as to shew that a subsequent advancement was intended as a satisfaction of the legacy in part.

590 *The ground, upon which the presumption of law in such cases is founded, is this. Legacies to a child are in general given, in pursuance of the natural obligation of the parent, as a provision for the advancement and establishment of the child in life; and, if in the life time of the father, the child is settled in life, by marriage, or otherwise separated from the family of the parent, and commences the business of his life, and the parent makes him substantial advancements in proportion to his ability and pre-determination as expressed in his will, he is presumed to have intended to give now what (when he made his will) he intended to give at his death, in whole or in part, according to the amount and circumstances of the advancement, rather than to have intended to abandon and violate the deliberate purpose expressed in his will, as to the distribution of his property amongst the members of his family, by giving to the child advanced an undue proportion of his estate, and more than he intended by his will, both the legacy and the advancement.

The testator, in the case at bar, left a wife and three sons, all under age when he made his will, and four daughters, of whom three were married, and had been in part advanced, and the other was an infant. To the daughters and their families, he gave money and negroes. To the sons, he gave all his land, consisting of two tracts, the quarter which he devised with the stock, &c. upon it to Robert the complainant, and that where he resided, which he divided between his two younger sons. A part of the negroes at the quarter, he bequeathed to Robert by name; and gave the balance, except those specifically bequeathed, to the families of his married daughters, together with all his undisposed of residuum,

consisting of stocks, &c. to his two youngest sons and unmarried daughter, to be kept together and worked on his home plantation, for the support of his wife and three youngest children; and when Benjamin came of age or married, he was to have his part of the land, and one third of the residuary negroes, stocks, 591 *&c. and the balance to be kept on that part of the land, and worked for the support of the widow and two youngest children, until Martha came of age or married; when she was to have the money given her, and a moiety of the remainder of the negroes, and Thomas was to have the residue of the land, negroes, &c. charged with the support of the widow.

When Robert came of age, the testator put him in possession, as his own, of all that he had devised and bequeathed to him, except the negroes in question; two of which he withdrew from the plantation given to Robert, to which they had belonged; and instead of these three negroes, he advanced to Robert three other negroes, which lived on that plantation, and other articles not bequeathed to him by the will; which, with the value of the three negroes not bequeathed, exceeded in value the three negroes bequeathed and not advanced or delivered to Robert; and this was a full and equal proportion of the testator's estate. What the other property not bequeathed, given to Robert, besides the negroes not bequeathed, consisted of, is not stated; but, it was probably provision to support the plantation until Robert could make a crop, which was not provided for him by the will.

These are the facts and circumstances, on which we are to say, whether a legal presumption arises, that the testator, by this gift to Robert when he came of age, intended to satisfy and adeem the legacy in full, and whether the bequest is revoked by implication, or not?

I cannot resist the conviction, that such was the intention of the testator. The circumstances that when his son came of age, he put him immediately in the possession of all the property devised and bequeathed to him, except the three negroes, and gave him three other negroes not bequeathed, of less value indeed than the others, but compensated in other property; the separating, at that precise time, the two negroes bequeathed, from the rest, and removing them from the plantation,

592 where they had been *resident and employed; as well as the separating and removing of all the other negroes not given, who were settled on the same plantation; indicated clearly an intention to separate this son finally from the family of the testator, to set him up in life, and to advance him fully to the extent intended by the father. He was doing, in his lifetime, in effect, all he had intended to do for this son by his will; and the substitution of three other negroes for the three taken away, and compensating the son for the difference in value, with other property not bequeathed, fortifies this conclusion.

This conclusion was resisted, in the argument of the cause, by the sugges-

tion that the negroes given by the testator, were not of equal value with those given by the will, and withheld. This objection is unfounded; for, that difference in value was made up with other property given with them.

The only real objection insisted on is, that no case has been decided, in which a gift of a specific thing has been adjudged to adeem a legacy of another specific thing; and that the rule in respect to satisfactions and adempptions, presumed from circumstances, is, that the thing given, and the thing bequeathed, should be ejusdem generis.

In cases of this class, the question is only as to the intention of the testator, to be inferred from his acts, and not from his expressed will. It is impossible to prescribe any technical and inflexible rules governing the result of such an enquiry. Each case must depend upon its own circumstances. The rule of ejusdem generis is of some use in elucidating the enquiry into intention. If either the specific thing, given by the will, or given by the testator in his life, should appear not to be intended as a portion, or as a substantial part of the intended advancement for the establishment of the child in life, and intended as an additional manifestation of kindness, the gift of one would not adeem the other; and in England, hardly any other

case of the bequest and gift of specific 593 articles can occur. There *the universal practice is to provide the portions or fortunes of younger children in money, either by will or settlement; and the obligation, when resulting from a settlement or a promise made by will, is generally satisfied by a bequest of money, or a gift of money in the life-time of the party. With us, the advancement of children is most frequently in negroes; and a bequest or gift of negroes is generally made as an advancement for the better establishing the child in life; and here, a gift of negroes, in lieu of other negroes, may be considered as an ademption of the legacy, if other circumstances shew that such was the intention of the testator. These are, to all the purposes of the argument, ejusdem generis.

There are also cases in the English books, in which this rule has not been strictly adhered to. A few examples of the application of the rule, and in which it has been disregarded, will illustrate the reason and foundation of the rule.

In the case of *Grave v. The Earl of Salisbury*, 1 Bro. Ch. Cas. 425, it was held, that the grant of a lease for 99 years at a rent of 40l. per annum, which was worth 180l. per annum, and money paid for repairs, and the standing crop, the commissioner estimating the value of the whole at 4,400l., was not an ademption pro tanto of a legacy of 10,000l. The Chancellor says, upon this rule of ejusdem generis, "In the present case, it would be presuming that Lord Salisbury had the idea of a portion in his mind, when he was giving a thing not ejusdem generis. The true ground of this case is, that the whole gift of the lease, repairs and crop, being one and the same transaction, was either intended as an advancement and ademption of the legacy

pro tanto, or the testator had no such intention. If he had intended it as an ademption pro tanto, he would have fixed a value upon it, and not have left it to be afterwards ascertained by estimate and conjecture. See *Bengough v. Walker*, 15 Ves. 507.

594 *In *Holmes v. Holmes*, 1 Bro. Ch. Cas. 555, it was held by the Lords Commissioners, that a legacy to a son of 500*l.* was not adeemed by the father's taking him into partnership with him, in a trade in which they were to have a capital of 3000*l.* to be brought in equally. The father brought in the whole capital, and had said that he meant to give half the stock to his son, and so it was understood in the family; and one witness said he had given him half the stock. This was not held to be a satisfaction, not being ejusdem generis, and that it must have been the testator's intention that he should have both.

It has also been held, that the bequest of a residue is not a satisfaction of a portion, for which the father was bound, as it consists of choses in action and is uncertain as to its amount. In such a case, when the father is under a legal obligation to pay a portion, the provision by will must be equal to the portion, and subject to no condition or uncertainty; a rule, which is not strictly applied to a case of the ademption of a legacy by a gift. For, both the legacy and the gift are purely voluntary, and the testator may substitute, if he choose, one thing for another, or a lessor for a greater value.

The only enquiry is, whether, in fact, the circumstances were such as to prove that intention. The cases above noticed, proceeded upon intention; and the difference in the things given and bequeathed, and the uncertainty of the residue both as to the amount and time of payment, were calculated to induce a belief, that the testator had no intention to adeem the legacy, or satisfy the portion. Other cases have occurred, in which the rule of ejusdem generis has given way to the intention of the testator, inferred from the other circumstances of the case, and a residue has been considered as a satisfaction; as in *Hoskins v. Hoskins*, Prec. in Ch. 263, the father bequeathed to his younger son 750*l.* and afterwards bought him a cornet's commission for 650*l.*; and this was held to be a revocation of the legacy pro tanto. In this case, it was proved that

595 *the testator intended to alter his will, and deduct this from the legacy, but died before he did it. This evidence probably had no influence on the decision; for, it was clearly inadmissible, the case occurring after the statute of frauds.

In *Bengough v. Walker*, 15 Ves. 507, it was held, that a portion of 2000*l.*, for which the father was bound, was satisfied by a legacy of a share in powder works, (charged by the will with the payment of an annuity of 20*l.*) which the testator directed should be made up in money to the value of 10,000*l.* The value of the share did not appear, and might have been 9,500*l.* The value of the legacy, as fixed by the testator, ascertained his intention; and in

Rickman v. Morgan, 2 Bro. Ch. Cas. 394, it was held, that a residue was a satisfaction of a portion of 8,000*l.*; the intention of the testator being inferred from the quantum of the residue.

It seems, therefore, that the rule of ejusdem generis is not conclusive that the testator did not intend to adeem a legacy by giving another thing in his life-time; but is one (and in England, a strong) circumstance to prevent the presumption of ademption or satisfaction, yet capable of being overruled by other circumstances; and in the case at bar, I think the manner and circumstances of the gift shew, that the intent of the testator was to give at once to the plaintiff all he intended to give him, and to substitute the three negroes and other property given, for the three negroes bequeathed and not given.

The declarations of the testator are admissible evidence to rebut this presumption. But, they were not such as to impair the legal presumption in this case. The enquiry of the testator, when the clause in the will giving the negroes to the plaintiff was read, whether Ellick and Aggy were not in it, does not prove that he wished to insert their names in addition to the others; but might have been to provide, as he had done in respect to others of his children, and as is very usual, a clause confirming the title to what he had already given him. It is not necessary to
596 examine *the other suggestions of the executor's answer, in respect to the testator's intentions.

This case being one of the first impression with us, and presenting a question of some novelty and difficulty, I think the County Court were right in not decreeing costs to either party; but wrong, in giving the plaintiff an election; which, however, can now do no injury to the appellee; and that the decree of the Chancery Court should be reversed with costs, and that of the County Court affirmed, with costs of the Chancery Court to the appellee.

JUDGE CABELL, concurred, and the decree was reversed.*

Clay v. Neilson.

August, 1827.

Attachment—Fatal Defects.—A *capias ad respondendum* being returned "not found," an attachment is issued, which neither specified the names of the plaintiffs nor of the defendants. It is levied on an "ox-cart," without saying to whom the ox-cart belonged. For each of these defects, the attachment is void.

Appeal from the Superior Court of Nottingham county, where an action of debt was brought by Neilson & Nisbet, partners, assignees of Woodward, who was assignee of Townes, against Charles Clay and Edward Clay. A *capias ad respondendum* was issued against the defendants, and returned "not found," as to one of the defendants, and as to other, that he confined himself to the house, and would not be seen by the sheriff.

An attachment was awarded against the

*The PRESIDENT and JUDGE COALTER, absent.
*See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.
The principal case is cited with approval in *Offindinger v. Ford*, 86 Va. 919, 13 S. E. Rep. 1.

defendants; but, it did not specify the names either of the plaintiffs or defendants, "but only describes them as "the above named defendants."

The sheriff returned, that it was levied on one ox-cart. The defendants still failed to appear; and judgment was entered at the rules, which was made final at the succeeding Court.

From this judgment, the defendants appealed.

The case was submitted.

August 21. JUDGE CABELL.

This was an action of debt on a bond against Charles Clay and Edward Clay. The capias being returned "not found," an attachment was thereupon issued, which was returned "levied on an ox-cart." The defendants still failing to appear, a common order was taken against them, which was afterwards confirmed.

A supersedeas was awarded on the application of Edward Clay.

The attachment specifies neither the names of the plaintiffs, nor of the defendants, nor any sum of money as being demanded in the suit. For these reasons, the attachment was fatally defective, and unfit to be the foundation of the judgment.

I consider the return, also, on the attachment, as defective. It does not state to whom the "ox-cart" belonged; and there is nothing in the body of the attachment to lead us to the knowledge of the fact. An attachment is resorted to, for the purpose of forcing an appearance. It is intended to supply the place of a capias executed. It ought, therefore, to be levied on some property belonging to each defendant; otherwise, there will be nothing to inform him of the existence of the suit; and a judgment would thus be obtained by surprise. Even if the attachment had specified the names of the defendants, yet I should be inclined to think the return defective, in not specifying to whom the ox-cart belonged. The defendants were not sued as partners, *and it is very improbable that the ox-cart belonged to them jointly. If it belonged to one of them only, there was no service of the attachment as to the other.

The judgment should be reversed, the attachment quashed, and the cause remanded to the rules, to be farther proceeded in.

JUDGES GREEN and CARR concurred, and the attachment was quashed, &c.*

*The PRESIDENT and JUDGE COALTER, absent.

APPENDIX—No. 1.

OPINION OF JUDGE CABELL, IN THE CASE OF LAND *v.* JEFFRIES.

[See the case pa. 268.]

Land *v.* Jeffries.*

June, 1827.

[See the case pa. 268.]

Mrs. Birdsong, a widow, being entitled to several slaves as her dower in the estate of her former husband, and to some furniture in her own right, and being about to marry John M. Jeffries, who was known to be very much in debt, was very desirous to have her property conveyed to her own separate use and benefit, and protected from all liability to the payment of the debts of her intended husband. Jeffries was utterly opposed to becoming a party to any marriage settlement, but declared his entire willingness that she should make any disposition of her property that she and her friends might desire. Nathaniel D. Land, one of the brothers of Mrs. Birdsong, on whom she relied for taking such measures as might be necessary for effectuating her wishes, in relation to her property, confiding in the integrity and skill of Jeffries, the intended husband, (who was a lawyer by profession,) consulted him on the occasion; and he advised the execution of an absolute conveyance of the property to John

W. Land, another brother of Mrs. Birdsong, who was then absent in the military service of the State. Such a conveyance was accordingly drawn by Jeffries himself, and executed by Mrs. Birdsong, in the presence of many persons, on the day of the marriage, and probably not an hour before the marriage. The property, after the marriage, passed into the possession of Jeffries until the return of Land, which seems to have been shortly afterwards, when it was hired by Land to Jeffries, for one year; and he continued to hold it, afterwards, on the same terms, until some of the slaves were taken in execution, by Charles W. Steward, a creditor of Jeffries. John W. Land, the grantee, in the deed executed by Mrs. Jeffries, as aforesaid, presented, as her next friend and trustee, to the Chancellor of the Richmond District, a bill of injunction, stating the above circumstances, and particularly, that the object of the conveyance was to secure the property to the separate use of Mrs. Jeffries, free from the claims of the creditors of Jeffries. The injunction was awarded, and afterwards dissolved by the Chancellor.

The question is as to the validity of the deed from Mrs. Birdsong to her brother John W. Land.

The statute of frauds, (under which it is contended that the deed is void,) is merely declaratory of the common law, and vacates

no conveyance, unless it shall appear to have been executed with intent to delay, hinder or defraud creditors or subsequent purchasers; for, as Lord Mansfield said, in *Cadogan and Kennet*, Cowper, 434, "that statute does not militate against any transaction, bona fide, and where there is no imagination of fraud; and so is the common law."

The burden of proving the fraudulent intent, is on him who seeks to vacate the conveyance. But, he will be allowed to establish it by any kind of legal testimony; whether it be direct and positive, or presumptive or circumstantial.

In the absence of direct and positive testimony, there are many facts and circumstances which the law admits to be marks or signs of fraud; and from which, therefore, the fraudulent intent may be inferred. Some of these circumstances afford only prima facie evidence of it; but others afford conclusive evidence, and establish it decisively.

There are some cases where the conveyance is said to be fraudulent in law, and others where it is said to be fraudulent in fact.

A conveyance is said to be fraudulent in law, when it has been executed under such circumstances, that the law itself conclusively infers a fraudulent intent, from the intrinsic nature of the circumstances, without any enquiry into the actual intent of the parties to the transaction. A conveyance is said to be fraudulent in fact, where the circumstances are not such as that the law conclusively infers a fraudulent intent from them, but where the parties have actually intended to delay, hinder or defraud creditors or subsequent purchasers. But, both descriptions of cases are equally void under the statute of fraud; for, in the first, the fraudulent intent is inferred by the law, and in the second it is actually proved.

It is contended for the appellee, Steward, that the conveyance, in this case, is fraudulent in law, because, the possession did not accompany and follow the deed.

Before I examine the character of the possession in this particular case, and the weight to which it is entitled, I deem it important to state, as concisely as I can, my views of the doctrines of the law on the subject of the possession of personal property, in general, after an absolute conveyance of them. I deem it important, because I conceive that the decision of this case will depend mainly upon the correct understanding of these doctrines.

I will premise that I have not been able to discover, any contrariety or inconsistency in the modern decisions of the English Courts,

*JUDGE CABELL refers to this decision in *Clayton v. Anthony*, 6 Rand. 316; *Davis v. Turner*, 4 Gratt. 460; and *BALDWIN, J.*, refers to it in *Tavenner v. Robinson*, 2 Rob. 386.

or in the opinions of their Judges on this subject. There is certainly no such contrariety nor inconsistency to be discovered in the Supreme Court of the United States, or in this Court. If there be the appearance of
602 *contrariety or inconsistency of opinion, that appearance will vanish, if the expressions of the Judges shall be construed, (as they always ought to be) in reference to the circumstances of the particular case, and to the points presented for decision.

The only real question that has ever been submitted to the Courts, on this subject, is whether a possession not accompanying and following the deed, is to be considered as only a badge or evidence of fraud, to be submitted to the jury, under the direction of the Court, and, of course, liable to be rebutted by counter-testimony, or whether it is to be considered "such a circumstance per se, as makes the transaction fraudulent in point of law."

But, that question does not, by any means, involve any doubt as to the effect of the mere circumstance of actual possession not passing from the grantor, contemporaneously with the execution of the conveyance; nor as to the effect of the mere circumstance of such possession being found in his hands afterwards. No body ever pretended that either of these, was such a circumstance, per se, as makes the transaction fraudulent in law. Every body admits that the mere possession of personal property, after an absolute conveyance, is only evidence of fraud, to be submitted to the jury, and that it is only prima facie evidence. This is expressly stated by Lord Eldon, in *Lady Arundel v. Phipps*, 10 Ves. 144. He says, "the mere circumstance of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is prima facie evidence of property in the man possessing, until a title, not fraudulent, is shewn, under which that possession has followed. Every case from *Twyne's Case* downwards supports that." Being only prima facie evidence of fraud, it must, from its very nature, be liable to be rebutted by other testimony. (1 Starkie's Evidence, 453,) and consequently, the possession of the vendor is susceptible of explanation, as to its character,

for the purpose freeing it from the imputation of fraud. Many cases might be stated as examples, for shewing the operation of this principle; but a single one will suffice. A man purchases a slave of another, for full consideration, and bona fide; the slave at the time of the sale, is on the farm of the vendor; it is the expectation and intention of both parties that he shall be removed with all reasonable despatch; and he remains, in the mean time, in the possession of the vendor, without any regard to his convenience, but solely to await the reasonable convenience of the vendee in removing him. But, before the vendee can thus remove him, an execution comes out against the goods and chattels of the vendor, and the sheriff finding the slave in his possession, levies the execution upon him and sells him. In an action of trespass brought by the vendee against the sheriff, if the vendee exhibits nothing but his absolute bill of sale, the sheriff may shew that notwithstanding that bill of sale, the slave

was found by him in the vendor's possession. Now, as the possession of personal chattels is, prima facie, evidence of property in, or of trust for, the person possessing, the possession of the vendor, thus exhibited, would be prima facie, inconsistent with the avowed object of the absolute conveyance to the vendee, and would, therefore, be prima facie evidence of a trust for the vendor, and that the absolute conveyance was intended as a cover to disguise and conceal that trust, and thereby to delay, hinder and defraud creditors, &c. But still, this would be prima facie evidence only, liable to be rebutted by other testimony. If, therefore, the vendee shall prove that the possession of the vendor was connected with no motive of benefit or advantage to the vendor, but was for the reasonable convenience of the vendee only, and was intended to continue no longer than such reasonable convenience required, all presumption of property in the vendor, or of trust for him, is done away, and consequently, the possession of the vendor is shewn not to be inconsistent with the purpose of the absolute deed; and thus, the whole foundation

for the inference of fraud, would be removed. *But, suppose the sheriff should not only prove that the slave was found in the actual possession of the vendor, but that it was agreed between the vendor and vendee, at the time of the conveyance, that the slave should remain in the possession of the vendor, for a long or a short time, to be used by him, during that time, as if he were the owner. Such a possession by the vendor would be manifestly inconsistent with the deed; for, the deed purports to be for the sole and exclusive benefit of the vendee, whereas the possession, as explained by the agreement, shews a trust for the benefit of the vendor. Or, suppose there be no agreement expressly proved, that the slave shall remain with the vendor to be used by him as if he were the owner, yet if the slave be actually found in his possession and use, after the conveyance, or if he be found in his possession only, that is (as has been already said) prima facie evidence of property in, or of trust for the vendor, inconsistent with the deed; and although, as being prima facie evidence only, it is liable to be rebutted by other evidence shewing that the possession is not inconsistent with the deed, yet if there be no such rebutting testimony, the prima facie evidence acquires, thereby, "a conclusive quality," (1 Starkie, 454,) and proves the fact it purports to prove, the inconsistency of the possession, as decisively as if there had been an express agreement that the slave should remain in the possession and use of the vendor.

This inconsistency of possession is all that is meant, when it is said that possession does not "accompany and follow the deed;" and the only question that has ever been made upon the subject, is whether such inconsistent possession be only evidence of fraud, to be submitted to a jury, and liable to be rebutted by other testimony, or whether it be "such a circumstance per se, as makes the transaction fraudulent in law."

In some cases, the inference of fraud is a mere question of fact; and being a question of fact, can only be found by
605 *a jury. It is always so, when the

fraud depends, not on the mere act done, but on the intention with which it was done. As, for example, when a debtor assigns his property for valuable consideration, and delivers possession thereof; this will be fraudulent or otherwise, according to the intention with which it was done; and that can be ascertained by a jury only. 1 Starkie, 427; 2 Starkie, 616.

But, there are other cases in which the inference of fraud, is a mere question of law. And it is always so, when the act itself is deemed fraudulent, without regard to the particular intention with which it was done. 1 Starkie, 427; 2 Starkie, 616. In such cases, the inference of fraud is pronounced by the Court as a matter of law arising from the fact as found by a jury, agreed by the parties, or admitted by the pleadings; or, if the Court perceive that the testimony tends to establish a fact which the law deems fraudulent per se, the Court may instruct the jury that, if they accredit the evidence, they should find accordingly.

The case of possession by the vendor, inconsistent with the conveyance, presents one of the strongest instances of the inference of fraud being a question of law. Mere possession may be explained; and the presumption arising from mere possession, will be removed by an explanation shewing that the possession was not inconsistent with the conveyance. But, a possession, admitted or proved to be inconsistent with the conveyance, admits of no explanation, nor can the inference from it be repelled or rebutted by even the strongest testimony of the actual fairness of the intention of the parties; for, an inconsistent possession is, in the language of Judge Buller, (in *Edwards v. Harben*, 2 Term Reports, 596,) "such a circumstance per se, as renders the transaction fraudulent in point of law." The rule is not always declared, precisely in this form; for the same Judge laid down the rule, in different language, in the case of *Haselington v. Gill*, decided a few years before *Edwards* and *Harben*, and reported in a

606 note to *Jarman v. Woolloton*, 3 Term Reports, 620. He there expresses himself thus: "It has been frequently determined that possession alone is not evidence of fraud. The transaction must be shewn to be fraudulent from other circumstances. If the possession be inconsistent with the conveyance, that is evidence of fraud." But it is manifest, that Judge Buller did not mean that it was only prima facie evidence of fraud; for, that would have been directly contrary to the former decisions to which he himself refers in *Edwards v. Harben*, and to the unanimous opinion of all the Judges of England as declared in consultation on the case of *Bamford v. Baron*, 2 Term Reports, 594, (note.) He undoubtedly meant that an inconsistent possession is conclusive evidence of fraud. And there is, in truth, no difference between a transaction being, in law, per se, fraudulent, and its being, in law, conclusive evidence of fraud. The expressions are used, in the books, as synonymous.

The rule, as thus established in England, has been sanctioned by the Supreme Court of the United States, in the case of *Hamilton v. Russell*, 1 Cranch, 309; and by this Court,

in the case of *Alexander v. Deneal*, 2 Munf. 341; *Robertson v. Ewell*, 3 Munf. 1; *Thomas v. Soaper*, 5 Munf. 528; and *Williamson v. Farley*, Gilmer, 15.

This doctrine of fraud per se, as it is usually called, or of conclusive evidence of fraud, as it is sometimes called, excludes all regard to the actual intention of the parties, in every transaction that comes within its range. Hence it frequently happens, that conveyances are vacated as fraudulent in law, under this rule, when the parties had not, in fact, any fraudulent or covinous intent whatever. The case of *Edwards v. Harben*, (in which the rule was most emphatically laid down) was, itself, a case of that kind. The parties had, in fact, "no imagination of frauds;" for, the deed was intended merely as a security for a just debt, and the possession was not to remain with the vendor more than 14 days. The case of *Williamson*

607 *v. Farley*, *in this Court, (Gilmer, 15,) is, also, a very strong one of the same kind. There, the bill of sale of slaves was absolute on its face, and it was intended by the parties to be what it purported to be, an absolute sale. Valuable and full consideration was actually paid. The slaves were brought into the presence of the parties, at the time of the execution of the bill of sale, and the vendor told the vendee that they were his to do as he pleased with them. But at the same time and place, the vendee hired them to the vendor, for one year, for their food and clothing; and took a bond for returning them at the end of the year. The vendee took them out of the possession of the vendor in less than two months from the execution of the conveyance. Yet, this Court determined it to be a case of fraud per se. Nothing was farther from the minds of the parties in *Edwards v. Harben*, and in *Williamson v. Farley*, than an actual intention to delay, hinder or defraud creditors. But, in both cases, they intended and stipulated, that the vendor should remain in the possession and use of the property. In doing so, they did an act which the law, estimating it by its intrinsic nature, declares to be fraudulent per se; and as the law infers intention from acts, it infers conclusively that the intention of the parties was fraudulent; and vacates the transaction accordingly.

Such being the inflexible rigour with which the rule of fraud per se, is applied to all cases coming within its range, I think it very important that the limits of the rule should be most clearly defined; and although I approve of the rule, I do not think it ought to be extended to cases which do not strictly belong to it.

The rule itself, the principle on which it is founded, and the extent of its application, are laid down, with admirable perspicuity and force, by Judge Buller, in *Edwards v. Harben*. It is applied only to cases where possession does not "follow and accompany the deed;" or as he himself explains it, both in *Edwards v. Harben*, and in *Haselington* and *Gill*, it is applied only to cases where 608 the possession *is inconsistent with the deed. Inconsistency of possession is the principle, the foundation of the rule, and the test of its application. Wherever the

possession is inconsistent with the conveyance, the rule applies to and vacates the transaction. Wherever the possession is inconsistent with the conveyance, or, to speak more correctly, wherever the possession is not inconsistent with the conveyance the rule does not apply; and the transaction will be supported, unless it shall appear that the intention of the parties was actually fraudulent. Thus, in *Edwards v. Harben*; *Bamford v. Baron*; *Hamilton v. Russell*; *Alexander v. Deneal*; *Robertson v. Ewell*; *Thomas v. Soaper*, and *Williamson v. Farley*, (before cited) the transactions were held to be fraudulent per se, because the possession was inconsistent with the conveyance; there being proof either that there was an actual agreement that the vendor should remain in the possession and use of the property, or that he was permitted to remain in the possession without any proof to shew that the possession was not inconsistent with the conveyance. But in *Cadogan v. Kennet*, *Cowper*, 432; *Jarman v. Woolloton*, 3 Term Rep. 618; *Haselington v. Gill*, (reported in a note to *Jarman v. Woolloton*,) and in *Lady Arundel v. Phipps* 10 Ves. 139; the transactions were supported because the possession was not inconsistent with the deed. The cases of *Cadogan v. Kennet*, and *Lady Arundel v. Phipps*, shew that although the actual possession remain with the vendor in the same manner as if the deed had never been made, yet the act will not vitiate the deed, provided the transaction be free from actual fraud, and provided such possession be not inconsistent with the deed. In the first of these two cases, a husband before marriage, conveyed certain household goods belonging to him, at his house in town, to trustees for his own use during his life, remainder to his wife for her life, &c. The marriage took place, and the husband remained in possession as if the deed had not been made. It appeared in testimony

609 *was to marry was amply sufficient to pay all the debts he owed at that time, and that he had no idea of disappointing any creditor. It was held that as the possession by the husband was consistent with the deed, and as the transaction was exempt from all suspicion of actual fraud, the deed protected the property from sale, even during the life of the husband, for the satisfaction of a debt due even at the time of the settlement. In *Lady Arundel v. Phipps*, there was a purchase by a married woman, after marriage, from her husband, through the medium of trustees, for her separate use, of certain family pictures, furniture and other articles belonging to the husband, in and about his different mansion houses. The husband continued in the actual possession of the property, after the execution of the deed, in the same manner as if the deed had not been made; and it appeared, moreover, that the object of the purchase was to preserve from the creditors of the husband, and for the family, the property embraced by the purchase, which was of peculiar value to the family. This transaction was supported, because the evidence shewed it to be fair, and because the possession of the

husband (considering his relation to his wife,) was not inconsistent with the deed conveying the property to her separate use. The case of *Jarman v. Woolloton*, &c., was, like the case at bar, the conveyance by a woman just before her marriage, of her own property, with the consent of her intended husband. By the deed, reciting "that it was agreed between the parties, that the wife's stock in trade, book debts, &c. should be assigned to a trustee, in trust for her separate use and disposal, and to the intent that she might carry on her trade, at her own risk and charges, and for her own separate and exclusive benefit. She assigned, to a trustee, all and singular her stock in trade, and other effects, at, in or about and belonging to, the apartments then in her occupation, being part of a house No. 78, in Welbeck street, &c." For some time after the marriage, the wife carried on her trade in Welbeck street, 610 separately from her husband, *who was a linen-draper in Mary-le-bone street; but afterwards, all her effects were removed to his house, and she carried on her trade in a separate apartment there. The husband becoming a bankrupt, the wife's stock in trade, and her furniture (conveyed by the deed,) were taken possession of by his assignees. The trustee of the wife brought trover against the assignees, and the question was whether the deed protected the property. It appeared on the trial that the husband paid the rent of the house, and had been at the expense of fitting up the shop, but that there was contradictory evidence with respect to the manner of the wife's carrying on her business, whether for her own separate use or not. The jury found that it was not carried on separately, and gave a verdict for the defendant as to the stock in trade, but found a verdict for the plaintiff as to the furniture. The defendant's counsel moved to set aside the verdict and grant a new trial as to the furniture, on the ground that the trust deed did not protect this property. But, the verdict was sustained by the Court. The transaction being exempt from all suspicion of actual fraud, the furniture was held to be protected, notwithstanding it had been removed to the husband's house; for, as to the furniture, the possession of the husband, considering his relation to his wife, was not inconsistent with the deed conveying it to her separate use. But, as to the stock in trade, the deed, by its very terms, required that the wife should carry on the trade separately from her husband, and at her own risk and charges. The fact found by the jury that she did not carry it on separately, was, therefore, in direct opposition to the terms of the deed; and it was on the ground of this inconsistency, that the stock in trade was held to come within the influence of the rule of fraud per se. This is, certainly, a most remarkable case. The different parts of the property belonged to the same person, were conveyed by the same deed, to the same grantee, for the same purposes, and the actual possession, after the deed, was the same as to all the

611 *property. Yet the deed was held to protect a part of the property, because

the possession as to that was consistent with the terms of the deed, and to be fraudulent per se, as to other parts of the property, because the possession as to them, was inconsistent with the terms of the deed. This shews what is very important in the case at bar, that, as to property of the wife conveyed, fairly, before the marriage, the circumstance of possession by the husband, after marriage, will not bring it within the rule of fraud per se; unless the possession by the husband shall be inconsistent with the terms of the deed. And I will here take occasion to observe that as to the doctrine of inconsistency of possession, there is no difference between a conveyance to trustees, and a direct conveyance to the party beneficially interested; particularly in England, where deeds of trust are not required to be recorded.

One word more as to this rule of fraud per se, and I shall have done with the subject. It is never applied to cases of possession by the former owner, after a sale of property by a sheriff under an execution; whether the possession be left by the purchaser with the former owner, merely for his accommodation, or on condition that he will sell the property and pay the proceeds to the purchaser, or on a contract to pay rent or hire for them. *Kidd v. Rawlinson*, 2 Bos. & Pul. 59; *Cole v. Davies*, 1 Ld. Raym. 724; *Birch v. Alexander*, 4 Taunton, 823. Nor is it material in such cases, that the purchaser be or be not a creditor. Nor is the rule of fraud per se, applied to the case of possession by the former owner, after a sale made by trustees under an assignment for the benefit of creditors. *Leonard v. Baker*, 1 M. & S. 251. Nor is it applied to the possession of the former owner, after a sale by a landlord on a distress for rent. *Guthrie v. Wood*, 1 Starkie's Cases, 367; 2 Com. Law Reports, 430. In this last case, Lord Ellenborough said, "the doctrine of possession," (meaning this doctrine of fraud per se,) "applies to cases of conveyance from the party himself. *The statute of Elizabeth does not apply to a case like this, where the property is not sold by the party, but under a distress for rent." And how can it apply to any other case than to a conveyance from the party himself? For, how can a possession by the former owner, be inconsistent with a conveyance not from that former owner, but from some other person in whom the property has become legally vested, and who has full right to sell and convey to any fair purchaser. Such a purchaser is, as Lord Ellenborough said, in the case last cited, "quite at liberty to leave it in the possession of the former owner."

The result of the whole doctrine is this, that the mere possession of personal chattels, after an absolute conveyance of them, being only prima facie evidence of fraud, may be explained and rebutted by shewing that it is not inconsistent with the conveyance. But, if the possession be inconsistent with the conveyance, it is per se fraudulent in law, although the parties had not, in fact, any imagination of fraud. This rule, however, is never applied to any case but to one of inconsistent possession.

It remains now to apply these general principles to the case before us.

The deed from Mrs. Birdsong to her brother, was executed but a few hours, perhaps a few minutes, before her marriage; and it conveyed the property to him, absolutely, without any special stipulation, limitation, or reservation whatever. No possession of the property, therefore, embraced by this deed, can be inconsistent with the deed, but the possession of Mrs. Birdsong, or of those claiming under her. As to the possession of Mrs. Birdsong, herself, during the short period that elapsed between the execution of the deed, and the solemnization of the marriage, that is sufficiently explained to be not inconsistent with the deed, by the fact that there was no agreement that she should retain the possession, and by the fact that her brother, the grantee, was absent, and was not informed of the deed until after the marriage.

613 As to the possession of "Jeffries, after the marriage, that cannot, with any semblance of propriety, be said to be a possession under Mrs. Birdsong, the grantor. She had no right whatever, to the possession of the property, at the time of the marriage, nor had she the legal competency after the marriage, to deliver to him any actual possession which she may have held at the moment of the marriage; for, at that moment, she ceased to be sui juris. The possession of Jeffries after the marriage, was not, either as to right, or as to fact, under the grantor in the deed: and consequently, can no more be said to be inconsistent with that deed, than the possession by any other individual in the community. In truth, the possession of Jeffries, after Land's return from the military service, was under Land, the grantee in the deed, by hire from him, and so far from being inconsistent with the deed, was consistent with it. This case is very different from the case of *Jarman v. Woolloton*, so far as respects the interference of the husband in the wife's stock in trade, mentioned in that case. In *Jarman v. Woolloton*, there was an express stipulation in the deed, that the wife should carry on the trade separately from the husband. The interference of the husband in the trade, (which was acquiesced in by the wife and by her trustee,) was, therefore, inconsistent with this express stipulation of the deed; and it was on account of this inconsistency, that that case was determined, so far as related to the stock in trade, to come within the influence of the rule of fraud per se; and that also was the reason, and the only reason, why Lord Mansfield said, in the case of *Haselington v. Gill*, that if "the husband had carried on the trade in his own name, and contracted debts on it, that would have varied the case:" for, in *Haselington v. Gill*, as in *Jarman v. Woolloton*, there was an express stipulation in the deed that the trade should be carried on by the wife, separately from the husband. The mere circumstance of possession by the husband, is never regarded as fraudulent per se. It is only inconsistent possession, whether by the husband or any body else, that is regarded as fraudulent per se.

And I pronounce with confidence, that there is no case, where the possession of the husband after marriage, of property conveyed by the wife before marriage, has been held to be inconsistent with the deed of the wife, where that deed, like the deed before us, was absolute on its face, and without any special stipulation, limitation, or reservation. This case, therefore, cannot be brought within the influence of the rule of fraud per se; and can only be assailed on the ground of actual fraud.

Was there any actual fraud in this transaction? This was very faintly urged, if urged at all; and I am decidedly of opinion, that it is not supported by a single circumstance that is calculated to excite even the suspicion of fraud. Mrs. Birdsong, not being indebted herself, had a perfect right to make any disposition of her property that she thought proper; and she was under no obligation, legal or moral, to permit any of it to be applied to the payment of the debts of her intended husband. Nor was Jeffries himself, under any such obligation, to make any arrangement for subjecting to the payment of his debts, the property of his intended wife. Situated as he was, such an effort would have been reprehensible: and even his creditors do not exhibit themselves in a very enviable aspect, when, after imprudently trusting an insolvent, they seek to indemnify themselves by sacrificing the just rights of others. As to the possession of the property by the

husband, it was no more calculated to mislead or deceive creditors or purchasers, than the case which occurs daily, of the wealthy father-in-law permitting his son-in-law, to hold on loan, property which appears to the world to belong to the son-in-law, but which may be reclaimed at any time within five years. As to the use to which it was hoped the brother would hold the property, viz: the separate use of Mrs. Birdsong, after the marriage, that was in itself a just and legal object; and no body had a right to complain of its not being expressed in the deed, but Mrs. Birdsong
615 *herself. And the omission is of no consequence, even as to her; since the grantee himself, now declares it.

On the subject of the deed not having been recorded, I have only to say, that as it was absolute on its face, without any reservation of trust whatever, it cannot be regarded as a deed of trust, or marriage settlement; and therefore, that there was no necessity for recording it as to anybody, under the 4th section of our act concerning conveyances. Nor do I think it was necessary to record it under our statute of frauds; because I am of opinion that the possession really and bona fide remained with the donee; for, the possession of Jeffries, was the possession of Land.

I think the decree of the Chancery Court should be reversed, and the injunction be re-instated.

APPENDIX—No. 2.

[See page 418.]

PRICE'S REPORTS, VOL. 4, PAGE 50.

EASTER T. 57 GEO. 3, TO TRIN. T. 57 GEO. 3.

The King v. Ridge.*

May, 1817.

A scire facias having issued against the defendant, as the acceptor of three several bills of exchange, dated 12th April 1813, payable twelve months after date, drawn by the Earl of Moira, whereby he (Ridge,) became indebted to Austen (the holder) in that sum and interest, as found by an inquisition, under a commission on an extent against him, as receiver general for the county of Oxford; the defendant pleaded a general traverse: and the case coming on to be tried before the Lord Chief Baron, at the sittings after Trinity Term, the jury found a verdict for the Crown.

In Michaelmas Term, Clarke obtained a rule to show cause why a verdict should not be entered for the defendant, or a new trial granted.

From the report of the evidence, given on the trial, it appeared to have been proved, that a little before Lord Moira's departure for India, his Lordship had drawn four bills for one thousand pounds each, payable to his own order, *twelve months after date, which were accepted by Ridge, his Lordship's regimental agent.

That they were then handed over, endorsed by Lord Moira, generally, to Major James, his Lordship's confidential friend, and who had been employed in obtaining money for his Lordship, through the medium of such bills, ever since the year 1802, by getting them discounted for that purpose, and often at the house of Austen & Maunde, but more particularly with Austen, who usually furnished cash for them.

That Major James, (having previously had a communication with Maunde on the subject of getting the bills negotiated,) took them himself to the banking house of Austen, Maunde & Co., in Henrietta street; where, after several interviews with Maunde (without seeing Austen on business,) he at length received from Maunde 3600l. 0s. 0d. (three thousand six hundred pounds) for the four bills, which he immediately gave to Lord Moira. Major James was known to Austen & Co. to be the agent of Lord Moira, and to be procuring the money for him.

It was also in evidence, that Lord Moira's bills, so drawn and accepted, had become much depreciated in the market; which was explained to mean, that they were not negotiable for so much in value as they purported to be drawn for, and that fifteen pound, per cent per annum, was commonly required and

received for discounting them. Major James had himself no interest in the bills, but was merely the agent of Lord Moira; and had not endorsed them, nor was there any other endorsement on them but that of Lord Moira. On that evidence, the counsel for the defendant objected that the transaction was usurious; for that it was quite clear, that the money given for the bills in question, was in the way of discounting them for Lord Moira, and not as buying them of Major James.

His Lordship left it to the jury to say whether the transaction before them was merely colourable on the part of the house of Austen & Maunde, and was a discounting *of the bills; or whether it was a fair and bona fide purchase of the bills by them. If the former, directing them to find for the defendant; if the latter, for the Crown; when the jury found a verdict for the Crown.

Dauncey and Nolan, shewed cause; contending, that what had been done in respect of the bills, was on the face of the transaction a mere sale, and not a discount; when the Court calling on the counsel who were to support the rule:

Clarke and Peake submitted, that the transaction was a discounting, and not a purchase of the bills, and therefore usurious; that the money given for them was a personal advance to Lord Moira himself alone, on his credit, at a premium of 15l. 0s. 0d. (fifteen pounds) per cent. being considerably above the usual discount. Major James was not a third person holding the bill for his own benefit, as having received it for money due to him from Lord Moira, nor does he endorse it, or make himself liable; if he had, it would have been a loan to him, and therefore, equally usurious; but, he is identified with Lord Moira, who was at the time distressed for money, and was precisely one of the persons meant to be protected by the statute, (12 Anne, chap. 16,) against the mischievous consequences of their necessities, and the language of the act is most general: or, if transactions of this sort may be legalized as a sale, the beneficial provisions of that act will be frustrated. A party selling a bill is released from all responsibility on it.

Not so here. Lord Moira, whose sale it was, if the bill was sold, for it was sold for his benefit, and in fact by himself; for the mere agency of a third person can make no sort of difference in the act itself, which was a discounting of these bills at more than five per cent.

Dauncey and Nolan, contra, contended, that it was a mere question of fact for the

*This case is referred to in Whitworth v. Adams, 5 Rand. 389, 396, 418, 419, 423.

jury, whether this was a sale by Major James, or a discounting for Lord Moira; and their finding ought to be conclusive.

620 *It was in evidence that no one would take these bills for their full amount; therefore, they were sent into the market to be sold to any one who would purchase them on speculation. They had in the market a specific value assigned them, and the house of Austen & Co. had given for them all that they were considered to be worth. This is an instrument on which any one, becoming legally possessed of it, might sue, and therefore may be the subject matter of sale. If the issue of the bill was fair at first, subsequent usury does not vitiate it. If Austen & Maunde had endorsed these bills over to a third person, they would have been available in his hands; so also are they in the hands of the Crown.

RICHARDS, Chief Baron.

This is certainly a case of very singular circumstances. (Stating the transaction and the connection between the parties, and observing particularly on the communication between James and Maunde, before the bills were produced.) It is said that this transaction was usurious; and if it were, we are bound here to decide according to law.

Now I confess, on re-consideration, that I think this was an usurious transaction, and that the usury affects the Crown, in the same manner as it would the assignees of Austen & Maunde, if they had become bankrupt. Without entering into all the circumstances, the simple fact is, that Lord Moira and Major James were, as to this transaction, one and the same person. If Lord Moira had gone to Austen & Maunde, and said, "Lend me 3400l. and I will give you bills for 4000l." no doubt that would have invalidated the bills; and I do not see how we can distinguish between the facts of the bills being signed before or after the negotiation, or whether they were taken to Austen & Maunde in an issuable state or not. Major James does not affect to be more than a mere messenger in the business. It was argued,

621 *inception, subsequent usury would not make them bad. I think, however, that it would. Then it was contended, that in the hands of the Crown, as of an innocent holder, the vice of the bills was removed; but, I think that the Crown must stand in the place of an assignee; and I think it is clear, that in case of bankruptcy an assignee could not have recovered on the bills; and I see no difference, for they both become possessed by act of law.

It has been put also, that the question was fairly left to the jury as a question of fact, whether this negotiation was a loan or a sale; they being told that in the one case the bills would be bad; in the other, they

would be good. The effect of that direction would be, to leave the question of law to them. Now I think that the person who tried this case ought to have told the jury, that under the circumstances of this case the transaction was usurious. It did not occur to me then, as it does now, that this negotiation was tainted with usury; but, I should certainly now direct, if the case were trying before me, that Lord Moira could not be sued on these bills, because they are bad in point of law; and, therefore, I think there should be a new trial.

GRAHAM, Baron.

The arguments of the defendant's counsel have relieved me from many considerable difficulties; and I think the question was, ultimately, not one of fact. If Major James had received these bills from Lord Moira on his own account, as security for a debt, and had then sold them, the direction would have been right; but James was Lord Moira's confidential agent. (Adverts to the evidence.) This, therefore, being clearly a loan to Lord Moira, and not a purchase in the market, it was not a question for the jury; and the Judge should have told them, that it was a transaction which the law did not allow. Then the bills getting into the hands of the Crown, under this extent against its debtor, does not remove the 622 usurious quality; for, that is *certainly a very different thing from a bill originally good having got into the possession of a bona fide holder for a valuable consideration.

WOOD, Baron, absent.

GARROW, Baron.

The confusion which has got into this case, proceeds from its having been at one time considered, that these bills were sent about the town to be sold for what could be got for them; but the fact is, that this paper was sent by the maker to those who well knew its precise value, to get that value for it, which was done. Nothing had been given by Major James for it; and whether the transaction was originally good, it is not necessary to enquire: but that this transaction, as between Major James, the acknowledged agent of Lord Moira, and Austen & Maunde, was usurious, there can be no doubt.

It was ingeniously argued, that the bills, by getting into the hands of the Crown, made a difference, as between the Crown and the party; but, it would be most unfortunate if that were so; for, then the grossest usurer would have nothing to do but to get his bills seized under an extent, and then all his illegal transactions would be rendered available in the hands of the Crown. That is too monstrous a proposition for serious consideration, and would require to be supported by undoubted authority.

PER CURIAM.

Rule absolute.

CASES DECIDED BY
THE GENERAL COURT OF VIRGINIA,
NOVEMBER TERM, 1826.

JUDGES PRESENT.

<i>Stuart,</i>	<i>Daniel,</i>
<i>Brockenbrough,</i>	<i>Semple,</i>
<i>Johnston,</i>	<i>Parker,</i>
<i>Allen,</i>	<i>Summers,</i>
<i>Dade,</i>	<i>Bouldin.</i>

Samuel Anderson v. The Commonwealth.*

November, 1826.

Criminal Law—Incontinency—Jurisdiction.†—Before the statute of circumspecte agatis, 18 Edw. 1. the Court of King's Bench punished offences of incontinency, but since that statute the cognizance of such offences has been transferred to the Ecclesiastical Courts.

Same—Fornication—Common-Law Offence.‡—The offences of adultery, fornication, and the like, cannot be punished by our Courts of Law, as common law offences, unless they be accompanied with other circumstances, which of themselves constitute a misdemeanor: such as the public commission of the act, or a conspiracy. The statutory offence must be punished according to the statute.

Same—Seduction—Indictment.—The seduction and abduction of a female over sixteen years of age, (being not within the statute,) cannot be punished by indictment. It would have been otherwise, if a conspiracy had been charged.

628 ***Criminal Jurisdiction—Offences Contra Bonos Mores.**§—Although our Courts take cognizance of offences contra bonos mores, yet the adjudicated cases afford a safe rule for fixing the limits of the principle: If they are departed from, the criminal jurisdiction may be extended to cases, which, though grossly immoral, were never yet thought of as indictable offences; such as slander and the like.

This was a writ of error to a judgment of the Superior Court of Law for Chesterfield county, rendered against the plaintiff in error, by which he was sentenced to imprisonment in the jail of the county, without bail or mainprize for the space of two years and six months, and afterwards till he should make his fine with the Governor, by the payment of one thousand dollars, the fine assessed by the jury, or until he be discharged by due course of law.

The indictment against the plaintiff in error, contained two counts, the first of which charged that he, being a married man, on the 22d November, 1825, in the said county of Chesterfield, one Elizabeth F. Hargrove a maiden, and unmarried, and under the age of twenty-one years, that is to say, of the age of sixteen years, two months, and nineteen days, having no father living, and being then and there under the care and custody of Elizabeth Hargrove, a widow, her mother, did entice, inveigle, take and carry away

from the care and custody of her said mother, for the purpose of prostituting and carnally knowing her the said Elizabeth F. against the peace and dignity of the Commonwealth. The second count in like manner charges him with the enticing, inveigling, taking and carrying away the said infant over the age of sixteen years, and moreover charges that he did, on a subsequent day, deflower, carnally know, and prostitute her the said Elizabeth F. Hargrove, against the peace and dignity of the Commonwealth.

Our statute, like the statute of Philip and Mary, punishes by imprisonment, without bail or mainprize, the person who unlawfully takes and carries away any maiden, or woman child, being within the age of 629 sixteen years, from *the possession, and against the will of her father, mother, or other person having the custody of such maiden: and the punishment is greatly increased if the maid be deflowered. 1 Revised Code of 1819, chap. 106, sec. 25 and 26. The maiden in this case being more than sixteen, the offence was not within the statute; and the question was, whether it was punishable by indictment at common law.

A writ of error was awarded at the June term, and the Court now proceeded to judgment.

DADE, J. delivered the opinion of the Court.

The question is, whether the offence of which the plaintiff has been convicted, and had judgment, is a misdemeanor, punishable by indictment at the common law?

The class of misdemeanors within which it is insisted this offence is comprehended, is that of offences contra bonos mores, over which the Court of King's Bench in England, and the Superior Courts of Law of this Commonwealth, have always claimed to have jurisdiction. It is admitted, that before the statute of circumspecte agatis, 13 Edward 1, the Court of King's Bench did on this principle punish the offences of incontinency, and that by that statute the jurisdiction was transferred to the Ecclesiastical Courts. It may be well doubted whether the King's Bench before the statute, or the Courts Christian since, looked beyond the simple fact of incontinence, as that offence is at present contemplated and punished by our own acts of Assembly. In other words, whether they looked beyond the mere offence of incontinence, as consisting in the single act of cohabitation between persons of different sexes, without the rites of marriage, not varied by any fraud, deception, or inveiglement which may have been practised by the man. But, after the statute of circumspecte agatis, the Court of King's Bench did not exercise jurisdiction in punishing the mere act of incontinence. It, however,

*For monographic notes on Adultery, Fornication and Lewdness; Abduction and Kidnapping, see end of case.

†Criminal Law—Incontinency.—Simple incontinency is not punishable at common law. Com. v. Jones, 2 Gratt. 557, citing the principal case to sustain the point.

‡Same—Fornication—Common-Law Offence.—See principal case cited with approval in Com. v. Isaacs, 5 Rand. 634.

§Criminal Jurisdiction—Offences Contra Bonos Mores.—The principal case is approved in Com. v. Turner, 5 Rand. 679.

retained its general power of punishing offences *contra bonos mores*, and it is presumed might have punished an offence of incontinence combined with circumstances, which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society; as, in case of incontinence in a street or highway. But, in such cases the jurisdiction would not spring from the criminal character of the simple fact, but from its publicity; as, there are many cases where an act, which is not criminal in private, becomes penal by the publicity which attends its perpetration. The act of Sir Charles Sedley, in running naked through the streets, derived its whole criminality from its publicity. It is not, therefore, in this case allowable to connect the criminality of the mere act of incontinence, which as such, is punishable in a certain mode prescribed by the statute, with the particular circumstances of fraud and deception, and the special injury to the female, so as to make the supposed common law offence, (as the Courts might entertain it in England, since the statute of *circumspecte agatis*,) derive support, or even acquire being from the statutory offence. If the statutory misdemeanor of simple incontinence is to be punished, it must be according to the statute. If there be other circumstances in the case which entitle the Common Law Courts to jurisdiction, those circumstances must of themselves constitute a misdemeanor. By these principles, the only two reported cases in the English books are to be tested. The case of *The King v. Lord Grey* and others, 9 State Trials, (Cobbet's edition,) pa. 127, was that of an information, alleging a conspiracy to take away, and debauch a maiden over the age of sixteen, and under twenty-one, and an accomplishment of the act by those means. This conspiracy is emphatically charged in the information, and as it was to do a wrongful act, for which certainly, if done, an action lay to the father of the maid, the conspiracy, if proved, clearly amounted to a common law misdemeanor. So, in the case of Sir Francis Blake Delaval and others, 3 Burr. 1432, which was "a motion for

an information against the defendants for a conspiracy to put a young girl into the hands of a gentleman of rank and fortune, for the purpose of prostitution," although Lord Mansfield, in allowing the motion, intimates an opinion that the Court of King's Bench might have jurisdiction of the case, as one *contra bonos mores*, yet he decides it on the ground that there was in that case, "a conspiracy, and confederacy;" which, says he, "are clearly and indubitably within the proper jurisdiction of this Court." Without doubt in these cases, the Court having jurisdiction of them, on undeniable common law principles, the punishment in case of conviction, might well be aggravated by the baseness, perfidy, or malignity, which was the motive and end of the conspiracy. In like manner, as in trespass, circumstances may aggravate the damages, which would not of themselves alone support the action. But clearly, neither of these cases does maintain the position, that as a common law misdemeanor, an indictment or infor-

mation will lie, either for simple incontinence, or for incontinence produced by means of deception, inveiglement, or enticement, in other words, by seduction.

It is too late now to assume jurisdiction over a new class of cases, under the idea of their being *contra bonos mores*. We must consider the practice of the English Courts, from which we derive the principle, as having settled in the course of many centuries, the true limits and proper subjects of this principle. If we are to disregard these land marks, and take up any case which may arise under this principle, as *res integra*, then might it be extended to cases which none has yet thought of as penal. A case of slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, as ruinous effects in its consequences, and as pernicious an example in its dissemination, as this case of seduction. And yet none would think of prosecuting it criminally. It is true, that if something peculiar in our situation had given rise to a class of cases *contra bonos mores*, as in regard to our "slaves, which could not have existed in England, we might be justified in applying the rule in the absence of all precedent. But, in relation to seduction, no such supposition can be made, as we know from the books of reports that many such cases have occurred there. And we even see that in two cases, it was in fact the prominent feature, and yet the jurisdiction in one of them was made to hang on another hinge; and in the other, which was never decided, was certainly fortified by the allegation and proof of a common law misdemeanor.

From these premises, it would seem to be proper to infer that since the statute of *circumspecte agatis*, in England, the Common Law Courts have never taken jurisdiction of the mere offence of incontinence, nor of any offence of incontinence combined with other reprehensible circumstances, not in themselves importing a common law misdemeanor: that in this country the Legislature has taken up the subject of simple fornication and adultery, and has defined a precise mode of proof, and a fixed and certain punishment: that there is no reason to believe, that these statutes are cumulative; but, that they occupy the whole ground: and that, as in England, the offence being merely spiritual, is not, under any circumstances, allowed to be the foundation of a criminal prosecution in the Courts of Common Law; so here, by parity of reasoning, the offence being entirely statutory, it shall not be converted into the foundation of a common law misdemeanor.

If these premises and deductions be true, we must throw out of this case the statutory criminality of the mere act of incontinence, and then we cannot support the indictment, unless the other circumstances amount to a common law misdemeanor. If they had made out a case of conspiracy, that desideratum would have been supplied. But, it is not found in the artifices and contrivances, which may have been used in alluring the female from the path of virtue, and the home of her parent.

*For these reasons, the Court is

of opinion, that the judgment of the Superior Court of Chesterfield be reversed, and this Court proceeding to give such judgment as the said Superior Court ought to have rendered, it is further considered that of the offence of which the said Samuel Anderson hath been indicted, and convicted, he be acquitted and discharged, and that he go thereof without day.

Note by BROCKENBROUGH, J. The statute of *circumpecte agatis*, may be seen in the original Latin in 2 Coke's Inst. 487, and in its English dress, in 2 Bac. Abr. p. 171, title "Ecclesiastical Courts," D. In his commentary on that statute, LORD COKE says, that "in ancient time, the King's Courts, and specially the Leets, had power to enquire of, and punish fornication and adultery." The authority of the King's Courts over these mere spiritual offences, as they are called, appears to have ceased with the above statute, which forbids the Judges from interfering with the Courts Christian, in punishing them. That statute was enacted about the year 1285, that is, several centuries before the Colonization of Virginia, and consequently, that part of the ancient common law of which LORD COKE speaks, was not brought here by our ancestors. It cannot for a moment be supposed that the act of 1792, which repeals all British statutes, was intended to bring into existence an old law of England, which had never existed here.

But, although that common law power did not prevail, yet our ancestors, at a very early period, enacted several statutes on the subject. In the year 1642, it was enacted, that there should be a yearly meeting of the Ministers, and Church Wardens, before the commander, and commissioners of every County Court, in the nature of a visitation, and that the Church Wardens, on oath, should make presentment (inter alia) of all persons guilty of these high and foul offences. 1 Hen. Stat. at Large, 240. See also, p. 310. And in 1657, it was enacted, that for scandalous living in that way, the person convicted should be severely punished, and be held incapable of being a witness, and of bearing any public office in the Colony. Ib. 433. These acts seem to have been repealed in 1666, and a new enactment was then made on the subject. 3 Hen. Stat. 139. In 1705, it was enacted, that every person committing these offences, and thereof convicted by the oaths of two or more credible witnesses, or confession of the party, should be punished, for fornication, by a fine of 500 pounds of tobacco, and for adultery, by a fine of a thousand pounds of tobacco; to be recovered by the suit or prosecution of the Church Wardens, by bill, plaint, or information, for the benefit of the poor of the parish. Ib. 361. The provisions of the act of 1705, have been continued to this day, except as to the amount of the fine, and that the prosecution is to be carried on by the overseers of the poor. 1 Rev. Code of 1819, ch. 141, sec. 6.

There is no statute, either in England, or in Virginia, against the offence of seduction, except those which relate also to abduction; and these only apply where the female is under sixteen years of age.

And with respect to the punishment of seduction, as being an offence *contra bonos mores*, there does not appear to be a single authority for such a prosecution in the English Courts, unless where it is accompanied by conspiracy, or the like; but, civil prosecutions for these offences, are known to be very common.

ADULTERY, FORNICATION AND LEWDNESS.

I. ADULTERY.

A. AT COMMON LAW.

1. Definition.
2. Not Punishable.

B. BY CANON LAW.

1. Definition.
2. Ecclesiastical Offense after Stat. 13 Edw. 1.

C. BY STATUTE.

1. With a Slave.
2. Punishment.

D. PLEADING AND PRACTICE.

1. Indictment, Presentment and Information.
 - a. May Be Joint or Separate.
 - b. What It Must Show.
2. Variance between Presentment and Information.
 - a. When Not Available.

3. How Defects Taken Advantage of.

- a. By Demurrer.
- b. By Motion to Quash, or in Arrest of Judgment.

4. Change in Indictment.

E. Evidence.

II. FORNICATION.

A. AT COMMON LAW.

1. Definition.
2. Not Punishable.
3. Punishable if Accompanied with Misdemeanor.

B. BY CANON LAW.

1. Definition.
2. Ecclesiastical Offense Since Stat. 13 Edw. 1.

C. BY STATUTE.

1. Punishment.
2. Evidence.

III. LEWDNESS.

A. DEFINITIONS.

1. Lewd—Lewdness.
2. Lascivious.
3. Cohabitation.

B. WHAT CONSTITUTES LEWD AND LASCIVIOUS COHABITATION BY STATUTE.

1. Both Parties Must Have Criminal Intent.
2. The Burden of the Offense is Publicity.
3. Statute Must be Followed Strictly.
4. What Necessary to Sustain Action.
5. "Cohabitation" Construed.

C. PLEADING AND PRACTICE.

1. Bill of Exceptions.
2. Evidence.

Cross References to Monographic Notes.

Indictments, Informations and Presentments, appended to Boyle v. Com., 14 Gratt. 674.

Divorce, appended to Bailey v. Bailey, 21 Gratt. 43.

I. ADULTERY.

A. AT COMMON LAW.

1. DEFINITION.—Adultery, at common law, is criminal conversation with a married woman. She must be the wife of another; and whoever, married or single, has illicit intercourse with her becomes guilty of adultery. Am. & Eng. Ency. Law, vol. 1 (2d Ed.) 747.

Unmarried Man and Married Woman.—But it has been held that illicit sexual intercourse between an unmarried man, and a married woman is not adultery in the man. Com. v. Lafferty, 6 Gratt. 672.

2. NOT PUNISHABLE.—The offense of adultery cannot be punished by our courts of law, as a common-law offense, unless it be accompanied with other circumstances, which of themselves constitute a misdemeanor. Anderson v. Com., 5 Rand. 627; Com. v. Isaacs, 5 Rand. 634; Com. v. Jones, 2 Gratt. 555.

B. BY CANON LAW.

1. DEFINITION.—Adultery by the canon or ecclesiastical law was sexual intercourse between a man and a woman, of whom one at least was lawfully married to a third person. Am. & Eng. Ency. Law, vol. 1 (2d Ed.) 747.

2. ECCLESIASTICAL OFFENSES AFTER STAT. 13 EDW. 1.

1.—Before the statute of 13 Edw. 1 the courts of the kings' bench punished offenses of incontinency, but since that statute the cognizance has been transferred to the ecclesiastical courts. Anderson v. Com., 5 Rand. 627.

C. BY STATUTE.

1. WITH A SLAVE.—Adultery committed with a slave is a violation of the act, 1 Rev. Code, ch. 141, § 6. Com. v. Jones, 2 Gratt. 555.

2. PUNISHMENT.—Every person convicted of adultery under the statute, 1 Rev. Code, § 555, which pro-

vides, that every person not being a servant or slave, etc., is subject to a fine of twenty dollars. *Com. v. Jones*, 2 Gratt. 555.

D. PLEADING AND PRACTICE.

1. INDICTMENT, PRESENTMENT AND INFORMATION.—

a. May Be Joint or Separate.—In prosecutions for adultery the two participants may be joined in the same indictment or indicted separately. *State v. Foster*, 21 W. Va. 767.

b. What It Must Show.—Every indictment must show upon its face that some public law of the state has been violated, and that the offender has been indicted therefor, in the manner and within the time prescribed by the law of the land. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

2. VARIANCE BETWEEN PRESENTMENT AND INFORMATION.

a. When Not Available.—In a prosecution for adultery, where there is a variance between the presentment and information, it is not competent to arrest judgment on that ground, after a plea of not guilty, and trial and conviction on that plea. *Com. v. Jones*, 2 Gratt. 555.

3. HOW DEFECTS TAKEN ADVANTAGE OF.

a. By Demurrer.—Where a party is indicted he may upon demurrer to the indictment take advantage of all the defects therein to the same extent as by motion in arrest of the judgment. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

Statute of Limitations Fatal on Demurrer.—An indictment found on the eighth day of April, 1884, for adultery and fornication, which charged the defendant with committing the offense on the tenth day of March, 1883, and which offense is barred by the statute of limitations in one year, is fatally defective on demurrer. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

Demurrer Available Also Where Motion in Arrest of Judgment Would Be.—While the motion in arrest of judgment had by § 11, ch. 158 of the Code, been rendered less effectual than it was by the common law, yet a demurrer to the indictment remains unimpaired and may be resorted to in all cases where the defendant is entitled to move in arrest of judgment. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

b. By Motion to Quash, or in Arrest of Judgment.—Where an indictment is so defective that any judgment thereon against the defendant would be erroneous, he may take advantage of the defects by motion to quash, by demurrer, or by motion in arrest of judgment. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

4. CHANGE IN INDICTMENT.—Where an original indictment is brought before the appellate court, and it appears that the date of the year in which the crime was committed has been changed, the court, in the absence of anything in the record to the contrary, will presume that the same was made before the finding of the indictment. *State v. Ball*, 30 W. Va. 382, 4 S. E. Rep. 645.

E. EVIDENCE.

Statute Requiring Two Witnesses to Convict Repealed.—The act, 1 Rev. Code, § 555, which makes the oath of two credible witnesses necessary to convict of adultery, is repealed by ch. 27, 2, p. 164, of the Criminal Code, Session Acts 1847-48. *Com. v. Cregor*, 7 Gratt. 591.

One Credible Witness Sufficient to Convict.—One credible witness is now sufficient to authorize a conviction for adultery. *Com. v. Cregor*, 7 Gratt. 591.

II. FORNICATION.

A. AT COMMON LAW.

1. DEFINITION.—Fornication is the act of illicit sexual intercourse between either a married or an

unmarried man and an unmarried woman, both parties being guilty of the offense. *Am. & Eng. Ency. Law*, vol. 13 (2d Ed.) 1118.

Intercoarse by Single Man with Married Woman—Fornication in Man.—Illicit sexual intercourse between an unmarried man and a married woman, is fornication in the man. *Com. v. Lafferty*, 6 Gratt. 672.

2. NOT PUNISHABLE.—The offense of fornication, (or the cohabiting together by a man and a woman in a state of illicit commerce as man and wife, but without marriage,) is not punishable as a common-law offense. *Com. v. Isaacs*, 5 Rand. 634.

3. PUNISHABLE IF ACCOMPANIED WITH MISDEMEANOR.—The offense of fornication cannot be punished by our courts of law, as a common-law offense, unless they be accompanied with other circumstances which of themselves constitute a misdemeanor. *Anderson v. Com.*, 5 Rand. 627.

B. BY CANON LAW.

1. DEFINITION.—Fornication is the act of illicit sexual intercourse on the part of an unmarried person with the person of the opposite sex, whether married or unmarried, and, if married, whether a man or woman. *Am. & Eng. Ency. Law*, vol. 13, (2d Ed.) 1118.

2. ECCLESIASTICAL OFFENSES SINCE STAT., 13 EDW. 1.—Before the statute of 13 Edw. 1, the courts of kings' bench punished offenses of incontinency, but since that statute, the cognizance of such offenses has been transferred to the ecclesiastical courts. *Anderson v. Com.*, 5 Rand. 627.

C. BY STATUTE.

Intercoarse with a Slave.—Where a person not being a servant or slave, cohabits with such, he is punishable, for fornication, under the statute, 1 Rev. Code, § 555, which provides, that every person, not being a servant or slave, committing adultery or fornication, and being thereof lawfully convicted, etc. *Com. v. Jones*, 2 Gratt. 555.

1. PUNISHMENT.—Every person convicted of fornication under the statute, 1 Rev. Code, § 555, which provides, that every person not being a servant or slave, etc., is subject to a fine of ten dollars. *Com. v. Jones*, 2 Gratt. 555.

D. EVIDENCE.

Statute Requiring Two Credible Witnesses Repealed.—The act 1 Rev. Code, § 555, which makes the oath of two or more credible witnesses necessary to convict of fornication, is repealed by ch. 27, § 2, of the Criminal Code, Session Acts, 1847-48. *Com. v. Cregor*, 7 Gratt. 591.

One Witness Sufficient.—One credible witness is now sufficient to authorize a conviction for fornication. *Com. v. Cregor*, 7 Gratt. 591.

III. LEWDNESS.

A. DEFINITIONS.

1. LEWD.—Given to unlawful indulgence of lust; dissolute, lusty, filthy. *Am. & Eng. Ency. Law*, vol. 18 (2d Ed.) 841.

Lewdness.—That form of immorality which has relation to sexual impurity. *Bouvier's Law Dict.*, vol. 2 (Rawle's Rev.) 193.

2. LASCIVIOUS.—Loose, wanton, lewd; tending to produce voluptuous or lewd emotions. *Am. & Eng. Ency. Law*, vol. 18 (2d Ed.) 842.

3. COHABITATION.—The act or state of dwelling together, or in the same place with another; the state of living together as husband and wife. *State v. Miller*, 42 W. Va. 215, 24 S. E. Rep. 882; *Jones v. Com.*, 30 Va. 20.

B. WHAT CONSTITUTES LEWD AND LASCIVIOUS COHABITATION BY STATUTE.—To constitute the offense of lewd and lascivious association and cohabitation under § 7, ch. 149, Code 1891, it

must be proved that the parties cohabited together, that is, lived together in the same house as man and wife. *State v. Miller*, 42 W. Va. 215, 24 S. E. Rep. 882.

Occasional Acts of Incontinence.—Proof of occasional acts of incontinence merely is not sufficient to convict of lewd and lascivious cohabitation. *Jones v. Com.*, 80 Va. 18; *Pruner v. Com.*, 82 Va. 115; *State v. Miller*, 42 W. Va. 215, 24 S. E. Rep. 882.

1. **BOTH PARTIES MUST HAVE CRIMINAL INTENT.**—To constitute the offense of lewd and lascivious cohabitation it is essential that both parties should lewdly and lasciviously cohabit together, and that they should both have the same common purpose and intent. *State v. Foster*, 21 W. Va. 770; *State v. Foster*, 26 W. Va. 272.

Where One Party Innocent Neither Can Be Convicted.—Where one person who is married, intermarries with another, who is single, and without knowledge of the other party to the marriage, and in good faith, believing their marriage to be valid and binding neither party can be convicted of lewd and lascivious cohabitation. *State v. Foster*, 21 W. Va. 771.

2. **THE BURDEN OF THE OFFENSE IS PUBLICITY.**—The burden of the offense is the open, lewd and lascivious conduct of the parties living together as man and wife. *Pruner v. Com.*, 82 Va. 115.

3. **STATUTE MUST BE FOLLOWED STRICTLY.**—The offense of lewd and lascivious cohabitation is statutory, and the statute must be conformed to strictly. *Jones v. Com.*, 80 Va. 18; *Com. v. Isaacs*, 5 Rand. 634.

4. **WHAT NECESSARY TO SUSTAIN ACTION.**—To sustain a prosecution for lewd and lascivious cohabitation under § 7, ch. 7. Criminal Procedure of 1878, p. 303, the evidence must clearly establish that the parties not being married, lewdly and lasciviously associated and cohabited—that is, lived together in the same house as man and wife. *Jones v. Com.*, 80 Va. 18; *Pruner v. Com.*, 82 Va. 115.

5. **"COHABITATION" CONSTRUED.**—The term "cohabitation" as used in the statute, is construed to mean, a living together in the same house as married persons live together, or in the manner of husband and wife. *Jones v. Com.*, 80 Va. 20.

C. PLEADING AND PRACTICE.

1. BILL OF EXCEPTIONS.

Certifying Evidence Not Facts.—Where, though the bill of exceptions claims to set forth the facts proved upon trial, it is apparent that the evidence is certified, and not the facts, the court must look only to the evidence of the exceptee. *Pruner v. Com.*, 82 Va. 115; *Scott v. Com.*, 77 Va. 344.

D. EVIDENCE.

Postmaster Competent Witness.—In a prosecution for lewd and lascivious cohabitation, a postmaster is a competent witness against the accused. *Scott v. Com.*, 77 Va. 344.

Sufficiency.—Where it was proved, that S. admitted that J. was his wife, that they lived together, that H. admitted that J.'s daughter was his child, that he carried her mail to her from the postoffice, that he familiarly associated with her and was reported to live with her as man and wife, the court held the evidence sufficient to convict. *Scott v. Com.*, 77 Va. 346.

What Must Appear to Warrant Conviction.—In order to convict of lewd and lascivious cohabitation, it must appear on the face of the indictment, that both parties, lewdly and lasciviously associated and cohabited together or with each other. *State v. Foster*, 21 W. Va. 767.

ABDUCTION AND KIDNAPPING.

I. ABDUCTION.

A. Of Female over Sixteen Years of Age.

II. Kidnapping.

A. Selling Free Negro.

B. Stealing Free Negro.

1. Knowledge of Defendant.

C. Sale.

1. Affirmance.

a. Proof of Affirmance.

D. Consent.

III. The Indictment.

A. Averments of Knowledge.

1. When Knowledge Material.

I. ABDUCTION.

A. OF FEMALE OVER SIXTEEN YEARS OF AGE.—In *Anderson v. Com.*, 5 Rand. 627, the court held that the "abduction of a female over sixteen years of age (being not within the statute), could not be punished by indictment." But, it was added, "it would have been otherwise, if a conspiracy had been charged." See *Code*, 1887, § 3678.

II. KIDNAPPING.

A. SELLING FREE NEGRO.—The sale of a free negro, by his own consent, as a slave, under a collusive contract between the seller and the person sold (the free negro), that they would divide the proceeds of the sale between them, is not such a sale of a free negro for a slave as is made a felony by the statute. *Mercer v. Com.*, 2 Va. Cas. 144. And see *Davenport v. Com.*, 1 Leigh 595, where the above case is distinguished.

B. STEALING FREE NEGRO.—In the case of *Davenport v. Com.*, 1 Leigh 588, on an indictment for stealing a free negro, knowing him to be free—it was held that, the offense of kidnapping was complete, under the statute, without the actual sale of the negro by the kidnapper.

1. **KNOWLEDGE OF DEFENDANT.**—And stealing a free negro, with felonious intent to appropriate him, is criminal, whether the person stealing him knows him to be free or not. *Davenport v. Com.*, 1 Leigh 588.

C. SALE.—But it is held in *Com. v. Nix*, 11 Leigh 636, "that the sale of a free negro, to constitute the felony, must be absolute, and not conditional."

1. **AFFIRMANCE.**—Yet, though sale was conditional, if affirmed, then it became absolute, and the crime was complete. *Com. v. Nix*, 11 Leigh 636.

a. **Proof of Affirmance.**—And such affirmance of sale may be proved, either by positive act or lapse of time. *Com. v. Nix*, 11 Leigh 636.

D. CONSENT.—Where one takes and carries away a free negro boy, not over eight years of age, with the criminal intent to appropriate him, it is not necessary to prove it was done against the boy's consent, he being, by reason of his tender age, incapable of giving consent, and incapable of collusion. *Davenport v. Com.*, 1 Leigh 588. See *Mercer v. Com.*, 2 Va. Cas. 144.

III. THE INDICTMENT.

A. AVERMENTS OF KNOWLEDGE.—In an indictment for kidnapping, though the knowledge of the freedom be averred, it need not be proved, but may be regarded as surplusage. *Davenport v. Com.*, 1 Leigh 588.

1. **WHEN KNOWLEDGE MATERIAL.**—But if one come lawfully into possession of a free negro, not knowing him to be free, and sell him, knowledge of his freedom at the time of the sale is necessary to make the selling criminal. *Davenport v. Com.*, 1 Leigh 588.

634 *The Commonwealth v. David Isaacs and Nancy West.

November, 1826.

Criminal Law—Fornication—Common-Law Offence.*—The offence of fornication, (or the cohabiting together by a man and a woman, in a state of illicit commerce, as man and wife, but without marriage,) is not punishable as a common law offence. The statute, which prescribes a penalty for the offence, must be pursued in such case.

At the Superior Court of Law held for Albemarle, the Grand Jury made the following presentment: "We, on our oath, present David Isaacs, and Nancy West, (a free mulatto woman) for outraging the decency of society, and violating the laws of the land, by cohabiting together in a state of illicit commerce, as man and wife, without being lawfully married," &c. &c.; on the evidence of two persons named. The defendants were summoned to shew cause why an Information should not be filed against them, and that Court adjourned to the General Court the following question of law, viz: "Whether, admitting the facts presented by the Grand Jury to be true, an Information will lie for the said offence, at the suit of the Commonwealth?"

DADE, J. delivered the opinion of the Court.

This case involves the principal question which we have just decided in the case of Anderson v. The Commonwealth, and upon those grounds, it will not, therefore, be now discussed. If the presentment be of a single act of fornication, without other circumstances, then it clearly falls within the statute for the punishment of adultery and fornication, under which there

635 is no doubt an Information might be filed, and there is as little doubt that it could not be prosecuted as a mere common law misdemeanor. But, if by the charge of cohabitation "as man and wife," is intended, as we presume it is, that these people occupied the same chamber, ate at the same board, and discharged towards each other the numerous common offices of husband and wife, then it may be said that a publicity is given to the statutory offence of fornication, which aggravates its malignity, so as to draw it within the scope of a common law prosecution. But, this we apprehend is a mistake in the premises. The act of fornication in public, would be indeed an enormous indecency, and so grossly offensive and shocking to the feelings of society, as to entitle it to severe legal animadversion. But, nothing of that sort is pretended to exist in this case, which in truth presents nothing to the public but a

*Criminal Law—Incontinence—Common-Law Offence.—To the point that incontinence of itself is not punishable at common law, the principal case is cited in Com. v. Jones, 2 Gratt. 557.

Same—Lewd and Lascivious Cohabitation—Indictment.—Under the seventh section of ch. 192 of the Code of Virginia, 1873, p. 1208, an indictment for lewd and lascivious cohabitation may be either joint or separate. Scott v. Com., 77 Va. 346, citing principal case as authority.

The offence of lewd and lascivious cohabitation is a statutory offence, and the statute must be strictly conformed to. Jones v. Com., 80 Va. 19, citing principal case as its authority.

See further, monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

The principal case is also cited in Jones v. Com., 80 Va. 20; Com. v. Turner, 5 Rand. 679; State v. Foster, 21 W. Va. 770.

number of facts, in themselves harmless and inoffensive, from which the existence of a statutory offence may be inferred. Do these inoffensive evidences of an unlawful act, in themselves constitute an offence? Surely not. Then it has been already decided that they cannot be connected with the statutory offence, so as to make a new crime out of the combination. And therefore, we are of opinion, that no Information for a misdemeanor at common law, can be maintained on this presentment.

The following is to be entered as the judgment of the Court.

The Court is of opinion, and doth decide, that the presentment of the Grand Jury in this case, is good ground upon which to award a rule to shew cause why an Information should not be filed against the defendants for an act of fornication upon the act of Assembly, intitled "an act for the suppression of vice, and punishing the disturbers of religious worship and sabbath-breakers," but that it does not furnish the grounds of any Information against them as for a common law misdemeanor; which is ordered to be certified.

636 *Cummings E. Jackson v. Lewis Maxwell.†

November, 1836.

Prohibition—Jurisdiction of County Court.‡—The County Courts have no power to grant Writs of Prohibition: if they exceed their jurisdiction by granting them, the Superior Courts of Law may restrain the exercise of such jurisdiction by prohibition.

This was a case adjourned to this Court by the Superior Court of Law for Lewis county. The statement of the case is fully set out in the opinion of the Court, which was delivered by

SUMMERS, J.

The plaintiff Jackson, sued out, from a Justice of the Peace, a warrant for a small debt against the defendant Maxwell. The Justice rendered a judgment in favor of the plaintiff for ten dollars, with interest and costs: from this judgment an appeal was had to the County Court, and on examination there, the appeal was dismissed on the ground that it had been improvidently granted. The defendant Maxwell then filed a petition in the County Court, alleging various grounds why the Justice of the Peace ought not to have rendered judgment against him, (all of which go to the merits of the decision, not to the jurisdiction of the Justice,) and praying for a Writ of Prohibition. The County Court taking cognizance of the questions thus brought before that tribunal, ultimately gave judgment prohibiting the Justice of the Peace from enforcing his judgment rendered against the defendant.

A transcript of those proceedings was presented to the Superior Court of Law by the plaintiff Jackson, together with a suggestion, setting out all the circumstances, and alleging that the County Court had wrongfully usurped a jurisdiction which

†For monographic note on Prohibition, see end of case.

‡On the subject of prohibition, the principal case is cited in Mayo v. James, 12 Gratt. 18; Board of Supervisors v. Gorrell, 20 Gratt. 496; Hogan v. Guilgon, 20 Gratt. 718.

by law appertains exclusively to another tribunal, and on that ground praying a writ to prohibit the County Court from further proceeding in the matter, or enforcing its order awarding a like writ
637 to the Justice of the Peace. Upon this application, the Superior Court adjourned to this Court the following questions for its decision: 1. Can a Writ of Prohibition be awarded by a County Court in any instance? 2. If the County Court exceeded its jurisdiction in granting the writ set out in the record, ought the Superior Court of Law to award a writ prohibiting the County Court from enforcing its order granting the said Writ of Prohibition? 3. What judgment ought the Superior Court of Law to render on the whole premises?

On examining this subject, we find that the Writ of Prohibition was framed as early as 3 Edw. 1; that its purpose was to preserve the rights of the King's Crown and Courts, and was intended for the ease and quiet of the subject, because the wisdom and policy of the laws supposed that both would be best preserved when everything was restrained to its proper channel, according to the original jurisdiction of every Court. And certainly it cannot be less necessary and proper here, that the several Courts keep within the limits and bounds of the jurisdiction prescribed to each by the laws and statutes of the Commonwealth. The Superior Courts at Westminster, having the superintendency over all Inferior Courts, were accustomed, in all cases of innovation, &c. to award a Prohibition, particularly the Court of King's Bench. Fitz. Nat. Brev. 53, and 4 Inst. 71. But, the exercise of jurisdiction by way of prohibition, has ever been confined in that country to the Superior Common Law Courts.

With us, the Superior Courts of Law are the general depositories of the common law jurisdiction. Their authority extends to all persons and over all causes, matters or things at common law, which were cognizable in the General Court on the 22d of December, 1788. On this ground, Writs of Prohibition were awarded under decisions of this Court, in the cases of *Miller v. Marshall*, 1 Virg. Cases, 158, and *Hutson v. Lowry*, 2 Virg. Cases, 42; in both of which cases, the non-existence of such a jurisdiction in the County Courts must be taken to have been decided, be-
638 cause *if such power resided in those Courts, these were fit occasions for its exercise, and the jurisdiction of the Superior Courts of Law would have been confined to a superintendence of its application. A reference, however, to the acts giving jurisdiction to the County Courts, proves, that their entire authority is derived from the enumerated powers conferred; among which, this superintendency is not to be found, nor is it ancillary to any of the jurisdiction conferred upon those Courts. From this view of the subject, it follows, that the County Court exceeded its jurisdiction in the case before us, and so far as it transcended its rightful authority, the only remedy known to our laws, is found in the application of

the Writ of Prohibition to this unauthorised interposition.

The following is to be entered as the judgment of the Court.

This Court is of opinion, and doth decide, that a County Court has no jurisdiction by prohibition in any instance, and that when a County Court shall extend its jurisdiction by granting such writ, the Superior Court of Law may, and ought, upon proper application, to award a Writ of Prohibition to such County Court, prohibiting the further exercise of such jurisdiction, or the enforcing any order or judgment made under colour thereof.

PROHIBITION (WRIT OF.)

I. Definition.

II. General Characteristics.

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B. Function.

C. Character of Proceedings to Which the Writ Is Applicable.

D. Must Be No Other Adequate Remedy.

E. Applicable Equally to Courts of Law and Chancery.

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A. In General.

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C. Variance between Affidavit and Declaration.

D. Parties.

E. Stage of Proceedings When Application Must Be Made.

F. Raising Objection in Lower Court.

G. Proceedings in Vacation.

VI. Appeals.

I. DEFINITION.

The writ of prohibition is a proceeding between two courts, a superior, and an inferior, and is the means whereby the superior exercises its due superintendence over the inferior and keeps it within the limits and bounds of the jurisdiction prescribed to it by law. *Mayo v. James*, 12 Gratt. 17.

II. GENERAL CHARACTERISTICS.

A. RIGHT TO WRIT.—It is not a writ of right granted *ex debito justitiæ* but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. And, being a prerogative writ, it is to be used like all other prerogative writs, with great caution and forbearance, for the furtherance of justice, and to secure order and regularity in judicial proceedings, where none of the ordinary remedies provided by law are applicable. *Supervisors of Bedford v. Wingfield*, 27 Gratt. 333.

But by § 1. ch. 110, Code W. Va. (1891), it is provided that the writ of prohibition shall be no longer a matter of discretion, but a matter of right. *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196; *Wilkinson v. Hoke*, 39 W. Va. 408, 19 S. E. Rep. 520.

B. FUNCTION.—The ancient writ of prohibition remains, not only to prevent inferior courts from encroaching upon the jurisdiction of superior courts, but to prevent any inferior tribunal from usurping a jurisdiction with which it is not legally vested, and it is used to keep such courts within the

limits and bounds prescribed for them by law; for it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law intrusted. *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782. A writ of prohibition is to prevent the exercise by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance. It cannot be made use of as a means of correcting errors in the decision of the lower court where it is shown to have jurisdiction since that is the function of a writ of error. *State v. Kyle*, 8 W. Va. 711; *Cunningham v. Squires*, 3 W. Va. 422; *Hogan v. Gulgon*, 29 Gratt. 705; *Buskirk v. Judge*, 7 W. Va. 91; *Supervisors v. Wingfield*, 27 Gratt. 333; *McConiha v. Guthrie*, 21 W. Va. 134; *Ex parte Ellyson*, 30 Gratt. 10; *Wilkinson v. Hoke*, 30 W. Va. 403, 19 S. E. Rep. 520; *Moss v. Barham*, 94 Va. 12, 26 S. E. Rep. 388; *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. Rep. 993; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267; *Burroughs v. Taylor*, 90 Va. 55, 17 S. E. Rep. 745; *County Court of Wood v. Boreman*, 34 W. Va. 87, 11 S. E. Rep. 747; § 1, ch. 153, Acts 1881; *Hassinger v. Holt*, 47 W. Va. 348, 34 S. E. Rep. 728; *Bloxton v. McWhorter*, 46 W. Va. 32, 32 S. E. Rep. 1004; *West v. Rawson*, 40 W. Va. 480, 21 S. E. Rep. 1019; *Eastham v. Holt*, 43 W. Va. 569, 27 S. E. Rep. 883; *McDonald v. Guthrie*, 43 W. Va. 565, 27 S. E. Rep. 844.

Especially is this true where the law provides that no writ of error shall lie, but that the lower court shall determine finally. *Nelms v. Vaughan*, 84 Va. 606, 5 S. E. Rep. 704.

The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to have been observed, or when by the exercise of its jurisdiction the inferior court would defeat a legal right. *Nelms v. Vaughan*, 84 Va. 606, 5 S. E. Rep. 704.

But the mere fact that a writ of error or supersedeas would lie to the judgment of the inferior court does not show that prohibition does not also lie, they may be concurrent remedies, and if the remedy by writ of error is not adequate or as efficacious, a writ of prohibition will issue. *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

In *McDonald v. Guthrie*, 43 W. Va. 565, 27 S. E. Rep. 844, *BRANNON, J.*, was of opinion that the mere fact that the jurisdiction of the lower court depended on the constitutionality of an act of the legislature did not make a case for prohibition, but the rest of the court did not pass upon the question.

It follows necessarily from the doctrine just laid down, that mere errors, irregularities or mistakes in the proceedings of the inferior court, however gross or palpable, are not sufficient warrant for granting a writ of prohibition where such court has jurisdiction of the subject matter in controversy. And where such inferior court has general jurisdiction of the subject matter, it must exercise its own judgment of the sufficiency of the process by which it acquires jurisdiction of the special subject or person in any particular case, and an erroneous judgment in that regard is not ground for a writ of prohibition, but is the subject of a writ of error. But this general rule is subject to this modification, that where, the inferior court having a general jurisdiction of the subject matter in controversy, it clearly appears that in the conduct of the trial they have exceeded their legitimate power in some matter pertaining thereto, for which there is no adequate remedy in the ordinary course of proceeding, the writ of prohibition will lie under the West Virginia statute and under the general principles of

law. *McConiha v. Guthrie*, 21 W. Va. 134; *Fleming Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267.

All the requirements to give the circuit court jurisdiction of an appeal from the county court in a contested election case, which are mandatory, having been substantially complied with, no writ of prohibition will lie to the circuit judge to prevent him from exercising jurisdiction because some merely formal requirement of the statute has not been complied with. *Nelms v. Vaughan*, 84 Va. 606, 5 S. E. Rep. 704.

C. CHARACTER OF PROCEEDINGS TO WHICH THE WRIT IS APPLICABLE.—Prohibition lies only in case of the unlawful exercise of judicial functions. Acts of a mere ministerial, administrative, or executive character do not fall within its province. *Fleming v. Com.*, 31 W. Va. 608, 8 S. E. Rep. 267.

The writ of prohibition lies from a superior court not only to inferior judicial tribunals, properly and technically denominated such, but also to inferior ministerial tribunals possessing incidentally judicial powers, or tribunals such as are known in the law as quasi judicial tribunals and even, in extreme cases to purely ministerial bodies when they usurp judicial functions. When these latter abuse or exceed their legitimate powers, by the exercise of a jurisdiction that does not pertain to them, they may be restrained by prohibition. *Brazie v. Commissioners*, 26 W. Va. 218; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267.

While many of the acts of commissioners, while sitting as a board of canvassers, after an election, are merely ministerial, they are not all so; and where such tribunal, clothed by the statute with both ministerial and judicial powers, is merely exercising its ministerial functions, to its action in such matters prohibition will not lie; but when it is exercising its judicial functions, and is proceeding in excess of its judicial powers, or is usurping judicial powers which do not belong to it, to such action a writ of prohibition will lie. *Fleming v. Com.*, 31 W. Va. 608, 8 S. E. Rep. 267.

A mayor in the exercise of his power to supervise and remove the officers in his department is an executive officer and not a court, and is not inferior to the corporation court, hence a writ of prohibition will not lie from the corporation court to the mayor to restrain him from investigating charges against his chief of police. *Burch v. Hardwicke*, 23 Gratt. 51.

In *Hassinger v. Holt*, 47 W. Va. 348, 34 S. E. Rep. 728, it was held that a writ of prohibition would not lie from the circuit court to the board of education since its duties are purely ministerial.

D. MUST BE NO OTHER ADEQUATE REMEDY.—Being an extraordinary remedy, however, the writ of prohibition issues only in case of extreme necessity, and, before it can be granted, it must appear that the party aggrieved has applied in vain for redress; and it is never allowed except in cases of usurpation or abuse of power, and not then unless other existing remedies are inadequate to afford relief, or no other remedy exists; for it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding it that the party aggrieved has another and complete remedy at law. *Supervisors of Bedford v. Wingfield*, 27 Gratt. 333; *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782; *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. Rep. 747; *McConiha v. Guthrie*, 21 W. Va. 134; *Jelly v. Dils*, 27 W. Va. 267.

But while it is true that a writ of prohibition will

not lie where there is a complete remedy in some other and more ordinary form, this is only true where there is another adequate remedy, and if the judge or court is proceeding without any jurisdiction, a writ of prohibition ought to issue, although an appeal, writ of error or *supersedeas* would lie to any judgment he might afterwards render. *Swinburn v. Smith*, 15 W. Va. 483.

But by § 1, ch. 110, Code W. Va. (1891), the writ of prohibition is declared to lie in all proper cases whether there is any other remedy or not. *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

E. APPLICABLE EQUALLY TO COURTS OF LAW AND CHANCERY.—A writ of prohibition may as well be granted to prohibit proceedings in a court of chancery as in a common-law court. *Swinburn v. Smith*, 15 W. Va. 483.

III. INSTANCES.

A. WHERE WRIT WAS GRANTED.

To Circuit Court.—A writ of prohibition will lie to the circuit court to prevent it from proceeding on a writ of error and *supersedeas*, which it has awarded, without jurisdiction, to a judgment of a county court in an election contest. *Swinburn v. Smith*, 15 W. Va. 483.

A writ of prohibition will lie to prevent a circuit court from entertaining jurisdiction by appeal, writ of error or *certiorari* on the application of persons who have never appeared in the inferior court, where the remedy by appeal would be wholly inadequate. *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. Rep. 747. See also, *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. Rep. 488.

Where a civil case has been twice tried by a jury before a justice, the circuit court has no power to interfere by injunction to prevent the enforcement of such judgment, in the face of the constitutional inhibition against the granting of more than one new trial in such cases, and against the re-examination of any fact tried by a jury, otherwise than according to the rules of the common law, so a writ of prohibition will lie to the circuit court prohibiting the enforcement of its decree in such a case. *Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782.

The circuit court has no jurisdiction to review the order of a county court, granting a license to retail spirituous liquors, by *supersedeas*. All proceedings had on such a *supersedeas* are *coram non iudice* and void, and a writ of prohibition will be awarded by the supreme court to judge of the circuit court commanding him to proceed no further upon such *supersedeas*. *Hein v. Smith*, 13 W. Va. 358.

The statute, § 5, ch. 52 of the Code W. Va., being mandatory and declaring in express and positive terms that a company, in the exercise of eminent domain shall not invade a dwelling house or any space within twenty feet thereof, the circuit court has no discretion, and if it allows such dwelling house to be taken, it is an act in excess of the jurisdiction to which a writ of prohibition will lie. Such an act not being an erroneous exercise of conceded jurisdiction but entirely without authority or jurisdiction. *McConaha v. Guthrie*, 21 W. Va. 134.

In *Yates v. County Court*, 47 W. Va. 376, 35 S. E. Rep. 24, a writ of prohibition was awarded against a circuit court prohibiting it from ordering or confirming a donation made out of the county treasury without lawful authority.

A circuit court cannot review a judgment of a county court except in the cases and in the mode prescribed by law. If a circuit court, *ex mero motu*, undertake to review a judgment of a county court, it is an act of usurpation for which prohibition lies; so, if a circuit court undertakes to review such a

judgment on the petition of one who is not a party to it, the same remedy lies. *The Board of Supervisors v. Gorrell*, 20 Gratt. 484; *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. Rep. 747.

So in *Watson v. Blackstone*, 98 Va. 618, 38 S. E. Rep. 939, the writ was granted to restrain a circuit court from entertaining an appeal from a corporation court.

A writ of prohibition will lie to the judgment of a circuit court giving costs against a municipal corporation, in a prosecution for the violation of a municipal ordinance. *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. Rep. 152.

Where costs are given in a circuit court, in an action not on contract, where less than \$50 damages was recovered, which might have been brought and prosecuted to judgment in a justices' court, and where it is not entered of record that the object of the action was to try a right other than the mere right to recover damages or that the trespass was wilful or malicious, contrary to the statute, § 6, ch. 138, Code W. Va. (1891), a writ of prohibition is the proper proceeding to arrest the execution of the judgment, so far as it was rendered for such costs. *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. Rep. 520.

The supreme court has no jurisdiction to award a writ of prohibition to a circuit court to prohibit it from proceeding by *mandamus* to compel the secretary of state to deliver to the speaker of the house of delegates the sealed returns of an election for governor properly transmitted to him where the petitioner does not, by his petition, show such interest or right as would entitle him to interfere in or complain of the said *mandamus*. *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. Rep. 23.

An injunction having been granted as auxiliary to a writ of error and *supersedeas* to prevent a contestant from assuming to discharge the duties of the office of clerk, a writ of prohibition will lie to prevent the enforcement of such injunction. *Swinburn v. Smith*, 15 W. Va. 483.

The fact that a party has disobeyed an injunction order is no reason why a writ of prohibition should not issue to such injunction order, where such order was made without jurisdiction, for it is not contempt to disobey an order which a court had no jurisdiction to make. *Swinburn v. Smith*, 15 W. Va. 483.

To Corporation Courts.—In *Johnson v. Barham*, 99 Va. 305, 38 S. E. Rep. 136, the writ was granted to prevent a corporation court from entertaining an appeal from the judgment of the board of police commissioners from which there is no appeal.

The circuit court of Richmond being clothed with exclusive jurisdiction of suits to enjoin executions issued on judgments in favor of the commonwealth, a writ of prohibition will lie to the corporation court of Lynchburg to prevent it from proceeding with such a suit. *Com. v. Latham*, 85 Va. 632, 8 S. E. Rep. 488.

To County Courts.—Although the jurisdiction of the court is admitted, where the judge of another county court sits in the case and renders judgment without the prerequisites required by statute to authorize him to do so being fulfilled, a writ of prohibition will lie to prevent the enforcement of any judgment rendered by him, he being wholly without jurisdiction. *Gresham v. Ewell*, 85 Va. 1, 6 S. E. Rep. 700.

The writ of prohibition lies from the circuit court to the commissioners of the county court sitting as canvassers of an election, to prevent them from exceeding their legal powers in undertaking to hear evidence and review the action of the precinct commissioners. *Brazie v. Commissioners*, 25 W. Va. 218.

The county court having no authority by statute

to give a judgment for costs in contested election cases, a writ of prohibition will lie to arrest execution on such judgment. *West v. Ferguson*, 16 Gratt. 270.

To Justices of the Peace.—A justice of the peace having no jurisdiction to award a new trial more than thirty days after rendition of judgment, a writ of prohibition will lie from the circuit court to restrain him from proceeding with such new trial. *Burroughs v. Taylor*, 90 Va. 55, 17 S. E. Rep. 745.

A writ of prohibition will lie to prevent a justice of the peace from proceeding in a case, where the creditor has split up his debt, which in the aggregate was too great for the jurisdiction of a justice, induced the debtor to give notes payable at different times and in such amounts as to give a justice jurisdiction, and has brought separate warrants for each sum before the same justice, after they are all due. *Hutson v. Lowry*, 2 Va. Cas. 42; *James v. Stokes*, 77 Va. 226; *RICHARDSON, J.*, dissenting. *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. Rep. 392.

A writ of prohibition will lie to a justice of the peace, to prevent him from determining the rate of freight charges of a railroad, he having no jurisdiction in such cases. *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

A writ of prohibition will be granted by a district court to prohibit a justice of peace from taking jurisdiction of a suit to recover rent reserved in a deed to the grantor and his heirs forever, the rent being a freehold estate of inheritance in an incorporeal hereditament. *Miller v. Marshall*, 1 Va. Cas. 158.

In *Norfolk, etc., R. Co. v. Overton*, 3 Va. Law Rep. 735, a writ of prohibition was granted to a justice of the peace prohibiting him from proceeding further on a judgment, where, in an action for \$10 damages for killing plaintiff's horse, the plaintiff admitted that the horse was worth \$50, and that she sued for only \$10 damages in order to prevent the case from going to the county court, either by appeal or removal.

No action for money had and received lies against a tax collector for money paid as taxes, even when paid under protest, hence a writ of prohibition lies from the circuit court to a personal judgment rendered by a justice against a city treasurer for money so paid on the refusal of the officer to receive state coupons, to prevent the levy of an execution on such judgment, it being void. *Mallan v. Bransford*, 86 Va. 675, 10 S. E. Rep. 977.

B. WHERE WRIT WAS REFUSED.—Prohibition is not a proper remedy, where a town council, under § 28, ch. 47, Code W. Va., decides that a "merry-go-round" is a nuisance, where it is not claimed that the statute is unconstitutional, but merely that they erred in applying it to the facts. *Davis v. Davis*, 40 W. Va. 464, 21 S. E. Rep. 906.

A writ of error and not prohibition is the proper remedy where a party, who is entitled to be examined before the county court by the act of April 3, 1873, before the circuit court can try him for the felony for which he is indicted, is tried upon such indictment before such an examination is had, and is convicted. *Buskirk v. Judge*, 7 W. Va. 91.

In *Town of Davis v. Filler*, 47 W. Va. 413, 35 S. E. Rep. 6, it was held that a circuit court had no jurisdiction by prohibition to prohibit a town council from removing a superintendent of streets.

MONCRE, J. In *Mayo v. James*, 12 Gratt. 17, was of opinion, though unnecessary to the decision of the case by his view of it, that the mayor of Richmond having jurisdiction of cases under the laws of the state and cases in which any ordinance of the city was alleged to be violated, no writ of prohibition would lie against him on the ground that a cer-

tain ordinance was claimed to be in contravention of an act of assembly.

The circuit courts being invested by statute with a general authority and jurisdiction to condemn real estate for public purposes, although, in order to divest the title of the owner of the land, the mode prescribed by the statute must be strictly followed, nevertheless any informality in such proceedings, *e. g.* want of proper notice, is not ground for a writ of prohibition, but must be corrected by writ of error or *certiorari*. Any error in the decision of such a question by the court could not be regarded as an excess of jurisdiction, but merely an error in adjudicating a matter of which it had undoubted jurisdiction. *McConiha v. Guthrie*, 31 W. Va. 181.

The judge of the county court having jurisdiction to remove a sheriff who has accepted another office, a writ of prohibition will not lie to him from the circuit court in such case, but the proper remedy is by writ of error. *Shell v. Cousins*, 77 Va. 328.

The judge of a circuit court having authority to control the courthouse in which he administers justice, he has a right to enquire into any interference with such right by the board of supervisors, and no writ of prohibition will lie to his action; if erroneous, a writ of error is the proper remedy. *Supervisors v. Wingfield*, 27 Gratt. 329.

The corporation court having jurisdiction of contested election cases of city officers under § 160 of the Code Va. 1887, the writ of prohibition is not the proper remedy, merely because the court continues part of the case to a succeeding term. *Moss v. Barham*, 94 Va. 12, 26 S. E. Rep. 388.

The circuit court having jurisdiction, where a defendant puts in a plea unsupported by affidavit, in an action of *assumpsit* where the plaintiff put in an affidavit with his declaration, to strike out such plea and refuse to receive another, and to enter judgment, a writ of prohibition will not lie to prevent further proceedings on such judgment. *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. Rep. 993.

A justice of the peace having jurisdiction to hear motions against a constable and his sureties by any person injured by the failure of the constable to pay over money received by him on execution, irrespective of amount or of the fact that the same party is at the same time prosecuting other motions against the same constable and his sureties before the same or any other justice for other similar defaults, no writ of prohibition will lie to the justice to prevent further proceedings on judgments recovered in such motions because such motions were prosecuted under one joint notice, the motions and judgments being separate and distinct. *Hendricks v. Shoemaker*, 3 Gratt. 197.

The corporation court having authority to remove a judge of elections, no writ of prohibition will lie to the judge of such court to prevent him from exercising such authority. *McDougal v. Guilgon*, 27 Gratt. 133.

Where commissioners were assembled, under the West Virginia statute, in special session, after an election, to canvass the votes cast, and the question was presented to them whether the precinct commissioners, canvassers, and clerks, at a certain voting place were sworn, such question was a judicial one, within their jurisdiction, and, whether, on the evidence before them, they decided rightly or wrongly, could not be the basis for an application for a writ of prohibition. *Fleming v. Com.*, 31 W. Va. 608, 8 S. E. Rep. 267.

IV. BY WHAT COURTS ALLOWED.

A. SUPREME COURT OF APPEALS.

Generally.—The power of the supreme court of appeals to award writs of prohibition is conferred

by the constitution, and will always be exercised in a proper case; and when the proper case is made by the pleadings and evidence, the power to award the writ is unquestioned. *Supervisors of Bedford v. Wingfield*, 27 Gratt. 333; *Com. v. Latham*, 85 Va. 632, 8 S. E. Rep. 488.

The supreme court of appeals has concurrent original jurisdiction with the circuit courts in all cases of *habeas corpus*, *mandamus*, and prohibition. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267.

By a rule adopted by the supreme court of appeals, it will not take such original jurisdiction, unless special reasons appear therefor; but, when such reasons are made to appear, it will, without hesitation, exercise its jurisdiction. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267. This rule was intended to prevent the appellate court from being unnecessarily burdened with such cases which might just as well be determined in the circuit court and then, if errors were committed, a writ of error would lie to the appellate court. As in an election case, where it is necessary that the results be declared as soon as possible. *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 267; *Alderson v. Com'rs*, 31 W. Va. 633, 8 S. E. Rep. 274.

Sec. 7 of the Act of Jan. 1873, providing that each case shall be heard and determined in its own grand division, has no application to the supreme court of appeals in the exercise of its original jurisdiction in cases of *habeas corpus*, *mandamus*, and prohibition, but it may grant those writs at any of its terms in any division. It may grant a conditional writ at one term in one division, returnable to another term in a different division. *Buskirk v. Judge*, 7 W. Va. 91.

In *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. Rep. 893, a doubt was raised as to the constitutionality of § 1, ch. 110, Code W. Va. 1891, allowing one judge of the court of appeals to award a rule for a writ of prohibition in vacation, but the court did not decide the question.

Necessity for Declaration.—There is not the same reason, or necessity for a declaration in prohibition in the court of appeals, and where there is no necessity for it and no benefit to be derived from it, it will be dispensed with, *e. g.* where the facts relied on are matters of record, undenied and undeniable. *Board of Supervisors of Culpeper Co. v. Gorrell*, 20 Gratt. 484, 521.

To the County Courts.—The court of appeals has no authority to issue a writ of prohibition to the county court. *Gresham v. Ewell*, 84 Va. 784, 6 S. E. Rep. 134.

B. CIRCUIT COURTS.—The circuit courts, and the judges thereof in vacation, where a state of facts exists which would warrant a writ of prohibition at common law, have authority to issue the rule to show cause as well as the writ itself, to justices, and other inferior tribunals. Sec. 12, art. 8, Constitution of West Virginia, Acts 1882, ch. 153, § 1, ch. 73, § 3. *Brazie v. Commissioners*, 25 W. Va. 213.

C. COUNTY COURTS.—The county courts have no power to grant writs of prohibition; if they exceed their jurisdiction by granting them the superior courts of law may restrain the exercise of such jurisdiction by prohibition. *Jackson v. Maxwell*, 5 Rand. 636.

V. PROCEDURE.

A. IN GENERAL.—The following would seem to be the proper course to be pursued on an application for a writ of prohibition to a circuit court, or a judge thereof in vacation: The ground of the application should be set out in a proper suggestion, verified by affidavit, as to such material facts

as do not appear on the record; or in affidavits instead of a suggestion, according to the Code, ch. 155, p. 612. If, upon such suggestion or affidavits the court or judge be clearly of opinion that there is no good ground for a prohibition, it ought at once to be denied. But if otherwise, a rule should be made upon the adverse party to show cause why the writ should not be issued. The execution of the rule upon the party and the judge of the inferior court will have the effect of a prohibition *quousque*, or until the discharge of the rule. Upon the return of the rule executed, the court or judge will make it absolute or discharge it, as may then seem to be proper; and in the former case, may direct the applicant to declare in prohibition before writ issued; and ought to do so, if the defendant require it. If such direction be given, the further proceedings in the case will of course be in pursuance of the Code, ch. 155, p. 612. *Mayo v. James*, 12 Gratt. 17, Acts W. Va. 1882, ch. 153, § 1. *Jelly v. Dils*, 27 W. Va. 267; *Brazie v. Commissioners*, 25 W. Va. 213.

To the declaration the defendant may demur or plead such matter as may be proper to show that the writ ought not to issue and conclude by praying that such writ may not issue. In such case, of course, the trial would be referred by the judge to the court where it could be had if the rule was granted in vacation. *Brazie v. Commissioners*, 25 W. Va. 213.

B. THE PETITION.—The petition for a writ of prohibition must clearly show that the inferior tribunal is about to proceed in a matter over which it has no jurisdiction. *Haldeman v. Davis*, 28 W. Va. 324.

Where the petition for a writ of prohibition clearly shows that it is based on alleged usurpation of power, and that the circuit court had acted and was acting without jurisdiction, this is sufficient though it might have been stated more positively and directly. It need not allege in specific terms that the judge had in any manner as yet exceeded his authority or acted without jurisdiction, or that the judge had no jurisdiction in the case. In any case if these objections were valid they should have been made by the defendant's counsel in the argument of the question whether the rule *nihi* should be awarded. *Swinburn v. Smith*, 15 W. Va. 483.

It is improper to demur to the petition for a writ of prohibition, but if a demurrer is filed it may be overruled, since that is equivalent to striking it out. *Haldeman v. Davis*, 28 W. Va. 324.

C. VARIANCE BETWEEN AFFIDAVIT AND DECLARATION.—Advantage can only be taken of a variance between the affidavit and declaration in prohibition by plea in abatement and not by general demurrer. *Warwick v. Mayo*, 15 Gratt. 528.

D. PARTIES.—All parties adversely interested should be made parties respondent and be served with notice in prohibition proceedings, *e. g.* the railroad company in a proceeding to prohibit a county court from lowering the valuation of its property for taxation, and a failure to do so is ground for demurrer. *Armstrong v. County Court*, 15 W. Va. 190.

E. STAGE OF PROCEEDINGS WHEN APPLICATION MUST BE MADE.—The writ of prohibition is only applicable to a pending proceeding and cannot be used to prevent the institution of an action or proceeding or where the action or proceeding is finished. *Haldeman v. Davis*, 28 W. Va. 324.

While there is some apparent conflict of authority as to the stage of the cause in the court below in which the application for the writ may be made, as to whether it should be made before or after

the decision of the court, the distinction is as to whether the want of jurisdiction in the subordinate court, which is relied on as the foundation of the writ, is apparent upon the proceedings sought to be prohibited; where this want of jurisdiction is thus apparent upon the record, the superior tribunal may interpose the aid of a prohibition at any stage of the proceedings below, even after verdict, sentence or judgment. *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782; *French v. Noel*, 23 Gratt. 454; *Hein v. Smith*, 13 W. Va. 358.

In *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. Rep. 392, it was held, approving *Hutson v. Lowry*, 3 Va. Cas. 42, that it might be shown by evidence *de hors* the record of the lower court that the lower court had exceeded its jurisdiction, if such fact appears from the whole record.

In *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. Rep. 152, it was held that prohibition was the proper remedy to prevent the enforcement by execution of an unauthorized judgment for costs.

Though the judgments have been actually rendered, executions levied and the money in the hands of the constable, the writ will still lie, the defendant having given notice to the constable not to pay the money to the plaintiff. *Hutson v. Lowry*, 3 Va. Cas. 42; *James v. Stokes*, 77 Va. 225. See *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. Rep. 392.

F. RAISING OBJECTION IN LOWER COURT.—Where on the face of the proceedings the inferior court has not jurisdiction and the parties cannot by consent or waiver give the court jurisdiction, it may be prohibited from proceeding, though the record does not show that the party praying for the petition, either by motion or suggestion, in any manner asked the inferior court to dismiss the proceedings. This was the principle upon which the supreme court of Virginia acted in *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 495, and upon which this court acted in *Hein v. Smith*, 13 W. Va. 358. In each of these cases a judge of the circuit court had granted a writ of error and *supersedeas* to a judgment of the county court, when he had no jurisdiction to grant such a writ; and the supreme court of appeals awarded writs of prohibition, though the petitioners had made no motion in the inferior court to dismiss the writs of error and *supersedeas* as improvidently awarded. Such a motion, or a motion to dissolve an injunction, cannot therefore be held as essential before application can properly be made for a writ of prohibition. In some cases the court of appeals might decline to act in an application for a writ of prohibition till such a motion was made in the inferior court; for this writ is not granted *ex debito iustitie*, but is rather to be granted or withheld according to the circumstances of each particular case, and in the exercise of a sound judicial discretion. *Swinburn v. Smith*, 15 W. Va. 483.

In *Com. v. Latham*, 85 Va. 632, 8 S. E. Rep. 488, the court said that it was not necessary to raise the question of want of jurisdiction by motion in the lower court before a writ of prohibition could be obtained from the supreme court of appeals, original jurisdiction being given that court in any case, although, in that case a motion was made to transfer the suit to the proper court, which was overruled, and this was intimated to be a sufficient objection to the jurisdiction.

Whether it is necessary to object in the lower court to the assumption of jurisdiction, has been held a controverted question in Virginia and has not been decided. *Johnson v. Barham*, 99 Va. 305, 38 S. E. Rep. 136.

In *Jelly v. Dils*, 27 W. Va. 267, the court disapproved of the frequency with which the extraordi-

nary writ of prohibition was resorted to, and intimated that, to authorize a writ of prohibition to a lower court for want of jurisdiction, it would be necessary for a plea to the jurisdiction to have been tendered and overruled.

G. PROCEEDINGS IN VACATION.—In West Virginia, the judge of a circuit court is expressly authorized to issue the writ of prohibition in vacation, Acts W. Va., 1882, ch. 73, § 3, and having the power to issue the writ in vacation, it follows of necessity that he has authority to make the rule returnable before him and hear it in vacation. If he thinks it necessary to direct the defendant to declare in prohibition he would refer the trial to the court. *Brazie v. Commissioners*, 26 W. Va. 218.

VI. APPEALS.

The right of appeal is given by law in all cases of prohibition, and cannot be denied in a case in which the proceeding complained of is a criminal proceeding. Whether it be civil or criminal, damages and costs may be recovered against the defendant in prohibition; and he should have the same right to reverse the judgment for error therein in the one case as in the other. It is true that where the proceeding is criminal, the effect of the writ of prohibition may be to prevent the further prosecution of an offense by subjecting the judge of the inferior court and the prosecutor to an attachment for proceeding after the delivery of the writ to them. But this mere consequence of the writ is not an acquittal of the offense (which has never in fact been tried); and a *supersedeas* to the order awarding the writ, or refusing to discharge it, cannot be considered as a writ of error for the commonwealth in a criminal case. *Mayo v. James*, 12 Gratt. 17.

639 *James Smock v. Laurence T. Dade.

November, 1826.

Supersedeas Bond—Penalty—How Fixed.—The penalty of a *Supersedeas* bond is to be fixed by the Judge granting it, and is not governed by the law respecting appeals by plaintiffs, or demandants.

Execution—Relief from—How Obtained.—The *Audita Querela*, to relieve a defendant from an execution where the matter of discharge has been subsequent to the judgment, is an obsolete remedy, and has been substituted in modern practice by the motion.

Same—Same—Motion for—Jury.—If on a motion (to quash an execution, or enter a judgment satisfied,) the relief of the party depends on matters of fact, the Court has a discretion to direct a jury to try the facts.

Attorneys—Powers of.—An Attorney at Law has no right to receive a bond from the debtor in discharge of his client's claim, without the assent of the client. If he does, he is the agent, not of the plaintiff, but the defendant, and the plaintiff may still proceed against the defendant.

The plaintiff sued out of the clerk's office of Orange County Court an execution against the goods and chattels of the defendant, for the sum of \$205 44, with interest on the same from 27th October, 1821,

***Execution—Relief from—Motion.**—See principal case cited on this subject in *Steele v. Boyd*, 6 Leigh 552; *Shuford v. Cain*, 22 Fed. Cas. 49. For further information, see monographic *note* on "Executions" appended to *Paine v. Tutwiler*, 27 Gratt. 440.

***Attorneys—Powers of—Collection of Debts.**—It is well settled that an attorney at law has no authority to commute a debt in his hands for collection without the assent of his client. *Paxton v. Steele*, 86 Va. 313, 10 S. E. Rep. 1, citing principal case as authority.

An attorney at law employed to collect a debt may receive payment in money, but has no right to accept anything else in satisfaction, without express authority. *Wiley v. Mahood*, 10 W. Va. 221, citing the principal case as authority.

There is no doubt of the authority of an attorney in good faith to receive payment of a judgment due his client. *Chalfants v. Martin*, 25 W. Va. 398, citing

till paid. The execution bore date the 27th July, 1822; was returnable on the fourth Monday in September following, and having come into the hands of the sheriff, was returned by him with this endorsement, "Not executed by order of plaintiff's attorney."

Another execution issued in the name of the same plaintiff, on the same judgment against the goods of the defendant, bearing date the 10th October, 1823. Immediately thereafter, the defendant moved the County Court of Orange to quash the last execution, on the ground that the amount of the judgment on which the execution issued, was paid to the plaintiff's attorney after the rendition of the judgment, and before the emanation of the said execution. In support of his motion, the defendant gave in evidence the first mentioned execution, with the return thereon, and a receipt of Edmund Banks, the attorney for the plaintiff, in the words and figures following: "Received 25th November, 1822, from Col. Laurence T. Dade, one hundred and fifty-four dollars and seventy cents in money; also, the bond of William Quarles, for one hundred and seventy

640 \$dollars and thirty-nine cents, payable in four months, and a draft on Anthony Buck, for three hundred dollars, at ten days sight; which, when paid, will be in full of the executions of James Smock, and Peter Smock against him in Orange County Court. Edmund Banks, Attorney." The plaintiff admitted, that the amount of the draft on Anthony Buck had been received by the said Banks, the attorney, but there was no evidence of the payment of Wm. Quarles's bond, either to Banks or Smock, nor had it ever been returned or accounted for to Dade. The defendant also gave in evidence the execution from the same office against the goods and chattels of the defendant, in the name of Peter Smock, (as mentioned in the receipt,) for \$354. with interest from 22d December, 1820, till payment, bearing date the 27th July, 1822, and returned, "Not executed by order of the plaintiff's attorney;" for the collection of which last execution, also, the said Banks was attorney. The Court being of opinion, that the said receipt and other facts, were sufficient to sustain the motion, gave judgment that the execution of 10th October, 1823, should be quashed. The plaintiff excepted to the opinion of the Court, and spread all the foregoing facts on his bill of exceptions.

Smock v. Dade, 5 Rand. 639; *Wilkinson v. Holloway*, 7 Leigh 277; *Smith v. Lamberts*, 7 Gratt. 148; *Wiley v. Mahood*, 10 W. Va. 223, to support the statement.

And in *Harper v. Harvey*, 4 W. Va. 541, it is said: "The payment of a judgment or decree to the attorney of record, who obtained it before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff, so far as the defendant is concerned. *Yoakum v. Tilden*, 3 W. Va. 167. But it must be a payment of money, or if not a payment of money, it must be accepted by the plaintiff in lieu of money, or the attorney must have special authority to receive it. *Smock v. Dade*, 5 Rand. 639."

To the same effect the principal case is cited in *Wilkinson v. Holloway*, 7 Leigh 298; *Smith v. Lamberts*, 7 Gratt. 138, 143, 144, 145, and *foot-note*; *Tuley v. Barton*, 79 Va. 388; *Wiley v. Mahood*, 10 W. Va. 222.

See further, monographic note on "Attorney and Client" appended to *Johnson v. Gibbons*, 27 Gratt. 632.

The plaintiff obtained from a Judge of this Court a Supersedeas to the judgment, it being allowed on the petitioner's entering into bond with security in the penalty of fifty dollars.

The case came on before the Superior Court of Law for Orange, and the Judge thereof adjourned for decision to this Court the following questions:

1. Ought the Judge in the present case to have directed bond and security to be given in the penalty of \$63 33, and does the law respecting an appeal by the plaintiff or defendant, apply to a Writ of Error or Supersedeas?

2. Does the law authorise the County Court to quash an execution upon such evidence as was before it, and did it enter a correct judgment in quashing such execution?

3. All and every question arising out of the record?

641 *The case was argued by Chapman Johnson, for the defendant Dade, and by Stanard, for the plaintiff.

Johnson, on the first point, referred to the 1st Rev. Co. of 1819, ch. 71, sec. 72 and 73, and to ch. 69, sec. 58, 59; and admitted that the Supersedeas bond was right in this case. He contended, that the Writ of Audita Querela, had become obsolete, and that in modern practice the motion had been substituted for it. For the whole doctrine on this subject, he referred to the following authorities: 1 Bac. Abr. 311, *Audita Querela*, B.; 1 Comyn's, 778, *Aud. Quer. D.*; 3 Black. Com. 405-6; *Lester v. Mundell*, 1 Bos. & Pull. 427; Anonymous, 1 Salk. 93; *Wicket v. Creamer*, Ib. 264, and 1 Ld. Raym. 439; *Baker v. The Judges of Ulster*, 4 Johns. Rep. 1; *Burke v. Hunt*, 17 Johns. 484; *Bebee v. Bank of N. Y.* 1 Johns. 529; *Wardell v. Eden*, Ib. 522.

He referred to *Gordon v. Frazer*, 2 Wash. 130, to show that the motion had substituted the Writ of Error Coram Vobis. Also to *Hendricks v. Dundas*, 2 Wash. 50, 54, to shew the general power exercised by Courts over their executions, upon motion; to *Burke v. Levy*, 1 Rand. 1, to shew that the Court may have a jury, or not, at their election; and to prove the power of the attorney in receiving the money, and discharging the execution, for his client, he referred to 1 Comyn's, 157, 158, B. 9, B. 10; *Hudson v. Johnson*, 1 Wash. 10; *Branch v. Burnley*, 1 Call. 147.

Stanard, for the plaintiff.

I. As the claim to relief is founded on the allegation that the judgment was paid, relief ought to have been sought by *Audita Querela*, or Injunction, and not by motion. Though the motion is substituted in many cases in the place of the *Audita*

642 *Querela*, yet it is not, when it *depends on a contested matter of fact. 1 Salk. 264; *Barnes*, 204; 1 Johns. Rep. 531; 1 Ld. Raym. 439.

II. When relief depends on matter of law only, it is not granted on motion, unless the case be clear. 1 Johns. Rep. 531, in note. The case of *Lester v. Mundell*, 1 Bos. & Pull. 427, is not supported by any case previous, or subsequent, and is in direct contravention of the decision of Holt, 1 Salk. 264. The modern practice is not that

the motion has superseded the Audita Querela, in all cases, but in many or most cases. 2 Crompt. 416; 5 Taunt. 561.

III. If it is objected, that the Audita Querela has gone entirely out of use, the answer is, that it has not been substituted by motion, where relief depends on matters in pais, as payment, &c. If there be no modern example of a resort to the Audita Querela, there is none of a motion as its substitute. It has been substituted by Injunction.

IV. He contended, that the Court should not have decided the fact of payment, but should have submitted it to a jury. In the only case in which relief, depending on matter of fact or in pais, has been granted on motion, (1 Bos. & Pull. 437,) the fact was ascertained by an issue tried by a jury, and it is not surmised that it is competent to the Court to assume the decision of the fact. The control of the Court over its practice, may give them power to modify the form by which contested questions may be brought to adjudication, but gives no right to transfer to itself the functions of the jury.

It is incongruous, that the Court should try the fact of payment where the debt is evidenced by record, and have no such power when it is founded on a bond, note, or promise. If the Court can endow itself with jurisdiction to try the fact, in such suit, by a change of the manner of bringing the facts in judgment, why not in every other suit?

But, it is objected, that in motions on forthcoming bonds, and other summary remedies, questions of fact *that arise may, in the discretion of the Court, be decided by it, without the intervention of a jury. The answer is, that in those cases, the Courts are endowed by expressed statute law, with the power of deciding the motion, and giving judgment, and the decision sustaining their right to dispense with a jury, is nothing more than an interpretation of the statute, and a determination of the extent of power which such statute communicates. The power claimed and exercised, is derived from the legislative grant, not assumed under color of a change of the mode of bringing questions to adjudication. Suppose the statute law had not provided a remedy by motion, in the case of forthcoming bonds, could the Court assume the trial of the fact? English Judges have not ventured on such an usurpation. If the statutes giving the Court power to grant judgments on forthcoming bonds were repealed, the argument founded on the practice under those statutes, would lose its foundation. Can the right of the Judge to try and decide the question, whether a judgment has been paid or released, depend on the existence, or non-existence, of the statute giving remedy by motion on forthcoming bonds?

The Courts in England entertain motions to vacate judgments entered under warrants of attorney given on an usurious consideration, but they do not assume the power of deciding the fact of usury, but have an issue to try it. Cook v. Jones, Cowp. 727. Would the Courts here assume the power of trying the fact? He presumed not; and

yet if the position assumed, that the power to entertain the motion, carries with it the power to try and decide all matters connected with the motion, be correct, the Courts would have that power.

V. The decision on the fact was wrong. The attorney had no right, as such, to make a commutation of the debts, and bind his client by any such arrangement. His sole power was to collect the debt due from Dade to his client, and could bind him by the receipt of the money only. This is the

644 utmost extent which the decision of the Court *of Appeals has given to the authority of the attorney. Suppose he had neglected the collection of Quarles's bond, was Smock chargeable with the consequences? Smock had not confided that agency to him; Dade had; and in the collection of Quarles's bond, he was the agent of Dade only.

VI. Had Smock given the receipt himself, it would not have established the fact of payment. The receipt imports that the bond was taken as a security for the debt, not as a payment. If Smock had sanctioned the act of Banks, he could not have maintained a motion against him on the proofs in the record; he must further have proved that the bond was paid. Could the Court have been warranted in entering a satisfaction of the judgment? If not, the execution ought not to have been quashed. Indeed, the motion ought to have been to enter satisfaction of the judgment; for that would be the result of a successful prosecution of the Audita Querela; and if the motion be an authorised substitute for that writ, and the fact be made out, that should have been the judgment in this case. If the proofs do authorise such judgment, that which was given cannot be vindicated.

SUMMERS, J. delivered the opinion of the Court.

It is conceded by the counsel for the defendant, and the Court concur with him in the opinion, that the Writ of Supersedeas was properly allowed, and that the law respecting an appeal by the plaintiff or defendant, has no relation to Writs of Error and Supersedeas.

On examining the question, whether the remedy sought in this case should have been by an Audita Querela, or Injunction, and not by motion, we are satisfied, as well from the uniform practice in Virginia, as from the modern decisions in England, that the more summary, and less expensive mode of proceeding by motion was proper, and that relief may be given in this way in all cases, where 645 by *the ancient practice the party would be entitled to an Audita Querela.

When the claim of the party to relief depends on matters of fact, the Court may, in its discretion, cause them to be submitted to a jury, and such course is particularly proper where the evidence is contradictory, or where it may authorise conflicting inferences, and either of the parties are desirous of referring it to that forum. But, the case before us does not, in our opinion, fall within this rule,

nor does the record disclose any objection by the parties to the mode of trial adopted.

The authority of the attorney to receive payment of the debt which he is employed to recover, we think well settled; but, that authority, in our opinion, does not extend to its commutation without the assent of the client. In relation to Quarles's bond, we regard Banks, as the attorney of Dade, not of Smock. On giving an acquittance, or receipt for the money, he must have represented the former, not the latter. It was a new engagement, in which all his authority was derived from Dade: to him he must have looked for compensation, and to him he was accountable. To extend the authority of the attorney beyond this limit, without a general discretionary power from the party employing him, would carry the responsibility of the first client into transactions far beyond the first engagement, and which might be induced solely with a view to the profit of the attorney, or the accommodation of the debtor.

If, however, the receipt set out in the record had been the act of Smock himself, it would not, in our opinion, have authorised the quashing of the execution, without further proof of the receipt of the money; as that paper imports that the bond of Quarles was taken as a security, not as a payment of the debt.

As the money actually paid to Banks by Dade, and by Buck on Dade's order, did not amount to a full satisfaction of the judgments on account of which those payments were made, the execution ought not to have been quashed, although it would have been entirely proper, if such motion had been submitted, for the Court to have entered a satisfaction of the judgments to the extent of those payments.

The following is to be entered as the judgment of the Court.

1. The law respecting an appeal by the plaintiff, or demandant, does not apply to a Writ of Error, or Supersedeas, and therefore the penalty of the bond was properly directed by the Judge on awarding the Writ of Supersedeas in this case.

2. The law did not authorise the County Court to quash the execution on the evidence before it.

3. The Superior Court of Law ought to reverse the judgment of the County Court, and proceeding to give such judgment as the County Court ought to have rendered, to adjudge that the plaintiff below take nothing by his motion, &c.

The Commonwealth v. Horace Rutherford.

November, 1826.

Felony—Application for Release of Bail—Evidence.—

When a prisoner, who has been remanded for trial by the Examining Court to the Superior Court, on a charge of Felony, and against whom a Bill of Indictment has been found by the Grand Jury, applies to the Superior Court to be let to bail, on the ground that there is only a slight suspicion of guilt against him, that judgment, and the finding of the bill, are not conclusive evidence against the application, but the Court may examine other evidence.

Same—Same—Discretion of Court.—But it is a question for the exercise of the sound discretion of the Court, and if the Court is satisfied that there is material evidence for the Commonwealth that is

not before the Court, was not before the Examining Court, or spread on the record, the Court ought not to sustain the motion.

The prisoner was indicted at the Superior Court of Louisa for stealing a grey horse, the property of Elihu Terrell, at the October term, 1826. He pleaded not guilty, and pressed for a trial; but, in consequence of the absence of material witnesses, the Attorney for the Commonwealth
647 *applied for and obtained a continuance of the cause till the ensuing term. The prisoner then applied to the Court to bail him, on the ground, "that at most there was but a slight suspicion of guilt attached to him by the evidence respecting the supposed felony in the indictment mentioned; and to support his motion, desired that the evidence of the witnesses then present should be heard in open Court, or that the testimony as stated in the record of the Examining Court, together with the affidavit of Peter Johnson, who was also examined in the said Court, should be considered by the Court." And he exhibited a copy of the record and depositions of the witnesses in the Examining Court, which it is deemed unnecessary to insert here.

The Superior Court considering, that in this state of the prosecution, it was improper, either to examine the witnesses viva voce, or to consider the written evidence aforesaid, adjourned to the General Court the following questions: First, Should a Judge of the Superior Court of Law, in any case like the present, or in this case, examine witnesses as to the probable guilt, or innocence of the prisoner, and refuse bail, or let to bail accordingly, as he might think there was light, or strong suspicion of guilt? Secondly, Should the Judge examine the evidence contained in the record of the proceedings, before the Examining Court, and refuse bail, or let to bail as such evidence should satisfy his mind, that the suspicion of the prisoner's guilt was light or strong? Thirdly, Is the judgment of the Examining Court, and the finding of the Grand Jury, conclusive of the probable guilt of the prisoner, so as to exclude the examination of testimony by the Judge as to the question of probable guilt, or innocence, upon a motion to be let to bail?

DADE, J. delivered the opinion of the Court.

(After stating the case.) In proper order of time, it would seem right to examine, and decide the third question
648 *first. Because, if it be true that the judgment of the Examining Court, and finding of the Grand Jury, are conclusive of the question of slight suspicion of guilt, or not, so as absolutely to exclude bail, then the two former questions, which involve mere considerations of discretion, and expediency, could never arise. The Statutes of England,* and our own Acts of Assembly,† restraining the letting to bail in certain cases before conviction, have never been construed to ex-

*3 Edw. 1. ch. 15: 34 Edw. 3. ch. 1: 23 Hen. 6. ch. 10: 1 Rich. 3. ch. 3: 3 Hen. 7. ch. 3: 1 and 2 Ph. & M. ch. 18, and 2 and 3 P. & M. ch. 10.

†See 1 Rev. Code, 595, sec. 1.

tend to the Superior Courts of Law, or to the Judges thereof.* Before conviction, then, in every case, of the imprisonment of a citizen, the Superior Courts and Judges may enquire into the cause of confinement, and let to bail, if under the circumstances it seems right to do so. This general proposition repels the idea that the Court or Judge is concluded by the judgment of any inferior authority. But, without the aid of this general principle, the point is clear upon the Statute regulating criminal proceedings against free persons. 1 Rev. Code, p. 599, sec. 3, by which it is declared, that "any Judge of the General Court, when it is not sitting, may admit to bail a prisoner, when he shall think him or her entitled thereto, and grant a warrant for his deliverance, notwithstanding the Justices, before whom the examination was, shall have been of a different opinion." This act, in direct terms, extinguishes the notion of conclusiveness in the judgment of the Examining Court. And it would seem strange indeed, that while the Legislature should deny this influence to the judgment of a Court hearing the testimony on both sides, and acting directly on the question, on a motion to be let to bail, the Superior Court should attribute more weight to the voice of a tribunal, (the Grand Jury,) which hears nothing but the testimony in support of the accusa-

649 tion. *We therefore think, that the judgment of the Examining Court, and finding of the Grand Jury, did not conclude the Judge of the Superior Court from entering into the enquiry, whether there was but a light suspicion of guilt against the prisoner.

The two other questions admit but of a single answer. From what has been before said, it follows, that the Judge had the power to bail in this case, and of course that he might have heard evidence, either written or parol, in support of the motion. But, it was a matter in his sound legal discretion; and if it is intended to be referred to this Court, how, under the circumstances of this case, that discretion should have been exercised, then we say, we think he ought to have refused to entertain the motion. The power to let to bail, implies the power to hear all legal testimony which may influence the decision of the motion. Therefore, on a petition from one in confinement, under the judgment of an Examining Court, the Judge may hear testimony other than the depositions taken on the prisoner's examination. And there may be a state of things, which would justify, and require such proceeding. In general, it would be wrong to go out of the depositions, because ordinarily in such case, the examination would be *ex parte*. There is certainly nothing in the statute, or in sound legal construction, which, upon a motion to let to bail in such a case, limits the investigation of the facts to the depositions taken in the Examining Court. If the whole testimony should not have been before the Examining Court, or if the notes of the testimony should be imperfect, or inaccurate, (all of which sometimes

happens,) it would be hard to conclude a prisoner thereby, and deny him the right to enlarge, contradict, or explain these depositions in a case in which it might happen that the whole testimony on both sides was within the reach of the Judge; and the principle is the same in regard to the Commonwealth. It is true, such a case will not often occur, but if one such might happen, it negatives the rule of confining

650 *the investigation of the facts to the depositions taken in the Examining Court. The leading objection to the examination of other testimony than that appearing on the record, is, that generally such examination would be *ex parte*. And for this same reason, we think that the Judge of the Superior Court of Law for the county of Louisa should have refused to enter into the examination of the testimony, either written or parol, which was offered when the motion to let to bail was made in this case. The trial had been already continued on the motion of the Attorney for the Commonwealth, because of the absence of material witnesses. The examination, either upon the depositions, or parol testimony, must then necessarily have been *ex parte*, and injurious to the Commonwealth, unless we are to presume that the absent witnesses had been examined in the Called Court. But, whatever latitude may be allowable to a jury, or other tribunal examining a matter of fact, to draw any probable inferences, we apprehend that legal presumptions must be necessary, and not barely probable deductions, and we cannot perceive how it must necessarily be presumed that the absent witnesses had been before the Examining Court. The Courts, and officers of the law, are indeed legally presumed to do their duty. But, it cannot be alleged as a breach of duty of the Examining Court, not to have had all the testimony in the cause before them, because they have nothing to do with the preparation of testimony. Nor is it strictly the duty of the Attorney for the Commonwealth to collect the witnesses; his duties in relation to this matter, commence in Court. In truth, the practice is for the Committing Magistrate to recognize such of the witnesses as may be before him, when the mittimus is made out, and for the Attorney for the Commonwealth, or any one else, who may take an interest in the subject, to order subpoenas for witnesses, who may be suggested as knowing something of the affair. And after all, the examination is often very imperfect before the called Court, and nothing is

651 *more common than that important testimony is discovered on either side, after the Examining Court has fulfilled its duties.

Upon the whole, therefore, we conclude, that whenever the motion to be let to bail is made upon the ground, that there is but a light suspicion of guilt against the prisoner, which of course induces an examination and weighing of the whole testimony in the case, the Court or Judge ought not to entertain the motion, when it is apparent that the Commonwealth is unavoidably deprived of some testimony, important in the decision of that question.

*4 Co. Inst. p. 71; 2 Co. Inst. p. 186; 2 Hale's H. P. C. 129.

The following is to be entered as the judgment of the Court.

The Court is of opinion, and doth decide, that the judgment of the Examining Court, and finding of the Grand Jury, were not conclusive of the probable guilt of the prisoner, so as to exclude the examination of testimony by the Judge, as to the question of probable guilt, or innocence, on the prisoner's motion to be let to bail. But, this Court is further of opinion, and doth decide, that under the particular circumstances of this case, the Court ought not to have gone into the examination of witnesses, or the depositions taken in the Examining Court, for the purpose of ascertaining the degree of suspicion of the prisoner's guilt, but ought to have rejected the motion to be let to bail on that ground. Which is ordered to be certified, &c.

652 *The Commonwealth v. William H. Garland and Others.

November, 1826.

Gaming.—What Constitutes*—Case at Bar.—Taking a chance in a raffle, at twenty dollars, or any less sum, although the property raffled for exceeds that sum, (the raffling being at a private house) does not bring the person within the operation of the gaming act.

Same—Same—Same.*—The winner of the thing raffled for (it exceeding \$20.) does come within the operation of the law, although neither of the losers (the loss of each being less than \$20.) comes within it.

Same—Same—Same.*—If the prize is won by two or more individuals in partnership, but the share of the gain of each is less than \$20, neither of them is embraced by the law.

Same—Statute—Construction.*—The taking a chance in a raffle is not the same offence as the purchase of a foreign lottery ticket, and is, therefore, not liable to the penalty prescribed for the latter offence, by the latter part of the 27th section of the gaming act.

The Grand Jury for the Superior Court of Albemarle, made sundry presentments against individuals under the gaming act. The first was against William H. Garland, "for putting up a watch to be unlawfully raffled for, to raise for himself the sum of twenty-five dollars." The second against Charles E. Harrison, "for unlawful gaming, by taking a chance at two dollars in a raffle, and raffling for a watch put up by William H. Garland, to raise for himself the sum of twenty-five dollars, the value of the watch so put up to be raffled for." The third against Charles Downing, "for unlawful gaming, by putting up two horses to be raffled for, to raise for himself the sum of two hundred dollars, at his own house, &c." The fourth against Lyman Peck, "for unlawful gaming, by taking a chance at twenty dollars, in a raffle, and raffling for two horses, put up by Charles Downing, at the price of two hundred dollars, at the house of Charles Downing, &c." The fifth against Charles Downing, "for unlawfully putting up a raffle, to be played for at cards, a parcel of books, of the amount of eighty dollars, and having the same played for at cards, to raise for himself the sum of eighty dollars, at his own house, &c." The sixth against William F. Gordon, "for unlawful gaming with cards, and winning *a parcel of books, of the value of eighty dollars, within twenty four hours, at the

house of Charles Downing, &c. said books having been unlawfully put up in a raffle by said Downing, to be played for with cards, to raise for him the sum of eighty dollars, &c." The seventh was against William H. Jones, for putting up a raffle of pictures of the value of eighty dollars, and was of the same description as the fifth. The eighth was against Ebenezer Zane, for taking a chance at three dollars, in the last raffle, and is like the second.

The Superior Court being doubtful whether a portion of the cases thus presented, if established by proof, be punishable by the laws made for the prohibition of unlawful gaming, adjourned the following points to this Court for its decision.

"1. Does the individual who takes a chance in a raffle, at twenty dollars a chance, or any smaller sum, where the property raffled for, exceeds twenty dollars in value, and the raffling takes place in a private house, come within the 'act, to reduce into one the several acts, or parts of acts, to prevent unlawful gaming?'"

"2. Does the individual who takes a chance as aforesaid, and who raffles as aforesaid, and wins the thing raffled for, come within the meaning of the said law?"

"3. Where the whole value of the thing raffled for exceeds \$20, but the prize is won by two individuals in the raffle in partnership, and the value to each when divided does not amount to twenty dollars, do both come within the operation of the said law, or without?"

"4. As lotteries and raffles, are both games of chance, and of similar character, prohibited by the Legislature in the same clause of the gaming law, and as by an amendment to that clause, the vendor, or purchaser of a lottery ticket, is subjected to a penalty (viz: \$100,) and as by the 29th section of the same law, the Courts are directed to construe the several laws made for the prevention of unlawful gaming, as remedial statutes, and as the purchase of *a chance in a raffle comes within the evil intended to be remedied by the said amendment, can the individual who takes a chance in a raffle, be considered as embraced by the said amendment?"

The General Court, after conferring on the subject, entered the following judgment.

The Court is of opinion, and doth decide:

1. That the class of cases embraced by the first question adjourned to this Court, does not come within the "act to reduce into one the several acts, or parts of acts, made to prevent unlawful gaming."

2. That the class of cases mentioned in the second question, does come within the meaning of the law.

3. That the third class of cases does not come within the operation of the law.

4. That an individual who takes a chance in a raffle, cannot be considered as embraced in the amendment referred to in the fourth question.

Which is ordered to be certified, &c.

Note by BROCKENBROUGH, J. The reasons for the above opinion were not assigned by any member of the Court, but they are believed to be as follows. The 27th section of the act prohibits raffling as an

*See monographic note on "Gaming" appended to Neal v. Com., 22 Gratt. 917.

unlawful game. The sixth section declares, that if any person, by playing or betting at any game, or wager whatsoever, at any time within the space of twenty-four hours, shall lose, or win to, or from another, a greater sum, or any thing of greater value than \$20, the loser and winner shall be liable to pay one-half of the entire sum above the said sum of twenty dollars, which he shall so win, or lose, upon information, &c., to the use of the Commonwealth, &c. The first class of cases, mentioned by the Court, supposes that the individual stakes twenty dollars only, or less, upon the game: he cannot lose more than twenty dollars, and the case does not suppose that he wins the thing raffled for, but is unsuccessful. He does not, therefore, come within the law. So, as to the third class of cases; neither individual wins as much as twenty dollars, and therefore, does not come within the act.

As to the second class of cases, it is different. The prize is of greater value than twenty dollars, and is won by the defendant. But it is objected, that he does not win from another, but from sundry persons the thing raffled for, and as they do not lose more than \$20 each, and therefore, do not come within the law, so neither does the winner. To this it was answered, that although such might be the grammatical, and literal meaning of the clause, it was not the proper construction. This law is to be construed, according to its own provisions, as a remedial law; in other words, so as to advance the remedy, and suppress the mischief. The object of the law is to prevent high gaming, and if an individual wins more than the prescribed sum, his offence is the same, whether he wins it from one, or from several.

As to the fourth class of cases, it does not come within the law, because although raffles and lotteries are similar, yet they are not the same.

655 *The Commonwealth v. Thomas Hughes.

November, 1826.

Criminal Law—New Trial—Preconceived Opinion of Juror.—An hypothetical declaration (made by a juror before he was impanelled) that "if he (the prisoner) killed the man, he ought to be hanged," is not a sufficient ground on which to grant a new trial: such declaration not being an opinion as to the prisoner's guilt.

*Criminal Law—New Trial—Incompetency of Juror.

In *State v. Greer*, 22 W. Va. 824, it is said: "In Virginia and this state it has been repeatedly held, that a new trial will be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as such juror, but which was unknown to the prisoner until after the verdict, and which could not have been discovered before the juror was so sworn by the exercise of ordinary diligence; unless it appears that the prisoner suffered injustice from the fact that such juror served upon the case. *Smith's Case*, 2 Va. Cas. 6; *Poore's Case*, 2 Va. Cas. 474; *Kennedy's Case*, 2 Va. Cas. 510; *Brown's Case*, 2 Va. Cas. 516; *Hughes' Case*, 5 Rand. 655; *Jones's Case*, 1 Leigh 598; *Heath's Case*, 1 Rob. 735; *Hallstock's Case*, 2 Gratt. 564; *Curran's Case*, 7 Gratt. 619; *Dilworth's Case*, 12 Gratt. 689; *Bristow's Case*, 15 Gratt. 634; *McDonald's Case*, 9 W. Va. 456. The same doctrine is held in civil cases. *Sweeney v. Baker*, 18 W. Va. 158; *Fletcher v. Hale*, 22 W. Va. 44." And in *State v. Baker*, 33 W. Va. 324, 10 S. E. Rep. 641, it is said: "There have been many cases in Virginia upon the incompetency of jurors in criminal cases on account of preconceived opinions. *Lithgow's Case*, 2 Va. Cas. 297; *Sprouce's Case*, 2 Va. Cas. 373; *Poore's Case*, 2 Va. Cas. 474; *Pollard's Case*, 5 Rand. 650; *Hughes' Case*, 5 Rand. 655; *Mendum's Case*, 6 Rand. 704; *Brown's Case*, 2 Leigh 769; *Ostlander's Case*, 3 Leigh 780; *Hendrick's Case*, 5 Leigh 707; *Malle's Case*, 9 Leigh 661; *Moran's Case*, 9 Leigh 631; *Armistead's Case*, 11 Leigh 667; *McCune's Case*, 2 Rob. 771; *Heath's Case*, 1 Rob. 736; *Hallstock's Case*, 2 Gratt. 564; *Epes' Case*, 5 Gratt. 676; *Smith's Case*, 6 Gratt. 606; *Smith's Case*, 7 Gratt. 593; *Clare's Case*, 8 Gratt. 606; *Wormeley's Case*, 10 Gratt. 658; *Montague's Case*, 10 Gratt. 767; *Jackson's Case*, 23 Gratt. 919; *Little's Case*, 25 Gratt. 921; *Cluverius' Case*, 81 Va. 787."

On this subject the principal case is also cited in *Curran's Case*, 7 Gratt. 623; *foot-note* to *Com. v. Hallstock*, 2 Gratt. 564; *foot-note* to *Bristow v. Com.*, 15 Gratt. 634; *State v. McDonald*, 9 W. Va. 465; *Sweeney v. Baker*, 18 W. Va. 228; *State v. Hobbs*, 37 W. Va. 335, 17 S. E. Rep. 385.

See further, monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733; monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 322.

This was an adjourned case from the Superior Court of Halifax. The prisoner was indicted for the murder of Thomas Boyd, and was convicted by the jury of murder in the second degree. On the last day of the Court, he moved the Court to grant him a new trial, on the following facts and statement. On impanelling the jury in this case, Anderson H. Trabue, one of the jury who tried the prisoner, was called and sworn to answer such questions as might be asked him, in order that it might be ascertained whether he was a proper juror, or not; and in answer to questions put to him, stated, that he had not made up, and expressed an opinion upon the guilt, or innocence of the prisoner. After the verdict was rendered, the prisoner introduced James Watson, who being first sworn, stated, that shortly after the alleged murder was committed, he heard the said Trabue say, in conversation in relation to the prisoner, "Damn his (meaning the prisoner) soul; if he took his knife and killed the man, he ought to be hanged without Judge or Jury." Also, Randolph Hambrick, who being also sworn, stated, that he and the said Trabue were conversing about the prisoner's case some short time after the prisoner was committed; and in that conversation, the said Trabue stated to him, that "if he (the prisoner) did kill the man, he ought to be hanged." Both of the above witnesses are men of good character. The above statement having been made, and the Court not having time to give to the prisoner's motion the smallest consideration, by consent of the prisoner, the question whether the Court ought to grant a new trial upon the facts and statement, was adjourned to the General Court, for their opinion and advice.

BOULDIN, J. delivered the opinion of the Court.

Not deciding whether the cause stated be one, on account of which the Superior Court could regularly adjourn a case here for decision, it is the opinion of this Court, that the declaration of the juror was not the expression of an opinion relative to the guilt or innocence of the prisoner, but from the words used by him, was a reply to some loose and general statement, of the accuracy of which he had probably not reflected. A new trial ought not to have been granted to the prisoner on such ground.

657 *JUNE TERM. 1827.

JUDGES PRESENT.

<i>Brokenbrough,</i>	<i>Smith,</i>
<i>Daniel,</i>	<i>Semple,</i>
<i>Parker,</i>	<i>Bouldin,</i>
<i>Upshur,</i>	<i>Field.</i>

The Commonwealth v. Augustine Leftwich, (Son of Uriah).*

June, 1827.

Unlawful Marriage—Conviction of—Judgment.—Qu. If a husband be prosecuted and convicted of an unlawful marriage, and the wife is not prosecuted, can a judgment of separation be pronounced on the verdict?

*For monographic note on Statutes, see end of case.

Penal Statutes—Repeal—Effect on Offences Already Committed.—The repeal of a law, prescribing a punishment for an offence, without a proviso, that offences committed before the operation of the new law, shall be punished under the old, excuses offenders under the repealed law. This is again decided, after repeated adjudications to the same effect.

BROCKENBROUGH, J. stated the case, and delivered the opinion of the Court.

An Information was filed (founded on a previous presentment of a Grand Jury) by the Attorney for the Commonwealth, in the Superior Court of Law for the County of Bedford, in April, 1822, against the defendant, charging him with having intermarried with Hulda Hackworth, the sister of Polly Hackworth, his deceased wife, contrary to law. 1 Revised Code, p. 399, sec. 17. The case came on for trial in September, 1823, and the defendant was convicted by the jury. No process was taken out against the female, nor was she in any manner before the Court. The defendant Leftwich moved the Court to arrest the judgment on the ground, that according to the act of Assembly, the judgment of the Court upon the verdict of the jury is a judgment of separation, by which Hulda Hackworth, who was not before the Court, and who had not had the benefit of a trial by jury, would be affected. The Court thereupon adjourned to this Court the question, whether the Court should proceed to render judgment against the defendant in this case, and what judgment?

It has now become unnecessary to decide the question propounded by the Circuit Court; because, by the act of the last session of the General Assembly, ch. 22, the punishment for a man's marrying his deceased wife's sister, is changed. Instead of the separation of the parties, as provided by the former law, it is now enacted, that the parties shall be punished by fine or imprisonment, or both, at the discretion of the jury; and all acts and parts of acts coming within the purview of the act, are repealed; nor is there any proviso, that offences under the former law shall still be punished under it. The consequence is, that according to the uniform decisions of this Court,† all offenders under the former law, so far as they were guilty of forming this connection, (that is, of the man's marrying the deceased wife's sister,) are excused from all punishment whatever.

The following is to be entered as the judgment of the Court.

This Court is unanimously of opinion, and doth decide, that by virtue of the act passed March 2, 1827, entitled, "an act to alter and amend the act, entitled, 'an act to reduce into one, the several acts to regulate the solemnization of marriages;' prohibiting such as are incestuous, or otherwise unlawful; to prevent forcible and stolen marriages, and for the punishment of the crime of bigamy," whereby the punishment prescribed for the offence of a man's marrying his deceased wife's sister by former laws, is changed, and all former acts coming within the purview of the said

act, are repealed, there is now no law in force, by which the said Augustine Leftwich can be punished; and that, therefore, no judgment can now be rendered against the defendant in this case; which is ordered to be certified.

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 - a. Affirmative.
 - b. Negative.
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 - B. In Respect to Subject Matter.
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 - C. In Respect to Compliance Required.
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 - a. To Delegate Authority.
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 5. Passage.
 - a. Yeas and Nays on Final Passage.
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 - a. Prima Facie Validity.
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- IV. Time of Taking Effect.
 - A. From a Future Day.
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- VI. Titles and Subjects under Constitution.
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*See principal case cited in *Pitman v. Com.*, 2 Rob. 813, 816.

†*Scutt's Case*, 2 Virginia Cases, 54; *Attwo's Case*, Ib. 882.

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3. Incidental or Auxiliary Objects.
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5. Matters Cognate or Germane.
6. Matters of a Proper or Necessary Connection.
7. Generality of Title.
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 - b. Election to Remove County Seat.
 - c. County Officers.
 - d. Railroad Companies.
 - e. Navigation Companies.
 - f. Building and Loan Association.
 - g. Taxation.
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- A. By Implication.
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- C. Reference to Section Amended.
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5. Construed Words.
6. Provisos, Exceptions and Saving Clauses.
 - a. Provisos.
 - b. Saving Clauses.
 - c. Jurisdiction.

K. Associated Words.

1. When Used in Several Places.
2. Words Conferring Authority.
3. General Words Following Particular Ones.

L. Retrospective Laws.

1. Definition.
2. Rules of Construction.
 - a. Statutes of Limitation No Exception.
 - b. Prima Facie Construction.
3. Remedial Statutes.

M. Words, Phrases, etc.

1. "Held."
2. "May."
3. "Persons."
4. "Practice."
5. "Passage."
6. "Registered."
7. "Shall."
8. "Vacancy."
9. "Personal Representative."
10. "Other Accidental Clauses."
11. "Cattle, Sheep, Swine and Other Animals."
12. "During Good Behavior."
13. "Bay or River Craft or Other Boat."
14. "And So Forth."
15. "Members Elected."
16. "Adjourned from Day to Day."
17. "Once within the Gift of the People."

X. Repeal.

- A. In General.
 1. Power Not Given to Courts.
 2. Power to Revoke Equivalent to Power to Repeal.
 3. Court to Determine.
 4. Presumption.

- a. What Necessary to Justify.
 - B. Express.
 - 1. Presumption Where Not Express.
 - C. Implied.
 - 1. In General.
 - 2. Construction Favored.
 - 3. By Repugnancy.
 - a. Must Be Plain and Visible.
 - b. Not to Be Presumed.
 - c. Affirmative Statutes.
 - d. Repeal May Be Partial or Total.
 - e. General and Special Statutes.
 - f. Prescribing Exclusive Rules.
 - 4. By Act Covering Entire Subject.
 - a. General Rule.
 - b. Revisions.
 - c. By Amendments.
 - 5. Implied Repeal Not Favored.
 - a. Presumption.
 - b. Repugnance Must Be Plain.
 - D. Effect.
 - 1. General Rule.
 - 2. On Interest under Repealed Statute.
 - a. Inchoate Rights.
 - b. Past or Closed Rights.
 - 3. On Pending Interest.
 - a. Remedies.
 - b. Contracts.
 - c. Jurisdiction.
 - d. Penalties and Forfeitures.
 - 4. Of Repeal and Re-Enactment.
 - 5. Of Repeal of Repealing Act.
 - a. Common Law Revived.
- (1) Code Provisions Not Applicable.

I. OBJECT AND SUBJECT.

The "object" of an act is the aim or purpose of the enactment, while the "subject" is the matter to which it relates, and with which it deals. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. Rep. 508.

II. CLASSIFICATION.

A. IN RESPECT TO NATURE AND OBJECT.

1. **DECLARATORY.**—A declaratory statute is one which is passed in affirmation of a former law. 23 Am. & Eng. Ency. Law, 148; *Bouviere Law Dict.* (Rawles Rev., vol. 1) 520.

a. *Affirmative.*—An affirmative statute is one enacted in affirmative terms. 23 Am. & Eng. Ency. Law 148.

b. *Negative.*—A negative statute is one expressed in negative terms, and which repeals other laws with which it conflicts. 23 Am. & Eng. Ency. Law 144; *Bouviere Law Dict.* (Rawles Rev., vol. 2) 478.

2. **REMEDIAL.**—A remedial statute is one made to supply some defects or abridge some superfluities of the common law. 23 Am. & Eng. Ency. Law 144; *Bouviere Law Dict.* (Rawles Rev., vol. 2) 870.

3. **PENAL.**—A penal statute is one that imposes a forfeiture or penalty for transgression of its provisions, or for doing a thing prohibited. *Hall v. N. & W. R. Co.*, 44 W. Va. 36, 28 S. E. Rep. 754.

B. IN RESPECT TO SUBJECT MATTER.

1. **PUBLIC.**—A public act is one which effects the public, either generally or in some class. *Hart v. B. & O. R. R. Co.*, 6 W. Va. 336.

2. **PRIVATE.**—A private law is one which does not concern the public at large. *Hart v. B. & O. R. R. Co.*, 6 W. Va. 336; *Groves v. Grant County Court*, 42 W. Va. 587, 26 S. E. Rep. 460; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. Rep. 239.

Relocation of County Seat.—So much of ch. 31 of the Acts of 1895 as provides for the relocation of county seats by a majority vote in cases where the county seat of any county in this state has, since the 1st day of January, 1872, been relocated by a special act

of the legislature, is a special law, and as such is prohibited by § 89, art. 6 of the Constitution. *Groves v. Grant County Court*, 42 W. Va. 587, 26 S. E. Rep. 460.

3. **GENERAL.**—A statute relating to persons or things as a class is a general law. *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. Rep. 239; *Groves v. Grant County Court*, 42 W. Va. 587, 26 S. E. Rep. 460.

4. **LOCAL.**—A local statute is one which operates in a limited sphere, as a city or county. 23 Am. & Eng. Ency. Law 152; *Bouviere Law Dict.* (Rawles Rev., vol. 2) 1032.

C. IN RESPECT TO COMPLIANCE REQUIRED.

1. **MANDATORY.**—A statute is mandatory when its provisions are the essence of the thing required to be done. 23 Am. & Eng. Ency. Law 153; *Bouviere Law Dict.* (Rawles Rev., vol. 2) 1033.

2. **DIRECTORY.**—As a general rule, where a statute directs certain proceedings to be done in a certain way, and the form does not appear essential to the judicial mind, the law will be regarded as directory, and the proceedings under it will be held valid, though the command of the statute as to form has not been strictly obeyed, the manner not being the essence of the thing to be done. *Calwell v. Prindle*, 19 W. Va. 608.

Failure to State Name of Witness on Indictment, Directory, Not Fatal.—A statute requiring the name of the witness, on whose evidence the indictment was found, to be stated at the foot of the indictment is directory, and the omission to so state the name is not fatal to the indictment. *State v. Enoch*, 26 W. Va. 254.

D. IN RESPECT TO TIME OF TAKING EFFECT.

1. **PROSPECTIVE.**—A law is said to be prospective when it is applicable only to cases which arise after its enactment. 23 Am. & Eng. Ency. Law 154.

2. **RETROSPECTIVE.**—A retrospective statute is one which applies to existing cases, as those which destroy or impair vested rights, create new obligations, impose new duties, or attach new disabilities in regard to transactions already passed. 23 Am. & Eng. Ency. Law 155.

a. *Touching Civil Remedies.*—The right to a particular remedy is not a vested right, and retrospective laws touching civil remedies is valid. *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1006.

Within Province of Legislature.—Any rule or regulation with regard to the remedy which does not, under pretense of modifying or regulating it, take away or repair the right itself, cannot be regarded as beyond the province of the legislature. *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1006.

b. *Touching Civil Rights.*—No statute, however positive is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared; and the courts will apply new statutes only to future cases unless there is something in the very nature of the case or in the language of the new revision which shows they were intended to have a retroactive operation. *Rogers v. Lynch*, 44 W. Va. 94, 29 S. E. Rep. 507.

c. Touching Crimes.

(1) **Ex Post Facto Laws.**—*Ex post facto* laws relate to crimes and punishment, and not to civil proceedings, which affect private rights. *Danville v. Pace*, 25 Gratt. 1; *Jones v. Com.*, 86 Va. 663, 10 S. E. Rep. 1005.

(a) **Definition.**—An *ex post facto* law within the meaning of the United States constitution is one which makes an act done before the passing of the law, which was innocent when done, criminal; or makes a crime greater than when committed; or inflicts a greater punishment than the law annexed

to the crime when committed; or alters the legal rules of evidence, and requires less or a different testimony than the law required at the commission of the offense, in order to convict the offender. *Jones v. Com.*, 86 Va. 663, 10 S. E. Rep. 1006; *Danville v. Pace*, 25 Gratt. 1.

(b) *Prohibited*.—The constitutional provision forbidding *ex post facto* laws, relates to crimes and punishments, and not to criminal proceedings. *Perry v. Com.*, 3 Gratt. 682.

III. ENACTMENT.

A. THE LEGISLATURE.

1. *CO-ORDINATE BRANCH OF GOVERNMENT*.—The legislature is a co-ordinate branch of the government, whose exclusive province is to make laws. *Bridges v. Shallcross*, 6 W. Va. 562.

2. *EXTRA SESSIONS*.—Where the constitution provides that the governor may call an extra session of the legislature, but when so convened it shall enter upon no business except that stated in the proclamation by which it was called together, under which authority the governor calls an extra session for the purpose, among other things, of "protecting the public treasury against unnecessary expenditures by regulating the cost charges, and proceedings in criminal cases before justices of the peace and circuit courts," and a bill was enacted allowing the accused to strike off six jurors and the prosecuting attorney two, was held to be constitutional. *State v. Shores*, 81 W. Va. 491, 7 S. E. Rep. 418.

3. *POWERS AND LIMITATIONS*.—The legislative power in a state possesses the absolute and uncontrolled power of legislation, except, first, as it may be limited by the constitution of the United States, and second, as it has been clearly limited by the constitution of the state. It possesses all the legislative power which the people themselves could confer, except so far as it is clearly restricted by constitutional provisions, or a declaration of rights, or both. *Bridges v. Shallcross*, 6 W. Va. 574; *Prison Association of Va. v. Ashby*, 93 Va. 637, 25 S. E. Rep. 893.

a. *To Delegate Authority*.—The legislature has authority to delegate the performance of many duties which it may provide for by law to other officers. *Bridges v. Shallcross*, 6 W. Va. 562.

And it may delegate its authority to other bodies for the purpose of taxation for specified objects. *Bull v. Read*, 13 Gratt. 78.

b. *To Make New Counties*.—Not only does the power of making new counties belong to legislature, but to no other department of the government. *Lusher v. Scites*, 4 W. Va. 11.

c. *Provisions of Constitution Must Be Followed*.—It is necessary that a bill be passed according to the constitutional requirements, in regard to the members of each house, in order to be valid. *Osburn v. Staley*, 5 W. Va. 85; *Boyers v. Crane*, 1 W. Va. 178.

d. *Presumption as to Requirements*.—The presumption is that constitutional requirements have been followed and the omission of matters not required to be entered therein will not effect the validity of a statute. *Wise v. Bigger*, 79 Va. 269; *Osburn v. Staley*, 5 W. Va. 85.

Requires Consent of Both Branches.—Every resolution requires the consent of both branches of the general assembly before it can become a law. *Field v. Auditor*, 83 Va. 882, 3 S. E. Rep. 707.

4. *RULES—PAIRS—LEAVE OF ABSENCE*.—Each house of the general assembly is vested with the power of making rules for its own government, and necessarily the power to grant members leave of absence, excuse them from voting when proper,

and recognize what are called pairs. *Wise v. Bigger*, 79 Va. 269.

5. *PASSAGE*.—The constitution of West Virginia provides that no act shall take effect, except the ones passed at the first session under this constitution, until the expiration of ninety days after its passage, unless the legislature, etc., and the word "passage" in this connection was construed to mean from the passage by both houses of the legislature, and not from the approval by the governor. *State v. Mounts*, 86 W. Va. 179, 14 S. E. Rep. 407.

Resolutions.—A resolution passed by one branch, only, of the general assembly, authorizing the governor to employ counsel to consider a claim against the state, confers no authority on him to bind the state. *Field v. Auditor*, 83 Va. 882, 3 S. E. Rep. 707.

a. *Yeas and Nays on Final Passage*.—Where the constitution requires the yeas and nays on the final passage of a bill, and that they shall be entered on the journal, a conformity to such requirement is necessary in order that the bill should be valid. *Osburn v. Staley*, 5 W. Va. 85.

6. *POWER OF RECALL BY LEGISLATURE*.—When a bill is once before the governor it is beyond the control of the general assembly. *Wolfe v. McCaull*, 76 Va. 889.

7. *EXECUTIVE FUNCTIONS*.—The governor has no legislative functions to perform, and while his approval of a bill passed by the legislature gives vitality to the law, yet the legislature may pass the law over his veto, which amounts to nothing more than an appeal for a reconsideration of a bill. *State v. Mounts*, 86 W. Va. 179, 14 S. E. Rep. 407.

And a bill passed by both houses of the general assembly, and presented to the governor, who at the request of the legislature, by a joint resolution, returns it to the legislature without his veto and objections, is not a good law; the legislature having no right to recall the bill, nor the governor to return it without his objections. *Wolfe v. McCaull*, 76 Va. 889.

8. LEGISLATIVE JOURNAL.

a. *In General*.—For a court to inquire into or dispute the veracity of the journals kept by the two branches of the legislature would be to violate both the letter and the spirit of the constitution, to invade a co-ordinate and independent department of the government and to interfere with separate and legitimate power and functions of the legislature. *Wise v. Bigger*, 79 Va. 269.

And a mere clerical omission in the journal of either house will not vitiate an act of the legislature, if there is sufficient on the face of the journal to show substantial compliance with constitutional requirements. *Price v. City of Moundsville*, 48 W. Va. 523, 27 S. E. Rep. 218.

Evidence as to Requirements.—Where the constitution requires each branch of the legislature to keep a journal, and that on the passage of every bill the vote shall be taken by yeas and nays and be entered in the journal, and that no bill shall be passed by either branch without an affirmative vote of all members elected thereto, the courts can look to the journal to ascertain if the bill was passed by the required number of votes. *Osburn v. Staley*, 5 W. Va. 85.

b. *Conclusiveness*.—The evidence furnished in the journal proceedings of the senate import an absolute verity and cannot be disputed by the courts. *Wise v. Bigger*, 79 Va. 269.

9. THE ENROLLED BILL.

a. *Prima Facie Validity*.—A bill duly enrolled, authenticated and approved is presumed to have been passed by the legislature in conformity with

the requirements of the constitution, unless the contrary is made to affirmatively appear. *Price v. City of Moundsville*, 43 W. Va. 523, 27 S. E. Rep. 218.

b. Evidence to Impeach.

Parol Evidence.—The testimony of the draftsman of the amendatory act, showing that the omission of words was inadvertent is not admissible, being forbidden by law, reason and public policy. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1090, 14 S. E. Rep. 976. See *Wise v. Bigger*, 79 Va. 269.

c. Conflict between Enrolled Bill and Published Act.—In the case of conflict between the enrolled bill and the published act, the enrolled bill is the best and controlling evidence of the legislative intent. *Johnson v. Barham*, 99 Va. 305, 38 S. E. Rep. 136.

IV. TIME OF TAKING EFFECT.

A. FROM A FUTURE DAY.—The legislature may provide that an act shall not take effect until some future day. *Bull v. Read*, 13 Gratt. 78.

1. DAY OF PASSAGE EXCLUDED.—The day of passage is excluded in considering when a statute will take effect. *The King v. Moore*, Jeff. 8.

2. DAY OF PASSAGE OR DAY OF TAKING EFFECT MAY BE EXCLUDED.—In computing the ninety days required by art. 6, § 80 of the West Virginia Constitution, it is immaterial whether we count the day of the passage, and reject the ninetieth day, or whether we include the ninetieth and exclude the day of the passage of the act. An act passed on the 27th day of Feb., 1891, will under the constitutional provisions, take effect on the 28th day of May, 1891. *State v. Mounts*, 86 W. Va. 179, 14 S. E. Rep. 407.

3. WHEN DAY FALLS ON SUNDAY—APPLICABLE TO CRIMINAL CASES.—The statute—Code, ch. 13, § 12, which declares that, the time within which an act is to be done shall be computed by excluding the first day and including the last; or, if the last be Sunday, it shall also be excluded, applies to the construction of statutes in criminal as well as civil cases. *State v. Beasley*, 21 W. Va. 778.

B. UPON A CONTINGENCY.—The legislature may provide that an act shall not take effect until the happening of some particular event, or upon some contingency thereafter to arise, or upon the performance of some specified condition. *Bull v. Read*, 13 Gratt. 78.

C. PROOF AS TO TIME OF TAKING EFFECT.—Whenever a question arises in a court of law, as to the existence, time of taking effect, or of the precise terms of a statute, the court in the absence of any positive law to the contrary has a right to resort to any information, which from its nature is capable of conveying to the judicial mind a clear and satisfactory answer. *Osburn v. Staley*, 5 W. Va. 92.

D. ACTS UNDER STATUTE BEFORE TAKING EFFECT VOID.—Where by an act of the general assembly a vote was to be taken on the fourth Thursday of May, 1866, before the proclamation of the president of the United States, declaring that the insurrection was at an end, and that peace and tranquillity reigned throughout the whole of the country, (issued on the 20th day of August, 1866) such a vote is a nullity, being taken before the act had validity. *Conley v. Supervisors*, 2 W. Va. 416.

V. VALIDITY AND EFFECT.

Whenever the legislature is expressly prohibited by the constitution from doing any particular act, and it clearly appears that the same has been done in violation of such prohibition, it is the duty of the courts upon a proper case presented before them, to declare such act null and void. *Bridges v. Shallcross*, 6 W. Va. 575.

Invalidity Must Be Clear.—The courts should sustain legislative action when not clearly satisfied of its invalidity; and unless it clearly appears that it is contrariant to the constitution then there is reasonable doubt of its invalidity, and it should be sustained and enforced. *Bridges v. Shallcross*, 6 W. Va. 574; *Danville v. Pace*, 25 Gratt. 1; *Osburn v. Staley*, 5 W. Va. 85; *South Morgantown v. City of Morgantown* (W. Va.), 40 S. E. Rep. 15.

A. STATUTES VOID IN PART.—A law may be good in part and unconstitutional in part and the valid part remains in force. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. Rep. 930.

1. WHERE VALID PART DEPENDENT ON VOID PART.—Where a statute is valid in part, and the valid part is so connected with and dependent on that which is void, so that the parts are not distinctly separable, the whole must fall. *Black v. Trower*, 79 Va. 123; *The Homestead Cases*, 23 Gratt. 266.

2. WHERE THE PARTS ARE SEPARABLE.—When any part of a statute is indicated by the title, and such part is capable of being separated from the part not so indicated, and is left complete in its self, and capable of being executed as the will of the legislature, the part so indicated is valid. *Board of Supervisors v. McGruder*, 84 Va. 828, 6 S. E. Rep. 232.

VI. TITLES AND SUBJECTS UNDER CONSTITUTION.

A. CONSTITUTIONAL PROVISIONS.—The constitutional provision, that "no act shall embrace more than one object which shall be expressed in its title," is not merely directory, but mandatory. *Board of Supervisors of Henrico Co. v. McGruder*, 84 Va. 828, 6 S. E. Rep. 232.

Provisions Merely Directory.—Where the constitution provides that an act shall not embrace more than one object,—such provisions are merely directory,—and that, though an act embraces several objects, if any or all of them be expressed in the title, the act, otherwise properly passed shall be valid as to the object expressed. *Shields v. Bennett*, 8 W. Va. 74. *Contra*, see preceding paragraph.

a. Objects of Provisions.—First, to prevent log-rolling legislation.

Second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the title gives no intimation, and which may therefore be overlooked and carelessly and unintentionally adopted.

Third, to fairly apprise the people of the subjects of legislation that are being considered in order that they may be heard by petition or otherwise. *Board of Supervisors of Henrico Co. v. McGruder*, 84 Va. 828, 6 S. E. Rep. 232; *Cooley's Const. Lim.*, 149; *Powell v. Supervisors*, 88 Va. 707, 14 S. E. Rep. 543.

b. How Failure to Comply Determined.—The question whether the object of an act is expressed in the title, is determined by a comparison of the act and title and is not influenced by any former law which the later act, if valid, expressly or by implication, repeals. *Shields v. Bennett*, 8 W. Va. 80.

Effect of Failure to Comply.—Where the title of an act is so framed as to include only certain matters, other legislation beyond the matters named is inoperative. *Supervisors of Alexandria Co. v. City Council of Alexandria*, 96 Va. 469, 28 S. E. Rep. 882; *Lacey v. Palmer*, 93 Va. 159, 24 S. E. Rep. 930.

B. STATUTE BROADER THAN TITLE.—When any part of the act is indicated by the title, and such part is capable of being separated from the part not so indicated, and is left complete in itself, and capable of being executed as the will of the legislature, the part so indicated is valid. *Board of*

Supervisors v. McGruder, 84 Va. 828, 6 S. E. Rep. 232; Shields v. Bennett, 8 W. Va. 74.

C. GENERAL RULES.

1. **WHERE TITLE AFFORDS NO CLUE WHATEVER.**—Where the title affords no clue whatever to the contents, the statute is wholly inoperative and void. Board of Supervisors v. McGruder, 84 Va. 828, 6 S. E. Rep. 232.

2. **MATTERS IN FURTHERANCE OF OBJECT.**—Although an act or statute authorizes many things of a diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. Com. v. Brown, 91 Va. 772, 21 S. E. Rep. 357; Ingles v. Straus, 91 Va. 217, 21 S. E. Rep. 490; Prison Asso. of Va. v. Ashby, 98 Va. 667, 25 S. E. Rep. 893.

3. **INCIDENTAL OR AUXILIARY OBJECTS.**—When a principal object of an act of the legislature is expressed in the title, and the act embraces along with such principal object, other incidental or auxiliary objects, germane to the principal object, the act is not repugnant to § 80, art. 6 of the Constitution of West Virginia. State v. Mines, 88 W. Va. 126, 18 S. E. Rep. 470; State v. Brookover, 88 W. Va. 141, 18 S. E. Rep. 476.

4. **TITLE NEED NOT BE AN INDEX.**—The title of an act need not be a detail or index of the contents of the act, but it must reasonably and fairly indicate its object and subject. State v. Mines, 88 W. Va. 126, 18 S. E. Rep. 470; McNeeley v. South Penn. Oil Co., 63 W. Va. 616, 44 S. E. Rep. 608; McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. Rep. 239.

5. **MATTERS COGNATE OR GERMANE.**—If the subjects embraced in the statute, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the constitution, as to title is satisfied. Ingles v. Straus, 91 Va. 216, 21 S. E. Rep. 490; Lacey v. Palmer, 98 Va. 150, 24 S. E. Rep. 930; Prison Asso. of Va. v. Ashby, 98 Va. 667, 25 S. E. Rep. 893; Bosang v. Building Asso., 96 Va. 119, 30 S. E. Rep. 440.

6. **MATTERS OF A PROPER OR NECESSARY CONNECTION.**—The title of an act may embrace all matters which are not incongruous with each other, and which by fair intentment, can be considered as having a necessary or proper connection. C. & O. R. R. Co. v. Patton, 9 W. Va. 648.

7. **GENERALITY OF TITLE.**—The generality of a title is no objection to it, so long as it is not made a cover for legislation incongruous in itself, and which, by no fair intentment, can be considered as having a necessary or proper connection. Powell v. Supervisors, 88 Va. 707, 14 S. E. Rep. 543.

8. **WHERE ORIGINAL TITLE IS SUFFICIENT.**—If the original title of a bill is sufficient, the legislature does not vitiate the legislation by rendering such title more definite and specific during the progress of enactment, if the object of the bill is not thereby essentially changed. Price v. City of Moundsville, 48 W. Va. 523, 27 S. E. Rep. 218.

9. **WHEN PRINCIPAL OBJECT IS EXPRESSED IN TITLE.**—When the principal object of an act is expressed in the title, and the act embraces with such principal object, other auxiliary objects, the act if otherwise unobjectionable, is valid, not only as to the principal, but also as to the auxiliary objects. Shields v. Bennett, 8 W. Va. 74.

D. MISCELLANEOUS INSTANCES.

Resolutions Cannot Have Force of Law under Provision.—Where the constitution provides that the style of the acts shall be, "be it enacted by the legislature of West Virginia," the legislature cannot give a matter the force and effect of law by the passage of a joint resolution in relation thereto, when such

matter is properly the subject of enactment. Boyers v. Crane, 1 W. Va. 176.

Removal of Seat of Government.—The title, "an act to remove the seat of the government temporarily to Wheeling," is sufficient to sustain a provision accepting the offer of certain citizens to effect, without cost to the government, such removal. Slack v. Jacob, 8 W. Va. 612.

1. **MUNICIPAL CORPORATIONS.**—An act entitled, "an act to incorporate the town of Iron Gate, Virginia," is not sufficient under art. 5, § 15 of the Constitution of Virginia, which declares that no law shall embrace more than one subject, which shall be expressed in its title, to sustain a provision in the act that the whole town shall be in Alleghany county, while in fact a portion of which is in Botetourt county, and thereby change the boundary lines of the two counties. Cahoon v. Iron Gate L. & I. Co., 92 Va. 307, 23 S. E. Rep. 767.

Municipal Corporation—Courts.—Chapter 47 of the Code, in relation to the incorporation of cities, towns and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the power of the legislative department of the state government, is constitutional and valid. Elder v. Central City, 40 W. Va. 223, 21 S. E. Rep. 738.

2. COUNTIES.

a. **Location of County Seat.**—An act entitled, "an act locating the county seat of Calhoun county," which embraced a provision, authorizing the board of supervisors to sell the county property, at Arnoldsburg, is repugnant to art. 4, § 38 of the Constitution, which provides that no law shall embrace more than one object which shall be expressed in its title. Cutlip v. Sheriff of Calhoun Co., 8 W. Va. 596.

b. **Election to Remove County Seat.**—An act entitled, "an act to authorize the qualified voters of Alexandria county to vote on the question of the removal of the courthouse from Alexandria city to some point within Alexandria county," is not sufficiently broad to sustain provisions in the act for the partition or sale of the courthouse and jail properties held for the use of the county and city, it being in conflict with art. 5, § 15 of the Constitution of Virginia which provides that no law shall embrace more than one object which shall be expressed in its title. Supervisors of Alexandria Co. v. City Council of Alexandria, 95 Va. 409, 28 S. E. Rep. 882.

Two Elections to Remove County Seat.—An act entitled, "an act to authorize and provide for a special election in the county of Pulaski as to the removal of the courthouse of said county," is sufficient, under art. 5, § 15 of the Constitution of Virginia to sustain a provision in the act for a second election, upon failure of the first to decide the issue. Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490.

c. County Officers.

Sheriff and Commissioner.—An act treating of both the sheriff and commissioner, who having certain duties in common is not repugnant to the Constitution of Virginia, art. 4, § 16. Com. v. Drewry, 15 Gratt. 1.

Treasurer.—The title, "an act to allow further time for the treasurer of Henrico county to make returns of delinquent taxes," will not sustain a provision for the treasurer of Henrico county to make supplementary returns of delinquent taxes for the years, etc. Board of Supervisors of Henrico Co. v. McGruder, 84 Va. 828, 6 S. E. Rep. 232.

An Act Regulating Salary.—An act which defines what duties are to be performed by an officer, in consideration of a salary given to him by the act, and which imposes upon him duties therefore dis-

charged by another officer, and provides that the latter shall no longer do the work or receive the compensation therefor, is sufficiently embraced within a title to "regulate the salary" of such officer. *Trehy v. Marye*, 100 Va. 40, 40 S. E. Rep. 136.

d. Railroad Companies.—The title, "an act to incorporate the Atlantic and Danville Narrow Gauge Railroad Company" will sustain a provision authorizing counties to aid by their subscriptions, in its construction. *Powell v. Supervisors*, 88 Va. 707, 14 S. E. Rep. 548.

Lien for Wages.—An act entitled, "an act to secure payment of wages and salaries of certain employees of railway and other transportation companies," is not sufficient to sustain a provision giving a lien on the property for cars, supplies and engines; being repugnant to § 15, art. 5 of the Virginia Constitution, which provides that no law shall embrace more than one object which shall be expressed in its title. *Fidelity Insurance, etc., Co. v. Shenandoah, etc., R. Co.*, 86 Va. 1, 9 S. E. Rep. 769.

e. Navigation Companies.—An act entitled, "an act to incorporate the Little Kanawha Navigation Company," is sufficient to embrace a provision in the body of the act, allowing counties benefited thereby to subscribe to the stock. *State v. Wirt County Ct.*, 87 W. Va. 808, 17 S. E. Rep. 879.

f. Building and Loan Association.—An act entitled, "an act to provide a new charter for the Iron Belt Building and Loan Association," is sufficient under art. 5, § 15 of the Virginia Constitution to sustain a provision in the act validating certain transactions previously made by the association, which were usurious when made. *Bosang v. Building Association*, 96 Va. 119, 30 S. E. Rep. 440.

g. Taxation.—The act approved March 5, 1900, entitled "an act to provide for the appointment of commissioners of valuation, and defining their duties," carries with it an appropriation of public money, and not having been passed by an "aye and no" vote, duly recorded as required by art. 10, § 11 of the Constitution, is null and void. The valid portion of the act cannot be separated from the invalid portion so as to give effect to the former, and hence the whole act is invalid. *Lambert v. Smith*, 98 Va. 268, 38 S. E. Sep. 988.

Sufficiency of Original Title.—An amendatory act which merely continues a tax, which has been imposed by a previous act, without stating the object to which the tax is to be applied, is not repugnant to § 16, art. 10 of the Constitution if the original act, which imposed the tax states the object to which it was to be applied. *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

To "Obtain Revenue" Sufficient.—The title of an act which imposes a tax sufficiently defines the object to which the tax is to be applied, within the meaning of § 16, art. 10 of the Constitution of Virginia, when it declares it to be to "obtain revenue." *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

Within the Constitutional Provisions.—Art. 10, § 19 of the Constitution provides that "every law which imposes, continues or revises a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix the tax or object." The act of March 8, 1898, (Acts 1897-8, p. 864.) provided that "the money collected for license taxes shall be paid over to the auditor of public accounts and accounted for in the general oyster fund of the state, but shall in nowise be considered a part thereof, or in any way used to defray the expenses of said oyster commission." *Held*, that act sufficiently stated the object for which the tax was imposed. *Morgan v. Com.*, 96 Va. 812, 35 S. E. Rep. 448.

3. CORPORATIONS.

Unpaid Subscriptions.—An act entitled, "an act to prescribe a mode by which unpaid subscriptions to joint stock companies may be recovered by said companies, their receivers or assignees," does not authorize any legislation as to the mode by which creditors may recover such unpaid stock subscriptions. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591.

Lien for Supplies Furnished.—Under a statute giving a lien to "all persons furnishing fuel and all other supplies necessary to the operation of any manufacturing company," it was held that pig iron was necessary to the operation of a rolling mill whose business it is to manufacture among other things, iron, steel and other metals. *Va. Devel. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. Rep. 806.

4. CRIMES.—An act entitled, "an act to prevent and punish gambling, and the making, writing or selling of books or pools or mutuels on the result of any trotting race of horses, or race of any kind, or on any election, or any contest of any kind, or game of baseball," is sufficient to embrace in the body of the act a provision to prevent the keeping a house for such betting therein. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. Rep. 546.

Allowing Judge to Fix Penalty.—Where the bill of rights contains the following clause, "that no person shall be deprived of life, liberty or property without a due process of law and the judgment of his peers," a bill enacted allowing the judge to fix the penalty after the jury has found a verdict of guilty is constitutional. *State v. Davis*, 81 W. Va. 390, 7 S. E. Rep. 24.

Appeal in Felony Cases Not Included.—Acts 1898-4, 494, providing that "no judgment shall be reversed for the failure of the record to show that there was a *venire facias* unless made a ground of exception in the trial court before the jury is sworn," does not control an appeal in a felony case, pending when the act was passed. *Myers v. Com.*, 90 Va. 785, 20 S. E. Rep. 153.

5. COURTS.—The title, "an act to enlarge the jurisdiction of the hustings court" is sufficient to embrace in the body of the act, a provision, that the judge may, in certain cases act as the judge of the chancery court. *Morriss v. Va. Ins. Co.*, 85 Va. 588, 8 S. E. Rep. 383.

E. AMENDATORY AND REPEALING ACTS.

Sufficiency of Original Title.—In the case of a statute amendatory of a prior one, where the question is whether the object is sufficiently expressed in the title, it is unnecessary to inquire whether the title of the amendatory statute be in itself sufficiently expressive of such object, if the title of the first act be sufficient to embrace the matters contained in the amendatory act. *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. Rep. 278; *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

1. AMENDMENT BY IMPLICATION.—A statute amending another merely by implication is not within § 30, art. 6 of the Constitution, and need not refer to the statute it so amends, either in its title or body, so its title be sufficient to cover its own matters. *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. Rep. 278.

F. ONE OR MORE SUBJECTS.

Location and Sale of County Seat.—An act entitled, "an act locating the county seat of Calhoun county," which embraced a provision authorizing the board of supervisors to sell the county property, at Arnoldsburg, is repugnant to art. 4, § 36 of the Constitution which provides, that no law shall embrace more than one object which shall be expressed in its title. *Cutlip v. Sheriff of Calhoun Co.*, 8 W. Va. 596.

Incorporation of Railroad—Subscription to Stock by Counties.—The title, "an act to incorporate the Atlantic and Danville Narrow Gauge Railroad Company" will sustain a provision authorizing counties to aid, by their subscriptions, in its constructions. *Powell v. Supervisors*, 88 Va. 707, 14 S. E. Rep. 543.

Security for Wages and Salaries.

Lien for Engines, Cars, etc.—An act entitled, "an act to secure payment of wages and salaries of certain employees of railway and other transportation companies," is not sufficient to sustain a provision giving a lien on the property for cars, supplies and engines; being repugnant to § 15, art. 5 of the Virginia Constitution, which provides that no law shall embrace more than one object which shall be expressed in its title. *Fidelity Insurance, etc., Co. v. Shenandoah, etc., R. Co.*, 86 Va. 1, 9 S. E. Rep. 759.

Incorporation of Navigation Company—Subscription to Stock by Counties.—An act entitled, "an act to incorporate the Little Kanawha Navigation Company," is sufficient to embrace a provision in the body of the act, allowing counties benefited thereby to subscribe to the stock. *State v. Wirt County Court*, 37 W. Va. 808, 17 S. E. Rep. 379.

Corporation and Creditors Collecting Unpaid Subscriptions.—An act entitled, "an act to prescribe, the mode by which unpaid subscriptions to joint stock companies may be recovered by said companies, their receivers or assignees," does not authorize any legislation as to the mode by which creditors may recover such unpaid stock subscriptions. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591.

Prevention of Gambling and Keeping House for Same.—An act entitled, "an act to prevent and punish gambling, and the making, writing or selling of books or pools, or mutuels on the result of any trotting race of horses, or race of any kind, or game of baseball," is sufficient to embrace in the body of the act a provision to prevent the keeping of a house for such betting therein. *Lescallett v. Com.*, 89 Va. 878, 17 S. E. Rep. 546.

Enlarging Jurisdiction of Court.—The title, "an act to enlarge the jurisdiction of the hustings court" is sufficient to embrace in the body of the act, a provision that the judge, may in certain cases act as judge of the chancery court. *Morriss v. Va. Ins. Co.*, 85 Va. 588, 8 S. E. Rep. 383.

Allowing Further Time for Treasurer to Make Returns and Supplementary Returns of Delinquent Taxes.—The title, "an act to allow further time for the treasurer of Henrico county to make returns of delinquent taxes" will not sustain a provision for the treasurer of Henrico county to make supplementary returns of delinquent taxes for the years, etc. *Supervisors of Henrico Co. v. McGruder*, 84 Va. 828, 6 S. E. Rep. 232.

Two Elections on Removal of County Seat.—An act entitled, "an act to authorize the qualified voters of Alexandria county to vote on the question of the removal of the courthouse from Alexandria city to some point within Alexandria county" is not sufficiently broad to sustain provisions in the act for the partition or sale of the courthouse and jail properties held for the use of the county and city; it being in conflict with art. 5, § 15 of the Constitution of Virginia which provides that no law shall embrace more than one object which shall be expressed in its title. *Supervisors of Alexandria Co. v. City Council of Alexandria*, 95 Va. 469, 28 S. E. Rep. 882.

Sheriff and Commissioner.—An act treating of both sheriff and commissioner, who having certain duties in common, is not repugnant to the constitu-

tion of Virginia, art. 5, § 15. *Com. v. Drewry*, 15 Gratt. 1.

Removal of Seat of Government at Expense of Another.—The title, "an act to remove the seat of the government temporarily to Wheeling" is sufficient to sustain a provision accepting the offer of certain citizens to effect, without cost to the government, such removal. *Slack v. Jacob*, 8 W. Va. 612.

VII. AMENDMENTS.

A. BY IMPLICATION.

Need Not Refer to Act Amended.—Statutes may amend others by implication, and it is not essential that they even refer to the acts, or section, which by implication they amend. *State v. Cain*, 8 W. Va. 720; *Shields v. Bennett*, 8 W. Va. 74; *Forqueran v. Donnelly*, 7 W. Va. 114; *Hogan v. Guilgon*, 20 Gratt. 705; *Fox v. Com.*, 16 Gratt. 1; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. Rep. 278.

B. BY RESOLUTION.—A resolution of the legislature appointing members of an electoral board for a single county, thereby supplying an omission under a previous act, amending a section of the Code, but leaving the general law intact is not an amendment of the previous law in the sense that it must be re-enacted and published at length as required by art. 5, § 15 of the Constitution. *Sinclair v. Young*, 100 Va. 284, 40 S. E. Rep. 907.

C. REFERENCE TO SECTION AMENDED.—When the title of an original act of the legislature sufficiently expresses its object in the manner required by the constitution, an act amendatory thereof may, by its title, simply refer to the section of the original act, which it is intended to amend, and this will be a sufficient compliance with § 30, art. 6 of the Constitution of West Virginia. *Heath v. Johnson*, 36 W. Va. 728, 15 S. E. Rep. 980.

D. STATUTES PROVIDING REMEDY.—If a statute providing a remedy is amended instead of repealed, the judgment pronounced in such proceeding must be according to the law as it then stands. *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1005; *Ewing's Case*, 5 Gratt. 701.

Amended Acts, How Read.—Where sections of the Code are amended and re-enacted, the sections as amended must be read in the room instead of the original section. *Christian v. Taylor*, 96 Va. 508, 31 S. E. Rep. 904.

Laws in Force at Time of Trial Prevail.—Every state may control the remedies furnished in her courts, and may at any time change the forms of procedure therein, and the laws in force in that respect at the time of trial must prevail. *Jones v. Com.*, 86 Va. 661, 10 S. E. Rep. 1005; *Wilson v. Com.*, 86 Va. 666, 10 S. E. Rep. 1007.

VIII. PROOF.

A. PUBLIC.—The courts take judicial notice of all public acts of the legislature, and they need not be proven. *Hart v. B. & O. R. R. Co.*, 6 W. Va. 336.

1. FOREIGN.—The usual and better, if not the only manner, of proving laws of a foreign state, when they are statutory, is by introducing in evidence a properly authenticated copy of the statute, or so much as is necessary to show the foreign law on the point or points in controversy. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. Rep. 421; *Warner v. Com.*, 2 Va. Cas. 66.

B. PRIVATE.—This court takes judicial notice of all such acts and resolutions of the legislature, though local and private, as appear to have been relied on in the court below. *Groves v. Grant County*, 42 W. Va. 587, 26 S. E. Rep. 460; *Somerville v. Wimblish*, 7 Gratt. 205.

1. MUST BE PROVEN WHEN IN ISSUE.—Private laws or acts of the legislature, it seems, must be proven when in issue. *Hart v. B. & O. R. R. Co.*, 6 W. Va. 336.

IX. INTERPRETATION AND CONSTRUCTION.

A. IN GENERAL.—Conflict and repugnance in statutes should always be avoided by construction if possible. *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. Rep. 484; *State v. Scott*, 36 W. Va. 704, 15 S. E. Rep. 405.

But the best rule to arrive at the meaning of a statute is to abide by the words the lawmaker has used, so that no clause, sentence or word shall be superfluous, void or insignificant. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409; *C. & O. Ry. Co. v. Walker*, 100 Va. 69, 40 S. E. Rep. 633.

General Rules Applicable to Criminals as Well as Civil.—In the construction of statutes whether they are penal or beneficial, restricting or enlarging the common law, four things are to be considered: 1. What was the common law before the making of the act? 2. What was the mischief and defect against which the common law did not provide? 3. What remedy the legislature hath resolved and appointed to cure the disease of the commonwealth? 4. The true reason of the remedy. *N. & W. R. R. Co. v. Prindle*, 82 Va. 130.

Where Statute Admits of Two Constructions.—When a statute admits of two constructions, the one destructive of the foundation of society, and inimical to the peace, welfare and good order of a people, and the other conducive to their welfare, and adding durability to the foundations of society, the latter should be adopted. *Offield v. Davis*, 100 Va. 253, 40 S. E. Rep. 910.

When the Meaning of the Constitution is Clear.—Where the meaning of the constitution is clear, the court, if possible, must give the statute such a construction as will enable it to have effect. *Charleston, etc., Co. v. Kanawha County*, 41 W. Va. 658, 24 S. E. Rep. 1003.

May Be Restricted or Extended.—Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter. *Brown v. Gates*, 15 W. Va. 165.

Subject, Context, Effects and Consequences to Be Considered.—The nature of the subject, the character of the statute, the context, and the effect and consequences must be regarded. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409.

No Part to Be Rejected.—Courts are justified in rejecting any part of a statute as unnecessary and irrelevant only as the last resort when it has been found impossible to give effect to all the language used, and reach a rational conclusion. *Postal Telegraph Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 82 S. E. Rep. 468.

Both Acts to Stand If Possible.—Where there are two acts on the same subject, the rule is to give effect to both if possible. *State v. Cain*, 8 W. Va. 734; *Harrison v. Allen*, *Wythe* 291; *Pitman v. Com.*, 2 Rob. 800; *Warder v. Arell*, 3 Wash. 283; *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. Rep. 815; *Somers v. Com.*, 97 Va. 759, 33 S. E. Rep. 381.

Particular Intention to Prevail.—A statute ought to be construed as a whole, and each section should be so construed that, if possible, no clause, sentence or word should be superfluous, void or insignificant, and where a general intention is expressed, and the act also expresses a particular intention, it will be regarded as an exception, and will prevail. *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. Rep. 404; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. Rep. 484.

No Part to Be Superfluous or Insignificant.—In interpreting a statute, it should be so construed, that if it can be prevented, no clause, sentence or word shall be superfluous or insignificant, and in construing a proviso or exception contained in the statute, the same rule should be applied. *Argand Ref. Co. v. Quinn*, 39 W. Va. 585, 20 S. E. Rep.

576; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. Rep. 484; *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. Rep. 404; *Bank v. County Court*, 36 W. Va. 341, 15 S. E. Rep. 78; *Elliot v. Lyell*, 3 Call 269.

One Word Not to Be Substituted for Another.—In construing a statute we are not at liberty, where the language is free from ambiguity, to substitute one word for another, and thereby change and reverse the express language of the act; yet it is a settled rule of construction to construe words used by the legislature in such manner as will advance the intention, prevent inconvenience, and avoid conflict with settled policy. *State v. Scott*, 36 W. Va. 704, 15 S. E. Rep. 405.

Rule in Construing Code.—In construing the Code, the rule of construction is that the old law is not intended to be altered unless such intention plainly appears. *Parramore v. Taylor*, 11 Gratt. 220; *Davis v. Com.*, 17 Gratt. 617; *Com. v. Maclin*, 3 Leigh 809; *Owners of Steamboat Wenonah v. Braddon*, 21 Gratt. 685.

Intent Paramount to Letter.—Statutes must be interpreted according to the intent and meaning, and not always according to the letter. *Bank v. Mercer County*, 36 W. Va. 341, 15 S. E. Rep. 78.

And the real intention of the legislature is the thing to be ascertained. *Railroad Co. v. Alexandria*, 17 Gratt. 176.

Popular Import.—The popular received import of words furnishes the general rule for the interpretation of public as well as private laws. *Postal Telegraph Cable Co. v. N. & W. R. R. Co.*, 88 Va. 925, 14 S. E. Rep. 803; *Daniel v. Sims*, 49 W. Va. 554, 39 S. E. Rep. 690; *N. & W. R. R. v. Prindle*, 83 Va. 130; *Slack v. Jacob*, 8 W. Va. 613; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409.

But where the language is free from ambiguity, and the intention plainly manifested by it, there is no room for construction. *Price v. Harrison*, 31 Gratt. 118.

Where Validity is the Question.—Whenever an act of the legislature can be so construed as to avoid conflict with the constitution, and give it force of law, such construction will be adopted by the courts. *State v. Workman*, 35 W. Va. 367, 14 S. E. Rep. 10; *Peel Splint Coal Co. v. State*, 36 W. Va. 842, 15 S. E. Rep. 1004; *Charleston, etc., Co. v. Kanawha County*, 41 W. Va. 658, 24 S. E. Rep. 1003; *Bridges v. Shallcross*, 6 W. Va. 574; *Osburn v. Staley*, 5 W. Va. 85; *Slack v. Jacob*, 8 W. Va. 612.

May Be Applicable to Cases Arising in the Future.—Although words of a statute are broad enough in their literal intent to comprehend existing cases they must be construed as applicable to cases arising thereafter unless a contrary intention appear. *Campbell v. Nonpareil, etc., Co.*, 75 Va. 292.

Construction Should Be Favorable to Validity.—It is the duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature may require, in some cases, where the meaning of the constitution is in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. Where the meaning of the constitution is clear, the court if possible, must give the statute such a construction as will enable it to have effect. *Slack v. Jacob*, 8 W. Va. 612; *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. Rep. 1004; *Eyre v. Jacob*, 14 Gratt. 422; *Sharpe v. Robertson*, 5 Gratt. 518; *Osburn v. Staley*, 5 W. Va. 85.

Official Terms.—Where a statute fixing the duration of an official term is ambiguous, it must be construed so as to limit the term to the shortest period. *Smith v. Bryan*, 100 Va. 206, 40 S. E. Rep. 652.

Expediency Not a Question for the Court.—The expediency or in expediency of an act is a question for the legislature and not for courts. *Slack v. Jacob*, 8 W. Va. 613; *Prison Asso. of Va. v. Ashby*, 93 Va. 667, 25 S. E. Rep. 893; *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. Rep. 1004; *Charleston, etc., Co. v. Kanawha County*, 41 W. Va. 658, 24 S. E. 1006; *Lusher v. Scites*, 4 W. Va. 11.

Province of Court and Legislature.—It is the province of courts to decide what the law is, and determine its application to particular facts in the decision of causes; the province of the legislature is to declare what the law shall be in the future. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

Intent to Be Substantially Followed.—When the legislative intent can be discovered it should be followed with reason and discretion, though such construction seem contrary to the letter when the words are obscure. *Postal Telegraph Cable Co. v. N. & W. R. R. Co.*, 89 Va. 925, 14 S. E. Rep. 803.

Extension and Restriction as to Letter.—Statutes are sometimes extended to cases not within the letter of them; and cases are sometimes excluded from the operation of statutes, though within the letter; on the principal that what is within the intention of the makers of the statute is within the statute, though not within the letter; and that what is not within the intention of the maker is not within the statute; it being an acknowledged rule in the construction of statutes, that the intention of the makers ought to be regarded. *Brown v. Gates*, 15 W. Va. 181; *Chalmers v. Funk*, 76 Va. 722; *Brown v. Gates*, 15 W. Va. 165.

Some Degree of Implication May Be Used.—The spirit as well as the letter of a statute must be respected, and when the whole context of the law demonstrates a particular intent in the legislature to effect a certain purpose, some degree of implication may be called to aid the intent. *Gas Co. v. Wheeling*, 8 W. Va. 320.

B. OBJECT.—In the interpretation of statutes, the primary object is to ascertain the intention of the lawmakers, and to give that intention effect, although the construction may not be in conformity with the letter of the law. *Chalmers v. Funk*, 76 Va. 721; *Forqueran v. Donnally*, 7 W. Va. 114; *Smith v. Bryan*, 100 Va. 199, 40 S. E. Rep. 652.

And no law will be construed to defeat the legislative intention but to carry it out. *Phillips v. Com.*, 19 Gratt. 485.

C. WHERE MEANING IS AMBIGUOUS.—When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion. *Offield v. Davis*, 100 Va. 257, 40 S. E. Rep. 910.

D. MEANS OF LEARNING INTENT.

1. CONTEXT.—A safe and established rule in the construction of statutes is, that the intention of the law giver and the meaning of the law are to be discovered and deduced from a view of the whole, and of every part taken and compared together. *Fox v. Com.*, 16 Gratt. 10; *Postal Telegraph Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. Rep. 468; *Gas Co. v. Wheeling*, 8 W. Va. 320; *Offield v. Davis*, 100 Va. 257, 40 S. E. Rep. 910.

Words, Subject Matter and Purpose.—In the construction of statutes, regard should be had not only to the literal sense of the words, but also to the context in which they stand, the subject matter, and the purpose and reason of the law. *Railroad Co. v. Alexandria*, 17 Gratt. 176.

2. STATUTES IN PARI MATERIA.—The intention of the legislature may be found from the act

itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the statute; and, whenever the intent can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute. This is the rule where the words of the statute are obscure. *Bank v. Mercer Co.*, 36 W. Va. 841, 15 S. E. Rep. 78; *Postal Telegraph Cable Co. v. N. & W. R. R. Co.*, 88 Va. 925, 14 S. E. Rep. 803; *Offield v. Davis*, 100 Va. 257, 40 S. E. Rep. 910; *Curran v. Owens*, 15 W. Va. 208; *Anable v. Com.*, 24 Gratt. 563; *Daniel v. Simms*, 49 W. Va. 551, 39 S. E. Rep. 690; *Forqueran v. Donnally*, 7 W. Va. 114.

Statutes Re-Enacted May Be Considered.—Where an act of the legislature is repealed and is re-enacted with some changes at the same time, both statutes may properly be taken into consideration in giving a construction to the latter; but the act repealed has no force whatever, only so far as it is continued in force by saving clauses and exceptions. *Curran v. Owens*, 15 W. Va. 230.

3. PURPOSE AND OBJECT.

Suppress Mischief and Advance Remedy.—It is the duty of the court at all times to so construe the law as to suppress the mischief and advance the remedy. *N. & W. R. R. Co. v. Prindle*, 82 Va. 130; *State v. Scott*, 36 W. Va. 704, 15 S. E. Rep. 405.

Effects and Consequences.—The nature of the subject, the character of the statute, the context and the effects and consequences must be regarded. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409.

Moving Cause.—The cause which moved the legislature in the enactment of a statute should always be considered in the construction of it. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409; *Fox v. Com.*, 16 Gratt. 10.

4. SUBJECT MATTER.—The nature of the subject, the character of the statute, the context, and the effects and consequences must be regarded. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409.

a. Technical Words.—Words of known legal import are to be considered as having been used in their technical sense, or according to their strict acceptation, unless there appear a manifest intention of using them in their popular sense. *Price v. Harrison*, 31 Gratt. 118.

b. Popular Meaning.—The popular or received import of words furnished the general rule for the interpretation of public laws, as well as of private and social transactions. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. Rep. 690; *Postal Telegraph Cable Co. v. N. & W. R. R. Co.*, 88 Va. 925, 14 S. E. Rep. 803; *N. & W. R. R. Co. v. Prindle*, 82 Va. 130; *Slack v. Jacob*, 8 W. Va. 613; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409; *Price v. Harrison*, 31 Gratt. 118.

Relying on Plain Words Safer.—There is always danger in giving effect to what is called the equity of a statute; it is much safer and better to rely on and abide by the plain words, although the legislature might have provided for other cases, had their attention been directed to them. *Price v. Harrison*, 31 Gratt. 118.

(i) May Be Restricted.—The real purpose and intention of the legislature is the thing to be ascertained in the construction of statutes, and to effect this the general meaning of the word may be restricted. *O. & A. R. Co. v. City Council of Alexandria*, 17 Gratt. 176.

E. AIDS TO CONSTRUCTION.

1. PREAMBLE.—The preamble may be consulted in some cases to ascertain the intentions of the legislature. But it is chiefly from the main body

the purview of the act, that the will of the legislature is to be learned; when this is clear and express, the preamble will not avail to contradict it. *Slack v. Jacob*, 8 W. Va. 613.

But a preamble cannot enlarge the scope of a statute. *Com. v. Smith*, 76 Va. 477.

2. PRIOR CONSTRUCTIONS.—When words in a statute have acquired, through judicial interpretation a well-understood legislative meaning, it is to be presumed, they were used in that sense in a subsequent statute on the same subject, unless the contrary appears. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. Rep. 690.

Ancient Statutes.—Constructions of ancient statutes which have been regarded as precedents should not be disturbed. *Com. v. Posey*, 4 Call 109.

Effects of Lapse of Time.—Where a statute is of doubtful import a court will consider the construction put upon the act when it first came into operation, and that construction, after an elapse of time, without change either by the legislature or judicial decision, will be regarded as the correct construction. *Smith v. Bryan*, 100 Va. 204, 40 S. E. Rep. 652.

a. By Those Charged with Execution.—The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. Rep. 690; *Smith v. Bryan*, 100 Va. 204, 40 S. E. Rep. 652.

3. FOREIGN CONSTRUCTIONS.—That in the interpretation of the statutes of another state, this court will adopt the construction given to such statutes by the highest judicial tribunal of such state, unless the same be in contravention of the constitution of the United States. *Nimick v. Mingo Iron Works*, 25 W. Va. 186.

English Constructions.—Whenever the legislature uses a term without defining it, which is well known in the English law, and these have a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is used in the English law. *N. & W. R. R. Co. v. Prindle*, 82 Va. 130.

4. USAGE AND CONTEMPORANEOUS CONSTRUCTIONS.—Contemporaneous construction and official usage for a long period by persons charged with the administration of the law have always been regarded as legitimate aids in the construction of statutes. *Smith v. Bryan*, 100 Va. 204, 40 S. E. Rep. 652.

In Absence of Ambiguity.—Although a custom or usage may be invoked to interpret a statute, yet where there is no doubt or ambiguity it cannot be resorted to, to contradict what is plain, or to control, vary or add to, or diminish what is expressed in formal and deliberate terms. *Delaplane v. Crenshaw*, 15 Gratt. 457.

Declarations of Draftsman Inadmissible.—The meaning of a statute should be arrived at from its own language and not from the declaration of the draftsman. *City of Richmond v. Supervisors*, 83 Va. 204, 2 S. E. Rep. 26; *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. Rep. 550.

5. FORMER STATUTES.—All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force; and a repealed section which defines a term does not change the meaning of the term when found elsewhere in the original connection, and the section repealed may be referred to, to determine the meaning of such terms. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. Rep. 690.

6. COMMON LAW.—It has been held that statutes are to be interpreted with reference to the common law in force at the time of their passage ex-

cept where the statute itself, or the courts have otherwise determined. *N. & W. R. R. Co. v. Prindle*, 82 Va. 130.

F. PRESUMPTIONS.

1. AGAINST UNDUE EXERCISE OF POWER.—Where two constructions may be put on a statute, one of which is clearly within the legislative power and the other beyond it, the legislature will be held to have intended to do what it had a right to do, and not that which was beyond its power. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591.

a. In Favor of Validity.—The presumption is in favor of the constitutionality of a statute, and the courts should give the statute effect, unless it is clearly unconstitutional. *Charleston, etc., Co. v. Kanawha County*, 41 W. Va. 658, 24 S. E. Rep. 1002; *Bridges v. Shallicross*, 6 W. Va. 562; *Osburn v. Staley*, 5 W. Va. 85.

2. AGAINST FRAUDULENT INTENT ON PART OF LEGISLATURE.—Courts will not presume fraudulent intent and corrupt purpose on the part of the legislature, but will presume the contrary. *Slack v. Jacob*, 8 W. Va. 613.

3. AGAINST CHANGE.

a. Common Law.—The common law is not presumed to be changed unless the intention to do so clearly appears in the statute. *Davis v. Com.*, 17 Gratt. 617; *Com. v. Maclin*, 3 Leigh 809.

b. Statutes.—Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change. *Parramore v. Taylor*, 11 Gratt. 243; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. Rep. 165.

Must Be in Express Words.—Whatever apparent inconsistencies may appear in the declarations of legislative will, yet it is not decent to presume that they would change their mind on the subject, without saying so in express terms. *Warder v. Arell*, 2 Wash. 283.

Protection of Life, Liberty and Character.—The courts should not impute to the legislature an intention to change a rule of common law which has received a great many solemn sanctions, without the clearest evidence of such intention; especially when it was established for the protection of life, liberty and character. *Matthews v. Com.*, 18 Gratt. 989.

4. IN FAVOR OF SANCTION OF FORMER CONSTRUCTION BY LEGISLATURE.—Where a statute has been construed by the courts, and is then re-enacted by the legislature, the construction given to it is presumed to be sanctioned by the legislature, and thenceforth becomes obligatory upon the courts. *Mangus v. McClelland*, 93 Va. 786, 23 S. E. Rep. 364; *Anable's Case*, 24 Gratt. 563.

5. AGAINST SUPERFLUOUS WORDS.—It is not presumed that the legislature intends any part of a statute to be without meaning, and all statutes *in pari materia* are to be read and construed together as if they form a part of the same statute, and were enacted at the same time. *Postal Telegraph Cable Co. v. N. & W. R. R. Co.*, 88 Va. 926, 14 S. E. Rep. 803.

6. IN FAVOR OF ORDINARY ACCEPTATION.—When a law is plain and unambiguous, whether expressed in general or limited terms, the legislature shall be presumed to mean what they have plainly expressed, and no room is left for construction. *Johnson v. Mann*, 77 Va. 265.

7. IN FAVOR OF STATUTE HAVING SOME, RATHER THAN NO EFFECT.—It is always to be presumed

that the legislature designed the statute to take effect, and not be a nullity. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. Rep. 1000; *Slack v. Jacob*, 8 W. Va. 612.

8. **AGAINST INJUSTICE.**—Where there is no express indication of legislative intention, it is not to be presumed that it was intended by any new enactment to arrest the regular prosecution of process essentially remedial, and take away the right acquired under it. *Curran v. Owens*, 15 W. Va. 208.

9. **AGAINST DISCHARGE OF PUBLIC RIGHTS.**—It is a settled rule of construction that the state is not to be presumed to have discharged the public rights without express declaration or manifest intention to that effect. *Bennett v. McWhorter*, 2 W. Va. 441.

G. STRICT CONSTRUCTION.

1. **STATUTES, PENAL.**—Penal statutes must be construed strictly. *Hall v. N. & W. R. Co.*, 44 W. Va. 86, 28 S. E. Rep. 754; *Davis v. Com.*, 17 Gratt. 617; *Com. v. Maclin*, 3 Leigh 809; *State v. Beasley*, 21 W. Va. 777.

Revenue Laws.—Revenue laws are neither remedial statutes nor laws founded on any public policy and are not liberally construed. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029, 14 S. E. Rep. 976; *Harris v. Com.*, 81 Va. 240; *Lescallett v. Com.*, 89 Va. 878, 17 S. E. Rep. 546.

2. **OF LIMITATIONS AS APPLIED TO CRIMES.**—The statute of limitations as applied to crimes comes within the general rule of strict construction. *State v. Beasley*, 21 W. Va. 777.

3. **IN DEROGATION OF COMMON RIGHT.**—Powers in derogation of common right are to be strictly construed. *Richmond v. Daniel*, 14 Gratt. 385; *Harrison v. Leach*, 4 W. Va. 383; *Harrison v. Smith*, 4 W. Va. 97; *Pendleton v. Barton*, 4 W. Va. 496; *Richardson v. N. & W. R. Co.*, 37 W. Va. 641, 17 S. E. Rep. 195; *McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. Rep. 36; *State v. Elk Island Boom Co.*, 41 W. Va. 796, 24 S. E. Rep. 590; *Delaplane v. Crenshaw*, 15 Gratt. 457.

Naked Powers in Derogation of Rights of Individuals.—Where a naked power is conferred by statute to an officer or other person, that power must be strictly pursued, especially, if by the exercise of such power the estates or rights of others may be forfeited or lost. *Holly River Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. Rep. 914.

Where Ambiguity Exists.—In statutes imposing a burden on the public where there is ambiguity, the law should be construed strictly and in their favor. *Fox v. Com.*, 16 Gratt. 11; *Com. v. R. & P. R. Co.*, 81 Va. 355.

4. **IN DEROGATION OF COMMON LAW.**—Statutes in derogation of common law should not be enlarged in its operation by construction beyond its express terms. *Harrison v. Leach*, 4 W. Va. 383; *Davis v. Com.*, 17 Gratt. 617.

5. **DELEGATING POWERS.**—Statutes delegating powers, as the right of condemnation are to be strictly construed in every particular. *Adams v. Clarksburg*, 23 W. Va. 208.

Implied When Necessarily Incident.—Authority delegated by the legislature must be in terms, and is to be construed strictly, and is never to be implied unless necessarily incident to the powers expressly delegated. *Peters v. Lynchburg*, 76 Va. 927.

Eminent Domain.—All grants of power by legislature are to be strictly construed, and this is especially true with respect to the power of eminent domain. *C. & O. R. R. Co. v. Walker*, 100 Va. 69, 40 S. E. Rep. 633.

6. **GIVING EXCLUSIVE RIGHTS.**—Exclusive rights to public franchises are not favored, and whenever

they are granted they will be construed strictly and in favor of the public. *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. Rep. 650.

7. **EXEMPTING FROM LIABILITY.**—Though it is true that laws conferring the power of taxation upon municipal corporations are to be construed strictly, it is also true that exemptions from taxation are to be construed strictly; and where the power has once been conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws. *O. & A. R. R. Co. v. City Council of Alexandria*, 17 Gratt. 176.

8. **CREATING LIABILITIES.**—It is a well-settled rule of law, that every charge upon the citizen must be imposed by clear and unambiguous language. *Fox v. Com.*, 16 Gratt. 10.

9. **IMPOSING TAXES.**—Statutes levying duties or taxes upon subjects or citizens to be construed most strongly against the government, and their provisions are not to be extended, by implication, beyond the clear import of the language used. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029, 14 S. E. Rep. 976; *Schofield v. Lynchburg*, 78 Va. 366; *City of Richmond v. Daniel*, 14 Gratt. 385; *Railroad Co. v. Alexandria*, 17 Gratt. 176.

10. **IMPOSING RESTRICTIONS ON TRADE.**—Statutes which impose restrictions upon trade or common occupation, or which levy an excise or tax upon them, must be construed strictly. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029, 14 S. E. Rep. 976.

11. **CHARTERS.**—The general rule is that charters should be strictly construed. *City of Richmond v. Daniel*, 14 Gratt. 385.

H. LIBERAL CONSTRUCTION.

1. **REMEDIAL STATUTES.**—Remedial statutes must under the rule for construing such statutes be construed largely and beneficially, so as to suppress the mischief and advance the remedy. *State v. Beasley*, 21 W. Va. 777; *Price v. Harrison*, 81 Gratt. 114.

a. *General Rules.*—1. The laws against gaming are to be construed as remedial laws. 2. Such construction shall be made as will give effect to the legislative intent and not defeat it. 3. The construction shall be, as nearly as possible, in conformity with the principles of the common law. 4. If it be possible a reasonable construction shall be made, and a reasonable and lawful intent imputed, rather than one unreasonable and unlawful. 5. All laws are, or ought to be, prospective in their action. Retrospective laws are odious, and never presumed to be intended, unless by inevitable construction. And *ex post facto* laws are void. All laws *in pari materia* should be considered together. *Pitman v. Commonwealth*, 2 Rob. 803.

b. *Registration Statutes, as Regards Writings.*—Registration statutes, as regards writings, are remedial laws and should be construed liberally. *Janesville, etc., Co. v. Boyd*, 35 W. Va. 240, 18 S. E. Rep. 381.

c. *Statutes of Jeofails.*—The statute of jeofails as regards clerical errors is remedial and should be construed liberally. *Davis v. Com.*, 16 Gratt. 134.

2. **TITLE OF STATUTES.**—The language in the title of a statute should be construed in its most comprehensive sense. *Shields v. Bennett*, 8 W. Va. 74; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470.

3. **ALLOWING REDEMPTIONS.**—Statutes allowing redemption of lands sold for taxes must be liberally construed in favor of persons entitled to redeem. *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. Rep. 379.

4. **AGAINST FRAUD.**—Statutes enacted for the suppression of fraud should receive a liberal construction. *Fitzhugh v. Anderson*, 2 Hen. & M. 289.

I. EXCEPTIONAL CONSTRUCTIONS.

1. **CORRECTION OF ERRORS.**—When one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. Rep. 950.

Mistake Leading to Different Conclusion.—A statute will be construed according to its obvious intention, though the collocation of the different branches of the provision are so arranged, by mistake, as to lead to a different conclusion. *Matthews v. Com.*, 18 Gratt. 989.

a. **Error in Arrangement.**—Where by mistake, words of a statute are arranged out of their regular order, the court may construe them as if the arrangement was correct. *Matthews v. Com.*, 18 Gratt. 989.

b. **Erroneous Reference.**—Where a statute amending a section of a given chapter of the Code refers to the section by the wrong number, and it is manifest from the title and body of the statute that another section was intended to be amended, the error as to the number of the section will be disregarded, and the statute will be applied to amend the proper section. *State v. Cross*, 44 W. Va. 315, 29 S. E. Rep. 527.

2. **INTERPOLATIONS.**—In order to enable a court to insert in a statute omitted words, the intent thus to have it read must be plainly deducible from other parts of the statute. *Hutchings v. Commercial Bank*, 91 Va. 74, S. E. Rep. 950.

a. **Must Be Necessary.**—Courts cannot, by construction, interpolate into statutes, words which do not appear there, when such interpolation is not plainly deducible from the context or other portions of the act, and when the omission would not render the act incongruous or unintelligible, nor lead to absurd results. *Johnson v. Barham*, 99 Va. 305, 88 S. E. Rep. 136.

b. **Intention Prevails.**—In the interpretation of a statute the intention of the lawmaker will prevail over the literal sense of the terms. *Offield v. Davis*, 100 Va. 257, 40 S. E. Rep. 910.

J. SPECIAL CLASSES.

I. PRIVATE AND SPECIAL.

a. **General and Particular Statutes and Clauses.**—A general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. *Conley v. Supervisors*, 2 W. Va. 416; *Sturm v. Fleming*, 81 W. Va. 701, 8 S. E. Rep. 263; *C. & O. Ry. Co. v. Hoard*, 16 W. Va. 270; *McConiha v. Guthrie*, 21 W. Va. 149; *Mason v. Harpers Ferry, etc., Co.*, 17 W. Va. 396.

General Prohibitions Not Applicable to Special Acts.—Where a prior statute is general in its terms and prohibits the taking of certain property in any case whatever, and the subsequent statute is special in its terms and authorizes the taking of such property in certain described localities only, the latter will be held to be a limitation on or qualification of the former, and the prohibition will continue in all cases except in localities specified in the subsequent statute. *McConiha v. Guthrie*, 21 W. Va. 149.

Particular Intention Will Prevail.—Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention will be regarded as an exception and will prevail. *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. Rep. 484; *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. Rep. 404.

(i) **Enactment—Effect on Prior Statutes.**—The passage of a local statute expressly applicable to only one county of a state in no way repeals, supersedes or effects an existing general law in the same words as the local law, unless it is applicable to all the

counties of the state. *Poindexter v. May*, 96 Va. 143, 34 S. E. Rep. 971.

(2) **Repeal of Special Statute.**—The repeal of a special statute must be either express, or the manifestation of the legislature must be so clear, as to amount to an express direction. *Com. v. R. & P. R. R. Co.*, 81 Va. 355; *Trehy v. Marye*, 100 Va. 40, 40 S. E. Rep. 126.

2. **ADOPTED STATUTES—PRESUMPTION.**—When the legislature adopts the statute of another country or state it is presumed to adopt the construction of such other state or country. *Doswell v. Buchanan*, 8 Leigh 365; *Danville v. Pace*, 26 Gratt. 1.

a. **Construction of Foreign Statutes.**—In the interpretation of the statutes of another state the court will adopt the construction given to such statutes by the highest judicial tribunal of such state, unless the same be in contravention of the constitution of the United States. *Nimick v. Iron Works*, 26 W. Va. 186.

3. **RE-ENACTED STATUTES.**—Where a statute has been construed by the courts and is then re-enacted by the legislature, the construction given it will be presumed to be sanctioned by the legislature, and thenceforth becomes obligatory upon the courts. *Mangus v. McClelland*, 93 Va. 786, 22 S. E. Rep. 364; *Anable's Case*, 24 Gratt. 563.

4. **ENGLISH WORDS.**—Whenever the legislature uses a term without defining it which is well known in the English law, and there, has a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is used in the English law. *N. & W. R. R. Co. v. Prindle*, 82 Va. 130.

5. **CONSTRUED WORDS.**—When words in a statute have acquired, through judicial interpretation, a well understood legislative meaning, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. Rep. 690.

6. PROVISOS, EXCEPTIONS AND SAVING CLAUSES.

a. **Provisos.**—A proviso to one section of an act cannot be applied to another section, unless it manifestly appears, by reference to the whole act, that it was the intention of the legislature that such proviso should limit the operation of other sections, than that to which it is appended. *Callaway v. Harding*, 23 Gratt. 542.

b. **Saving Clauses.**—Where an offense is made a felony by statute, and the statute is afterwards repealed, no proceeding after the repeal can be had for an offense committed under it unless the repealing statute has a proviso enabling the proceeding for offenses committed before. *Scutt v. Com.*, 2 Va. Cas. 54; *Com. v. Leftwich*, 5 Rand. 657; *Attoo v. Com.*, 2 Va. Cas. 382; *White v. Freeman*, 79 Va. 597.

c. **Jurisdiction.**—Where a statute confers jurisdiction on a court, and which is repealed without any reservation or exception, the jurisdiction to such court is taken away, and cannot be exercised. *State v. Brookover*, 22 W. Va. 214.

K. ASSOCIATED WORDS.

1. **WHEN USED IN SEVERAL PLACES.**—Where a word is used in several places in a statute with a clear and unambiguous meaning in one instance, it will be given the same in other places unless a contrary intention clearly appear. *Postal Telegraph Co. v. N. & W. R. R. Co.*, 88 Va. 999, 14 S. E. Rep. 661; *Postal Telegraph Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. Rep. 468.

2. **WORDS CONFERRING AUTHORITY.**—Words giving authority to three or more persons confer it upon a majority. *Gas Co. v. Wheeling*, 8 W. Va. 330; *Booker v. Young*, 13 Gratt. 303.

3. GENERAL WORDS FOLLOWING PARTICULAR ONES.

—When a particular class of persons or things is spoken of in a statute, and general words follow, the class first mentioned must be taken as the most comprehensive, and the general words treated as referring to matters of the same kind with such class, the effect of general words when they follow particular words being thus restricted. *Lynchburg v. N. & W. R. R. Co.*, 80 Va. 237; *American Mang. Co. v. Va. Mang. Co.*, 91 Va. 272, 21 S. E. Rep. 466.

Where Court to Be Held on a Particular Day.—Where a court directed to be held on a particular day of the month and that day falls on Sunday, the court shall be held or the proceeding take place on the next day. Va. Code, 1887, § 5, subsec. 10; *Read v. Com.*, 22 Gratt. 924; *Michie v. Michie*, 17 Gratt. 109.

L. RETROSPECTIVE LAWS.

1. DEFINITION.—A retrospective law is one which operates upon matters which occurred or rights or obligations which existed, before the time of enactment. 23 Am. & Eng. Ency. Law, 447.

May Substitute Oral for Written Evidence.—The legislature has power at its pleasure to alter the existing form of remedy, or the rules of evidence, and to substitute, in any class of cases, oral for written testimony. *Crawford v. Halsted & Putnam*, 20 Gratt. 211.

Laws Which Do Not Impair Rights.—Any rule or regulation with regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of the legislature. *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1006; *Ewing's Case*, 5 Gratt. 701.

May Change Form of Remedy but Not Impair Contracts.—It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided that no substantial right secured by the contract is thereby impaired. *The Homestead Cases*, 22 Gratt. 266.

2. RULES OF CONSTRUCTION.—A cardinal rule in interpreting statutes is to construe them as prospective in operation in every instance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively. In doubt it should be resolved against rather than in favor of retrospective operation. *Casto v. Greer*, 44 W. Va. 332, 30 S. E. Rep. 101; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. Rep. 736; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447; *Price v. Harrison*, 31 Gratt. 120; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 18 S. E. Rep. 777; *Duval v. Malone*, 14 Gratt. 24; *Tennant v. Brookover*, 12 W. Va. 337; *Phillips v. Com.*, 19 Gratt. 485; *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. Rep. 559; *City of Richmond v. Supervisors*, 83 Va. 204, 2 S. E. Rep. 26; *McCance v. Taylor*, 10 Gratt. 580; *Ryan v. Com.*, 80 Va. 385; *Ex parte Quarrier*, 4 W. Va. 210; *Curran v. Owens*, 15 W. Va. 208.

a. Statutes of Limitation No Exception.—Statutes of limitations are no exceptions to the rule that statutes are *prima facie* to be given only prospective operation. *Burns v. Hays*, 44 W. Va. 503, 30 S. E. Rep. 101; *Duval v. Malone*, 14 Gratt. 24; *Day v. Pickett*, 4 Munf. 104; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470.

b. Prima Facie Construction.—Statutes are *prima facie* to have no retrospective effect. *Elliot v. Lyell*, 3 Call 269; *State v. Mines*, 38 W. Va. 124, 18 S. E. Rep. 473; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. Rep. 736; *Warders v. Arell*, 2 Wash. 382; *Com. v.*

Hewitt, 2 Hen. & M. 181; *Day v. Pickett*, 4 Munf. 109; *Williams v. Lewis*, 5 Leigh 686; *McCance v. Taylor*, 10 Gratt. 580; *Duval v. Malone*, 14 Gratt. 24; *Price v. Harrison*, 31 Gratt. 114; *Crigler v. Alexander*, 33 Gratt. 674; *Ryan's Case*, 80 Va. 385; *Campbell v. Nonpareil Fire Brick Co.*, 75 Va. 291; *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. Rep. 371; *Tennant v. Brookover*, 12 W. Va. 337; *Hoge v. Brookover*, 28 W. Va. 304; *Thornburg v. Thornburg*, 18 W. Va. 522.

Time of Taking Effect.—No statute is to have a retrospect beyond the time of its commencement. *Crigler v. Alexander*, 33 Gratt. 674; *Campbell v. Nonpareil, etc., Co.*, 75 Va. 291.

Construction Interfering with Rights.—A statute which undertakes to give a retrospective effect to an invalid recordation, and thus divert or interfere with the rights of creditors, is to say the least, of doubtful policy. *Campbell v. Nonpareil, etc., Co.*, 75 Va. 298; *Forqueran v. Donnelly*, 7 W. Va. 114; *Danville v. Pace*, 25 Gratt. 1.

When within Proper Sphere.—Retrospective acts of legislation, when limited within the appropriate sphere, may undoubtedly be within the legislative power, and such acts have received judicial sanction. *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1006.

Where Doubt Exists.—In cases of doubt it should be resolved against rather than in favor of retroactive operation. *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. Rep. 550.

Laws Relating to Remedy.—Laws though relating to remedy, are presumed to operate in future unless plainly intended to act retrospectively. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Effect after Judgment.—The act of March 1st, 1871, entitled "an act to protect persons who aided in the late rebellion between the government of the United States and a part of the people thereof," does not operate to furnish immunity for acts done or committed by persons engaged on either side of the late rebellion, when judgment for such acts has been obtained prior to its passage. *Arnold v. Kelley*, 5 W. Va. 446.

Constitutions Have Prospective Operations.—Constitutions are deemed as intended to have a prospective operation unless a contrary intention appear. *Douglass v. Harrisville*, 9 W. Va. 162.

3. REMEDIAL STATUTES.—All statutes, remedial included, shall be construed to apply to future transactions, unless a contrary intention is inevitable. *Burns v. Hays*, 44 W. Va. 503, 30 S. E. Rep. 101; *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 437; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *City of Richmond v. Supervisors*, 83 Va. 204, 2 S. E. Rep. 26; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447; *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1006.

M. WORDS, PHRASES, ETC.

1. "HELD."—The word "held" as used in ch. 36, § 4, Acts 1891 relative to the separate assessment of lands and coal interest when owned by different persons, was construed as if the word "owned" had been used in its place. *Harrison v. Brewster*, 38 W. Va. 294, 18 S. E. Rep. 568.

2. "MAY."—The word "may" when used in statutes means must or shall only in cases where the public rights are concerned, or where the public or third persons have a claim *de jure*, that the power shall be exercised. *Bolling v. Mayor*, 3 Rand. 580.

3. "PERSONS."—When the word "person" is used in a statute, corporations as well as natural persons, are included for civil purposes. *Balt. & Ohio R. Co. v. Gallahue*, 13 Gratt. 655; *W. U. Telegraph Co. v. City of Richmond*, 26 Gratt. 1; *Miller v. Com.*, 27 Gratt. 110; *Lynchburg v. N. & W. R. R. Co.*, 80 Va. 237.

4. "PRACTICE."—The word "practice" as used in Code, ch. 32, § 2, relative to the business of a broker does not include one sale, but is used in the sense of

exercising or following a profession or calling as one's usual business to gain a livelihood. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. Rep. 575.

5. "PASSAGE."—The constitution of West Virginia provides that no act shall take effect, except those passed at the first session under this constitution, until the expiration of ninety days after its passage, unless the legislature, etc., and the word "passage" in this connection was construed to mean from the passage by both houses of the legislature, and not from the approval by the governor. *State v. Mounts*, 36 W. Va. 179, 14 S. E. Rep. 407.

6. "REGISTERED."—The word "registered" when used in our statutes relative to elections, refer to the persons whose names are placed upon the registration books provided by law as the sole record or memorial of the duly-qualified voters of the state. *Chalmers v. Funk*, 76 Va. 719.

7. "SHALL."—The West Virginia Constitution, art. 1, § 5 provides that indictments shall conclude "against the peace and dignity of the state of West Virginia." In a prosecution for stealing a horse the indictment concluded, against the peace and dignity of the state of West Virginia the court construed the word "shall" as mandatory, held that the indictment must conclude in the exact words provided by the constitution. *Lemons v. State*, 4 W. Va. 755.

8. "VACANCY."—The word "vacancy" where used in a statute, does not necessarily presuppose a former incumbent of an office. It fitly and aptly describes the condition of an office newly created, and never filled by any previous incumbent. *State v. Scott*, 36 W. Va. 704, 15 S. E. Rep. 405.

9. "PERSONAL REPRESENTATIVE."—The words "personal representative" are construed to include an executor of a will or the administrator of an estate of a decedent, an administrator *c. t. a.*, or an administrator *b. d. n.*, whether there be a will or not, a sheriff or sergeant qualifying and administering on the estate of a decedent and every committee or curator of a decedent's estate. Va. Code 1887, § 5, subsec. 4; *Brown v. Lambert*, 33 Gratt. 256; *Price v. Harrison*, 31 Gratt. 114.

10. "OTHER ACCIDENTAL CAUSES."—The words "other accidental causes" used in § 4386, revised statutes of the United States, means "other unavoidable accidental causes." *C. & O. Ry. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. Rep. 985.

11. "CATTLE, SHEEP, SWINE AND OTHER ANIMALS."—Section 4386 of the revised statutes, which forbids any railroad company which carries "cattle, sheep, swine or other animals" from keeping the same confined in its cars for a longer period than twenty-eight hours, etc., embraces horses, mules and all animals which may suffer for want of food, water or rest during such transportation. *C. & O. Ry. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. Rep. 985.

12. "DURING GOOD BEHAVIOR."—An official tenure "during good behavior" is for life unless sooner determined for cause. But a tenure "during good behavior or until removed by the mayor" is a tenure at the will of the mayor. *Smith v. Bryan*, 100 Va. 199, 40 S. E. Rep. 653.

13. "BAY OR RIVER CRAFT OR OTHER BOAT."—The words "bay or river craft or other boat," in § 17, ch. 95 of the Code, edition of 1890, embraces steamboats of five hundred tons burden. Owners of Steamboat *Wenonah v. Bragdon*, 21 Gratt. 665.

14. "AND SO FORTH."—The words "and so forth" express nothing and mean nothing as a compliance with art. 5, § 15 of the Constitution of Virginia which provides that no law shall embrace more than one object which shall be expressed in its title. *Lacey v. Palmer*, 98 Va. 159, 24 S. E. Rep. 930.

15. "MEMBERS ELECTED."—Upon a bill filed to de-

clare a statute void, on the ground that it was not passed by a majority of the members elected, the words "members elected" was construed to mean the members entitled to vote at the time the bill was passed. *Osburn v. Staley*, 5 W. Va. 85.

16. "ADJOURNED FROM DAY TO DAY."—Where a law authorizes a court, or the proceedings of an officer, to be "adjourned from day to day," an adjournment from Saturday to Monday is legal. Va. Code 1887, § 5, subsec. 10; *Michie v. Michie*, 17 Gratt. 109; *Read v. Com.*, 23 Gratt. 924.

17. "OFFICE WITHIN THE GIFT OF THE PEOPLE."—As applied to officers, art. 3, § 2, Virginia Constitution containing the words "office within the gift of the people" was construed to include officers appointed by the legislature as well as those elected by popular vote. *Black v. Trower*, 79 Va. 123.

X. REPEAL.

A. IN GENERAL.—A repealing statute is such an express enactment, as necessarily diverts all inchoate rights which have arisen under the statute, and fall with it, unless saved by express words in the repealing clause. *Curran v. Owens*, 15 W. Va. 208.

New Provisions Overruling Former Effect.—Where a new provision is made, imposing a liability as to which the original act is silent and the new provision operates to overrule the legal effect of the former law, but changes none of its terms, it does not "amend" in the sense of the constitution. Art. 4, § 16; *Anderson v. Com.*, 18 Gratt. 296.

Effect of Custom.—Although a custom otherwise good may override and displace the common-law rule, yet a statute introducing a new principal, with a negative either express or necessarily implied, must be strictly pursued and no custom can be set up against it. *Delaplane v. Crenshaw*, 15 Gratt. 457.

Latest Act Prevails.—Two statutory provisions *in pari materia* are passed at different times, but both are incorporated in several statutes enacted at a general revision of the statute laws: if there be any difference between them, the court will look to the dates of the original enactments, and give effect to the last passed. *Winn v. Jones*, 6 Leigh 74.

1. POWER NOT GIVEN TO COURTS.—The legislature cannot confer upon the courts the power to supersede, revoke or annul a city ordinance upon the petition of taxpayers, for such power is legislative and cannot be exercised by the courts. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

2. POWER TO REVOKE EQUIVALENT TO POWER TO REPEAL.—The power to revoke or annul a statute or ordinance is equivalent to the power to repeal it: and in either case the power is legislative, and not judicial, in its character. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

3. COURT TO DETERMINE.—The question whether a statute has been repealed, is one to be determined by the courts. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

4. PRESUMPTION.—The presumption is always against the intention to repeal where express terms are not used. *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. Rep. 815; *Somers v. Com.*, 97 Va. 759, 23 S. E. Rep. 381.

a. What Necessary to Justify.—To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. Rep. 815; *Somers v. Com.*, 95 Va. 759, 23 S. E. Rep. 381.

B. EXPRESS.

Constitutional Provisions Not Applicable.—The provision of the constitution that no law shall be reviewed or amended by its title, etc., does not relate to the repeal of a law either by express words, or by the enactment of a subsequent law with which

the former is inconsistent, and by which it is necessarily displaced. *Shields v. Bennett*, 8 W. Va. 74.

Constitutional Authority.—Authority delegated to the legislature by the constitution, which is prospective in its operation, does not operate a repeal of a law in force at the time of its adoption. *Douglass v. Harrisville*, 9 W. Va. 162.

1. **PRESUMPTION WHERE NOT EXPRESS.**—The presumption is always against the intention to repeal where express terms are not used. *Davies v. Creighton*, 33 Gratt. 696.

C. IMPLIED.

1. **INGENERAL.**—The established doctrine undoubtedly is, that repeal by implication are not favored, but when there are two acts on the same subject that are irreconcilable, the latter act prevails, and the first is repealed to the extent of the repugnancy. *Justice v. Com.*, 81 Va. 209; *C. & O. Ry. Co. v. Hoard*, 16 W. Va. 370; *State v. Cain*, 8 W. Va. 732; *Conley v. Calhoun Co.*, 3 W. Va. 416; *Forqueran v. Donnally*, 7 W. Va. 114.

2. **CONSTRUCTION FAVORED.**—To repeal a statute by implication it must appear, that the latter provision is certainly and clearly hostile to the former. If by any reasonable construction the two statutes can stand together, they must so stand. *State v. Enoch*, 26 W. Va. 254.

3. **BY REPUGNANCY.**—Two inconsistent laws cannot regulate the same subject, the former ceases to be a law, while the latter prevails. *Shields v. Bennett*, 8 W. Va. 74; *Conley v. Supervisors*, 2 W. Va. 416.

a. *Must Be Plain and Visible.*—Statutes are not considered to be repealed by implication, unless the repugnancy between the new provisions and former statutes be plain and visible. *Forqueran v. Donnally*, 7 W. Va. 114; *McConiha v. Guthrie*, 21 W. Va. 148; *Davies v. Creighton*, 33 Gratt. 696; *Ryan v. Com.*, 80 Va. 385; *Hogan v. Guigon*, 29 Gratt. 706.

b. *Not to Be Presumed.*—A repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable. *Davies v. Creighton*, 33 Gratt. 696.

c. *Affirmative Statutes.*—Where there are two affirmative statutes, and they do not conflict with each other, the latter does not repeal the former. *Wardner v. Arell*, 2 Wash. 282.

d. *Repeal May Be Partial or Total.*—A subsequent statute may be inconsistent with a part of a former one, and so operate as a repeal of that part by implication; or it may be wholly inconsistent with any part of the former one, so as not to repeal it but may operate to modify the construction and effect of the former law. *Anderson v. Com.*, 18 Gratt. 295.

e. *General and Special Statutes.*—It is well settled that a statute, general in its terms and without negative words, will not be construed to repeal by implication the particular provisions of a former one, which is special in its application, to a particular case or class of cases unless the repugnancy be so glaring and irreconcilable as to indicate legislative intention to repeal. *Chesapeake, etc., Ry. Co. v. Hoard*, 16 W. Va. 370; *Mason v. Harper's Ferry, etc., Co.*, 17 W. Va. 396; *Powell v. Parkersburg*, 28 W. Va. 698; *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. Rep. 363; *McConiha v. Guthrie*, 21 W. Va. 149.

Local Statute—Effect of Enactment.—The passage of a local statute, expressly applicable to only one county of the state, in no way repeals, supersedes or affects an existing general law in the same words as the local law, unless it is applicable to all the counties of the state. *Poindexter v. May*, 98 Va. 143, 34 S. E. Rep. 971.

Must Be Express, or Intent Clear.—The repeal of a special statute must be either express, or the mani-

festation of the legislative intent, to repeal, must be so clear, as to amount to an express direction. *Com. v. R. & P. R. Co.*, 81 Va. 355; *Trehy v. Marye*, 100 Va. 40, 40 S. E. Rep. 126.

f. *Prescribing Exclusive Rules.*—Although a subsequent statute be not repugnant, to a former one in all its provisions, yet if the latter was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act. *Fox v. Com.*, 16 Gratt. 11.

4. BY ACT COVERING ENTIRE SUBJECT.

a. *General Rule.*—Where a later statute embraces the whole subject of the former, and is plainly substituted for all former laws on the subject, the former will be deemed repealed. *Somers v. Com.*, 97 Va. 759, 33 S. E. Rep. 381; *State v. Cain*, 8 W. Va. 734.

b. *Revisions.*—A statute is repealed by implication when there is a subsequent one revising the whole subject matter of the first. *Conley v. Supervisors*, 2 W. Va. 416.

c. *By Amendments.*—When a statute is revised and a provision contained in it is omitted in the new statute, the inference to be drawn from such course of legislation is that a change in the law was intended to be made. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029, 14 S. E. Rep. 976.

Criminality of Offense Repealed.—Acts 1897-8, 745 expressly refers to act of March 5, 1888, amending it and the Code, §2148, "So as to read as follows," substituting the words of the amending act. The act of 1888, prohibited dredging on private grounds, even though it be by the owner, and prescribes a penalty; the act of 1898 prohibits dredging without attaching a penalty or making it a crime. *Held*, that the criminality of the offense is repealed by implication. *Somers v. Com.*, 97 Va. 759, 33 S. E. Rep. 381.

Where Intention Is Manifest.—A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as reason and common sense, operate to repeal the former. *State v. Cain*, 8 W. Va. 733; *Hogan v. Guigon*, 29 Gratt. 705; *State v. Mines*, 38 W. Va. 126, 18 S. E. Rep. 470; *Herron v. Carson*, 26 W. Va. 62.

5. **IMPLIED REPEAL NOT FAVORED.**—The repeal of statutes by implication is not favored by the courts. *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. Rep. 815; *Somers v. Com.*, 97 Va. 759, 33 S. E. Rep. 381; *Augusta Nat. Bank v. Beard*, 100 Va. 687, 42 S. E. Rep. 694; *Davies v. Creighton*, 33 Gratt. 696; *Sinclair v. Young*, 100 Va. 284, 40 S. E. Rep. 907; *Fox v. Com.*, 16 Gratt. 1; *Justice v. Com.*, 81 Va. 209; *Warders v. Arell*, 2 Wash. 282.

a. *Presumption.*—The repeal of statutes by implication is not favored, and the presumption is always against the intention to repeal where express terms are not used. *Augusta Nat. Bank v. Beard*, 100 Va. 687, 42 S. E. Rep. 694; *Davies v. Creighton*, 33 Gratt. 696; *Sinclair v. Young*, 100 Va. 284, 40 S. E. Rep. 907.

b. *Repugnance Must Be Plain.*—The law does not favor a repeal by implication unless the repugnance be quite plain, and then only to the extent of such repugnance. *Holladay, Judge v. The Auditor*, 77 Va. 429; *Hogan v. Guigon*, 29 Gratt. 705; *Fox v. Com.*, 16 Gratt. 1; *Justice v. Com.*, 81 Va. 209.

D. EFFECT.

1. **GENERAL RULE.**—The general rule is, that a repealed statute cannot be acted upon, after it is repealed, but as to all matters that have taken place under it, they remain valid and cannot be questioned. *Curran v. Owens*, 15 W. Va. 308; *White v. Freeman*, 79 Va. 597.

Intention to Be Manifest.—Courts will not readily intend, where the legislature enacts a general law upon a given subject and repeals an existing, general law, of like character upon the same subject,

that it was the intention of the legislative, by the repeal, to deprive the parties who acquired just rights or interests under the old law of all remedy, or to extinguish their rights or interests, unless such intention is manifest. *Forqueran v. Donnally*, 7 W. Va. 114.

Continuous Operation.—Where a statute which confers either a right or remedy is repealed by a subsequent statute which substantially re-enacts the provisions of the repealed statute, so that there is no moment of time when the repealed statute was not the law, the two statutes will be regarded as one continuous law, uninterrupted in its operation. *Tennant v. Divine*, 24 W. Va. 387.

2. ON INTEREST UNDER REPEALED STATUTE.

a. Inchoate Rights.—Inchoate rights derived under a statute, are lost by a repeal of the statute before they are perfected, unless they are saved by express words in the repealing statute. *Crawford v. Halsted*, 20 Gratt. 211.

b. Past or Closed Rights.—Acts done under a statute while in force, remains valid, though the statute may afterwards be repealed, but the rule goes no farther than to render valid, things actually done. *Crawford v. Halsted*, 20 Gratt. 211.

3. ON PENDING INTEREST.

a. Remedies.—If the repealing act does not substantially re-enact a section of the law repealed, which gave the right of action, and there is no saving clause as to pending suits and no general law on the subject, the legislative intent is clear that all suits brought upon the repealed act fall, unless carried into judgment. *Curran v. Owens*, 15 W. Va. 208.

What Constructions Not Favored.—A construction which repeals former statutes or laws by implication and divests long approved remedies, is not favored in any case. *Forqueran v. Donnally*, 7 W. Va. 114.

Proceedings Determined.—Where a statute providing a remedy is repealed while the proceedings are pending, such proceedings are thereby determined unless the legislature shall otherwise provide. *Jones v. Com.*, 86 Va. 664, 10 S. E. Rep. 1005.

And a right of action, which does not exist at common law but depends solely upon statute, falls with the repeal of the statute without a saving clause or a general law saving pending suits, unless that right has been carried into judgment. *Curran v. Owens*, 15 W. Va. 208.

b. Contracts.

Re-Enactment Validates.—Where one has lost a remedy, given or permitted to him, by statute, after which loss the right is again extended, it is valid, and does not impair the obligation of the contract. *Caperton v. Martin*, 4 W. Va. 138.

c. Jurisdiction.—Where a statute confers jurisdiction on a court, and which is repealed without any reservation or exception, the jurisdiction to such court is taken away and cannot be exercised. *State v. Brookover*, 22 W. Va. 214.

d. Penalties and Forfeitures.—No penalty can be enforced after the repeal of the law imposing it, unless saved by express words in the repealing act. *White v. Freeman*, 79 Va. 597.

Different Penalty—Failure to Repeal.—A statute passed in the session of assembly of 1827-8 prescribing a new punishment for an offense committed after the first of May 1828, does not repeal former statutes, defining the offense, and prescribing other punishment for the same, as to such offense committed before May 1st, 1828. *Com. v. Pegram*, 1 Leigh 569.

Right to Penalty Extinguished.—Where a statute repeals a former one which imposed a penalty, the right to the penalty is extinguished even though a

prosecution for it has been previously commenced. *Curran v. Owens*, 15 W. Va. 208.

Repeal after Conviction Arrests Judgment.—Where there is a criminal prosecution under a statute, which is repealed after conviction, the judgment is thereby arrested. *Curran v. Owens*, 15 W. Va. 208.

Applicable to Civil Cases.—Code 1873, ch. 15, § 13, providing that if by a new law repealing a former law, any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect, applies to forfeitures in civil as well as criminal cases. *White v. Freeman*, 79 Va. 597.

Offender Released.—Where an offense is made a felony by statute, and the statute is afterwards repealed, no proceeding after the repeal can be had for an offense committed under it unless the repealing statute has a proviso enabling the proceeding for offenses committed before. *Scutt v. Com.*, 2 Va. Cas. 54; *Com. v. Leftwich*, 5 Rand. 657; *Attoo v. Com.*, 2 Va. Cas. 388.

4. OF REPEAL AND RE-ENACTMENT.

Similar Remedy.—When a statutory remedy for a right created by that statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. *Curran v. Owens*, 15 W. Va. 208.

Continuous Operation.—Where a statute repeals and re-enacts the provisions of the former law such provisions re-enacted, are considered, as never ceasing to operate. *Burns v. Hays*, 44 W. Va. 503, 30 S. E. Rep. 101; *Curran v. Owens*, 15 W. Va. 208; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476.

Code Provisions Applicable.—Code 1887, § 4202, which provides for the repeal of all acts of a general nature upon the adoption of the Code, repealed the act of March 9, 1880, relating to the action of ejectment in certain counties, which act is a general law. *Carter v. Edwards*, 88 Va. 205, 13 S. E. Rep. 353.

5. OF REPEAL OF REPEALING ACT.

Repeal Not to Revive Former Law.—When a law which has repealed another shall itself be repealed, the previous law shall not be revived without express words to that effect, unless the law repealing it be passed during the same session. Va. Code, 1887, § 7; *Proudfitt v. Murry*, 1 Call 394; *Booth v. Com.*, 16 Gratt. 519; *Crawford v. Halsted*, 20 Gratt. 211.

Omissions Not Revived.—When a statute is revised, or one act framed from another and some parts are omitted, the omitted parts are not revived by construction, but are annulled. *Combined Saw etc., Co. v. Flournoy*, 88 Va. 1029, 14 S. E. Rep. 976.

Qualifying Statute.—An express repeal of a subsequent qualifying statute will restore the prohibition in the former general statute to its original force, and it will then operate as though the qualifying statute had never existed. *McConiha v. Guthrie*, 21 W. Va. 134.

a. Common Law Revived.—When a statute is repealed which itself repealed the common law, the common law is thereby revived. *Insurance Co. of Valley of Va. v. Barley*, 16 Gratt. 363; *Booth v. Com.*, 16 Gratt. 519; *Nickels v. Kane*, 82 Va. 312; *Rose v. Brown*, 11 W. Va. 142; *Moseley v. Brown*, 76 Va. 419; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470.

(1) Code Provisions Not Applicable.—If an act repealing a provision of the common law is itself repealed, the common law is revived, but the act, Va. Code, ch. 16, § 19, p. 102, applies to statutes and not to the common law. *Booth v. Com.*, 16 Gratt. 519; *Insurance Co. of Valley of Va. v. Barley*, 16 Gratt. 363; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470.

Thomas Pollard v. The Commonwealth.

June, 1827.

Criminal Law—Competency of Jurors—Opinion Formed*

—Case at Bar.—A juror, who having heard the testimony of a witness in the cause, and then formed an opinion on it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable he had expressed it, but declared that at the time of the trial he had no prejudice against the prisoner or his cause, and that he could, as he believed, give the prisoner as fair a trial as if he had not any thing on the subject, is an impartial juror, and a challenge against him for cause ought to be overruled.

This was an application for a Writ of Error to a judgment of the Superior Court of Law for the county of Cumberland, whereby the petitioner was sentenced to confinement in the Penitentiary-house for the term of five years, having been convicted of murder in the second degree. The application was founded on an alleged error in the Court's refusal to sustain the prisoner's challenge for cause of John H. Parker, a juror summoned to try him, and for putting him to his peremptory challenge. The prisoner filed a bill of exceptions, which stated that in the progress of the cause, John H. Parker was called as a juror, and upon being sworn to answer questions, said "that he heard one of the witnesses testify in the case

660 "of the prisoner in the Called Court: that he did not know that he heard all the evidence given by that witness: that upon the evidence of the said witness, he formed an opinion at the time: that he did not know that he expressed it, or that he did not, but thinks it most probable that he did express it: that he had no prejudice against the prisoner, or his cause at this time, (that is, at the time of the trial,) and that he believed he could give the prisoner as fair a trial as if he had never heard any thing on the subject, and that if he was capable of giving him a fair and impartial trial before he heard any thing of his case, he could do the like now."

Under the above circumstances, the Court ruled and determined that the said Parker was a good juror, and that the prisoner must take him as such, or peremptorily challenge him. He did peremptorily challenge him, and excepted to the opinion of the Court.

The General Court, after conferring on the subject, decided that the said Parker was an impartial juror, and could not be challenged for cause, and overruled the application for a Writ of Error.

The Commonwealth v. William Carver.

June, 1827.

Superior Court Judgment—Effect of General Court—Judgment on.—In general, the judgment of a Superior Court, although in favor of a prisoner, ought to yield to that of the General Court, expressed in an analogous case.

***Criminal Law—Competency of Jurors—Opinion Formed.**—See on this subject, *foot-note* to Com. v. Hallstock, 2 Gratt. 564; *foot-note* to Jackson v. Com., 23 Gratt. 920; monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

The principal case is cited on the subject in Brown v. Com., 2 Leigh 778; Jackson v. Com., 23 Gratt. 930, 933; State v. Baker, 33 W. Va. 324, 10 S. E. Rep. 641; *foot-note* to Com. v. Hughes, 5 Rand. 655 (containing an excerpt from State v. Baker, 33 W. Va. 324, 10 S. E. Rep. 641).

Unlawful Shooting—Statutes—Application of.—A negro slave is a person on whom a free person may commit the offence of malicious or unlawful shooting, stabbing, &c. under the act against those of fences, passed 9th February, 1819.

This was an adjourned case from the Superior Court of Cumberland. The prisoner was indicted for feloniously, maliciously, and unlawfully shooting, with intent to maim, disfigure, disable, and kill, a negro man slave of the name 661 "of Armistead, the property of Andrew Houston. The indictment was framed on the act against shooting, stabbing, maiming and disfiguring, passed 9th February, 1819. He was convicted by the jury, and on being brought up to receive his sentence, he moved the Court to arrest the judgment, on the ground that the act of Assembly "does not make it a felony for a free white man to shoot a negro slave, the property of any free man." The Judge of the Court "being inclined to the opinion that a negro slave is not a subject, or person on which the offence created, and the penalties prescribed by the first and second sections of the act, can be committed or incurred, and feeling some doubt as to the obligation imposed upon him by the decision of the General Court in Dolly Chapple's Case, doth, with the consent of the prisoner, adjourn to the General Court for its decision, the following questions: 1. In a criminal prosecution, wherein the judgment of the presiding Judge, if given in favor of the prisoner, would acquit him of the offence of which he was indicted, should such Judge pronounce judgment according to his own opinion, or is it the duty of such Judge in such case to suffer his opinion to be overruled by the previous opinion and judgment of the General Court, in any analogous case? If the first branch of this question be decided in the affirmative, and the second in the negative, no further question is adjourned; but if otherwise, then is adjourned, 2dly, Should judgment be arrested in the present case? And is a negro slave a subject or person on whom a free person can commit the offence created by the 1st and 2d sections of the act against Mayhem?"

BROCKENBROUGH, J. delivered the opinion of the General Court. He stated the case, and then said:

In answer to the first question, it may be remarked, that the whole system of our judicial polity is founded on the idea that the Inferior Tribunals are bound by 662 the decisions "of the Supreme Appellate Tribunal. There should be an uniformity of construction of the same law throughout the State, and this cannot be attained, without giving to the Appellate Court a superintending and controlling influence over the judgments of the Inferior Courts. It is not denied, that if the decision of the Highest Tribunal has been made by a divided Court, or upon a first impression, or it becomes doubtful whether the decision will be adhered to, upon a re-consideration of it, the Inferior Judge,

†See principal case cited in State v. Harr, 38 W. Va. 64, 17 S. E. Rep. 796; *foot-note* to Com. v. Lester, 2 Va. Cas. 198, containing an extract from State v. Harr, 38 W. Va. 64, 17 S. E. Rep. 799. See also, Com. v. Chapple, 1 Va. Cas. 184.

if he thinks it erroneous, may adjourn the question again, or may give a judgment contrary to it, for the purpose of having it re-viewed by the Supreme Tribunal. But, in general, the decision ought to be respected and obeyed. The same rule ought to prevail in Criminal as in Civil cases. If a construction of a law favorable to the accused, has been given by the General Court, there can be no doubt that the Judge of the Circuit Court ought not to disturb it; and if one unfavorable to him has been rendered, there is, perhaps, a stronger reason why the Circuit Court should yield its own opinion. In the former case, if the Circuit Judge refuses to carry into effect the decision of the General Court, the prisoner may except to his opinion, and his judgment may be re-viewed, and another opportunity will thereby be afforded to the Appellate Tribunal to re-consider its own opinion, but in the latter case, if the former decision of the General Court is disregarded, the case is at an end, because the Commonwealth's Attorney cannot except to any opinion of the Court; nor will a Writ of Error lie in behalf of the Commonwealth to an erroneous judgment of a Court given in favor of a prisoner.

This brings us to the second question, namely: Whether, under our present act against Mayhems, a free person shall be deemed guilty of felony, who maliciously or unlawfully shoots a slave?

Dolly Chapple's Case, 1 Virg. Cases, 184, was decided by the unanimous judgment of the seven Judges who were present, after an argument from the counsel for the

663 prisoner, "and the Commonwealth. That decision was founded on the act of 1803, which declared, that "whosoever shall wilfully, maliciously, and of purpose stab, or shoot another," with intention, &c. such offender shall be sentenced to a confinement in the Penitentiary, &c. The Court decided that a slave was a person on whom the offence of stabbing and shooting might be committed, and that the act was intended to protect slaves as well as free persons from such outrages. The same language is used in the act of 1819; and as the Legislature had the decision in Dolly Chapple's Case before them when they revised all the laws on the subject of Mayhem, and did not think proper to use plain words by which to exclude slaves from the protection of the act, we are of opinion that the same construction should now be adhered to, as in that case.

It has been supposed, however, that the words "being free," in the present act, do shew an intention in the Legislature to exclude slaves from the operation of the act. To give it this effect, however, it is necessary to dislodge the words "being free," from their present place in the section, and place them immediately after the word "whosoever," in the beginning. Thus transposed, the act would read thus: "Whosoever being free, shall shoot or stab another;" and it is supposed that the word another, has relation to the words "being free," so as to declare that whosoever being free shall shoot or stab another. being free, such offender shall be punished in the way provided for by the act. We

do not see the necessity for such a violent transposition of the words of the section. Placed as they are by the Legislature, they seem to be as plain as language can be made. There are in this country two classes of offenders, as to whom, the Legislature, from motives of public policy, have thought proper to prescribe different punishments for the same offence: these are the free man, and the slave. The former may be sent to the Penitentiary, the latter may not. The Legislature, therefore, thought it necessary in the revival of 1819, to make a distinction

664 *between these two classes of offenders, and in the act under discussion. they have appropriated the two first sections to a specification of the acts declared felonious, and to a denunciation of a certain punishment on free persons who commit those offences; and the third section provides a different punishment for the slave who shall commit either of the offences in the two first sections mentioned. The language of the act then is plainly this: that "whosoever" that is, whatever person "shall shoot, or stab another," that is, another person, "every such offender being free, his or her counsellors, aiders and abettors, being free," shall be a felon, and punished by confinement in the Penitentiary; but, if any slave shall commit any of the said offences, he is declared a felon, and shall suffer as in case of felony.

It has also been supposed, that the proviso in the first and second sections proves, that the Legislature did not intend that a free person shall be punished for maiming a slave. This objection, or a similar one, was made in Dolly Chapple's Case, and overruled. The giving an action to the party grieved, as in case of trespass, was intended as a benefit to him; but, the incapacity of a slave to bring an action, and his consequent inability to receive the benefit, should not exempt the guilty person from the punishment provided by law for the offence. An alien enemy is entitled to protection, whilst he is permitted to remain in the country, yet he cannot maintain an action during the war: it cannot for a moment be supposed that he may be shot, stabbed, disfigured or disabled, without subjecting the offender to the other pains and penalties of the act.

The other proviso is, that the party grieved shall be a competent witness. The case before mentioned explains why this provision was made in the act of 1803. It appears to have been copied into the act of 1819, without any necessity, because the law which gave a part of the fine to the person grieved, being changed, there could not be any interest in him which

would render him an incompetent
665 *witness: but, the carelessness of the draftsman of the bill, in retaining an unnecessary proviso, affords no reason for believing that the Legislature intended to exclude the persons of slaves from the protection of the act. If such had been their intention, it would have been easy to have made the exclusion by a direct provision, instead of leaving it to a far-fetched inference.

The distinction between free persons and slaves, was present to the legislative mind: they provided a different punishment for the two classes, when they were offenders. If they had intended to make the same distinction as to the persons offended against, they would have employed the same clear language.

It may further be remarked, that there appears no reason, arising from the relative situation of master and slave, why a free person should not be punished as a felon for maiming a slave. Whatever power our laws may give to a master over his slave, it is as important for the interest of the former, as for the safety of the latter, that a stranger should not be permitted to exercise an unrestrained and lawless authority over him. It is for the benefit of the master, and consoling to his feelings, that a third person should be restrained under the pains and penalties of felony, from maiming and disabling his slave.

The following is to be entered as the judgment of the Court.

This Court is of opinion, and doth decide, 1. That it is true as a general proposition, that in a criminal prosecution, wherein the judgment of the presiding Judge, if given in favor of the prisoner, would acquit him of the offence for which he is indicted, the Judge of the Circuit Court ought to suffer his individual opinion to be overruled by the previous opinion and judgment of the General Court in an analogous case; and particularly, that the decision of the General Court in Dolly Chapple's Case, ought to have such controlling influence in this case.

666 *2. That the judgment ought not to be arrested in the present case; and that a negro slave is a subject or person, on whom a free person can commit the offence created by the first and second sections of the act, intituled "an act to reduce into one act, the several acts against malicious and unlawful shooting, stabbing, maiming and disfiguring," passed February 9th, 1819; which is ordered to be certified to the Superior Court of Law for Cumberland county.

Richard B. Courtney v. The Commonwealth.
June, 1837.

Evidence—Bank Teller's Book—Effect.—The book of a teller in a bank is not per se evidence to establish the facts appearing in that book, but may be given in evidence in connection with the evidence of the teller himself, if the said teller's evidence make it proper to refer to it, to prove that a particular entry was made. [This was in a prosecution for forgery.]

Bill of Exceptions—What It Must Show.—The bill of exceptions ought to shew clearly, that such book was offered in evidence in connection with the teller's evidence; otherwise, it will not be so presumed.

This was a Writ of Error to a judgment of the Superior Court of Henrico. The plaintiff in error was tried on an indictment

*Evidence.—See generally, monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 276.

*Bill of Exceptions—What It Must Show.—In Lawrence v. Com., 86 Va. 679, 10 S. E. Rep. 840, the court held that nothing that transpired during the trial in the court below would be considered a part of the record unless made so by a bill of exceptions

ment for the forgery of a check for ten dollars, purporting to be drawn by one John Allen, jr. on the Cashier of the Farmers' Bank of Virginia; he was convicted and sentenced. At the trial, six exceptions were taken to the opinion of the Court, on questions arising therein; all of these were embodied in one bill: it is deemed proper to state two of those points only, on one of which the judgment was reversed, there being no error in the others. The bill stated, that "on the trial a witness was introduced, who stated, that he was paying-teller of the Farmers' Bank of Virginia, and was such teller on

667 the day *on which the offence charged in the indictment was alleged to have been committed, and for some years before, and ever since, and as such, in the constant practice of paying checks drawn on the said Bank; and proved that the check, on which the indictment was founded, was paid at the said Bank; to the admission of which evidence the counsel for the prisoner excepted, there being no other proof than the statement of the said witness, that he the said witness was what he represented himself, and no evidence except his own that he was properly authorised to pay checks on the said Bank, which objection was overruled."

"On the same trial, a book, said by the last mentioned witness to be in his own hand-writing, and to be the book in which he the said witness daily entered the names of the persons, whose orders or checks were paid at the said Bank, and the amount of such checks was offered in evidence by the Attorney for the Commonwealth, to the admission of which evidence the accused also objected, which objection, however, was overruled by the Court, who permitted it to go to the jury."

In discussing this subject in conference, the Judges were of opinion, that it did not sufficiently appear from the bill of exceptions, that the teller's book was offered in evidence in connection with the evidence of the teller himself, and that therein there was error. From this opinion, the Judge who had sat in the Court below dissented, being of opinion that, taking both exceptions together, that fact did sufficiently appear.

The following was entered as the opinion of the Court.

It seems to the Court here, that there was error in so much of the judgment of the Superior Court as is set forth by the following words in the bill of exceptions, to wit: "On the same trial, a book, &c." the Court being of opinion that the said book was not per se evidence, and it not appearing that the said book was offered in evidence in connection with the evi-

or order of the court; and that the mere statement in the record that certain pleas were rejected and that parties excepted to various rulings of the court is not sufficient. The principal case, Row v. Kille, 1 Leigh 216; White v. Toncray, 9 Leigh 347; Herrington v. Harkins, 1 Rob. 591; Bowyer v. Hewitt, 2 Gratt. 198; Johnson v. Jennings, 10 Gratt. 1; Fitzhugh v. Fitzhugh, 11 Gratt. 301; Dickinson v. Dickinson, 25 Gratt. 321; Stoneman's Case, 25 Gratt. 846; 4 Min. Inst. 746, are cited as authority.

See further, monographic note on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

dence of the teller, for the purpose
668 *of proving that the check in the
said bill of exceptions mentioned was
entered as paid in that book by the said
teller. It is, therefore, considered by the
Court, that the judgment aforesaid be re-
versed and annulled, and this Court pro-
ceeding to give such judgment as the said
Superior Court ought to have given, it is
further considered that the verdict of the
jury be set aside, and that a Venire Facias
de novo be awarded, and a new trial
granted to the prisoner, on which new
trial the said book is not to be offered in
evidence per se, to establish the facts ap-
pearing in that book, but may be given in
evidence in connection with the evidence
of the teller, if the evidence of the teller
make it proper that the said book should
be referred to, to establish the fact that
any particular entry is therein made.

669 *NOVEMBER TERM, 1827.

JUDGES PRESENT.

<i>Brockenbrough,</i>	<i>Semple,</i>
<i>Johnston,</i>	<i>Summers,</i>
<i>Allen,</i>	<i>Bouldin,</i>
<i>Dade,</i>	<i>Field,</i>
<i>Saunders,</i>	<i>Daniel.</i>

Charles Wortham v. The Commonwealth.*

November, 1827.

Criminal Law—Trespass—Indictment—Sufficiency of.

—In an Indictment for a trespass or misdemeanor, it is not necessary to insert the name or surname of a prosecutor at the foot of the Indictment, if it appears that the Indictment was found true on the evidence of a witness sent to the Grand Jury either at their own request, or by direction of the Court, and this whether there was a previous presentment or not.

Same—Prosecutor.—A volunteer informer ought to be made a prosecutor, and liable for costs in case of failure; but one who is compelled to be an informer, cannot be considered a prosecutor.

Same—Gaming—Indictment—Sufficiency of.—An Indictment, which charges that unlawful gaming is carried on at a house of public resort, is good.

Same—Dismissal of Presentment—Effect.—The dismissal of a presentment by the Court, at the instance of the Attorney for the Commonwealth, is not an acquittal. It is an informal Nolle Prosequi.

Same—Felon—How Acquitted.—There are only three ways by which even a felon can be acquitted: they are, the judgment of the Examining Court, the verdict of the jury, or the failure to indict after three terms of the Superior Court have passed.

Same—Retraxit.—A dismissal of a presentment is not a retraxit, nor is a retraxit known to the criminal law, where the prosecution is carried on by the commonwealth.

Same—Plea of Autrefois Acquit—Sufficiency of.—A plea of Autrefois acquit, which does not set forth

the Court, nor the time, nor other circumstances of the trial or acquittal, nor vouch the record, nor shew it, if of another Court, should be rejected on motion. The Attorney ought not to be required, either to plead or demur to it.

At the Hustings Court for the City of Richmond, in May, 1827, an indictment was preferred to the Grand Jury by the

Attorney for the Commonwealth
670 against Charles *Wortham, for unlaw-
ful gaming at faro, and was found
“a true bill.” It charged that he, on the
10th February, 1827, unlawfully did game
by playing at a game called faro, a game
played with cards, at a house of public re-
sort, called the Chocolate House, on Twelfth
street in the said City of Richmond, and
within the jurisdiction aforesaid, contrary
to the form of the act, &c. At the foot of
the Indictment was written as follows:

“Wm. H. Allen, the witness called on,
sworn and sent to the Grand Jury by the
Court, on the motion of the Attorney for
the Commonwealth, and certified by order
of Court. (Signed) Th: C. Howard, Clk.”
The defendant having been summoned, ap-
peared and moved the Court to quash the
Indictment. The ground of this motion
was, that there was no prosecutor's name
and surname written at the foot of the In-
dictment, it not appearing from the records
in the Court that the said bill of Indict-
ment was sent to the Grand Jury, who
found the same in consequence of a pre-
vious presentment by a Grand Jury, made
on the information of any two of their own
body, or the testimony of a witness, called
on either by the Court, or the Grand Jury.
The motion was overruled, and the defend-
ant excepted to the opinion of the Court.

He moved the Court to quash the Indict-
ment on another ground: that the Indict-
ment has not followed the words of the
statute. This was also overruled, and the
defendant against excepted.

The defendant then pleaded, that a pre-
sentment was made against him on the
26th February, 1827, at the Court of Hus-
tings for the City of Richmond, for the same
identical offence charged in the Indict-
ment; and that, on the 25th May, 1827, on
the motion of the Attorney for the Com-
monwealth in this Court, it was ordered,
that the said presentment be dismissed;
and thereupon, the said defendant was dis-
charged, and he vouched the record, and
so, he concludes, that he has been hereto-
fore wholly acquitted of the said offence,
&c. To this plea, the Attorney for

671 *the Commonwealth, after craving
oyer of the record in the plea men-
tioned, demurred, and the defendant joined
in demurrer, and the Court sustained the
demurrer, and overruled the plea.

The defendant also tendered two other
pleas, in the first of which he set forth that
on the 26th February, 1827, a certain pre-
sentment was made against him by the
Grand Jury in the said Court for the same
identical offence charged in the said Indict-
ment, and that afterwards, the defendant
having appeared to answer the same, the
Attorney for the Commonwealth withdrew
the prosecution of the said presentment,
and he vouched the record. The second
plea was, that the general one that he had
been heretofore acquitted, and discharged

*For monographic note on Robbery, see end of case.

†Trespass—Indictment—Sufficiency.—See mono-
graphic note on “Indictments, Informations, and
Presentments” appended to Boyle v. Com., 14 Gratt
674.

‡Gaming—Tavern—Public Place.—A house of public
resort, whether licensed or not, is a tavern, and
consequently a public place within the meaning of
the statute as to gaming. Linkous v. Com., 9 Leigh
611, citing principal case.

See further monographic note on “Gaming” ap-
pended to Neal v. Com., 22 Gratt 917.

§Criminal Law—Nolle Prosequi—Effect.—See prin-
cipal case cited in Com. v. Adcock, 8 Gratt. 671; foot-
note to Lindsay v. Com., 2 Va. Cas. 345; McCann v.
Com., 14 Gratt. 581.

¶Criminal Law—Plea of Autrefois Acquit—Sufficiency
of.—See monographic note on “Autrefois Acquit and
Convict (Jeopardy)” appended to Page v. Com., 26
Gratt. 948.

The principal case is cited with approval on the
subject in State v. Cross, 44 W. Va. 317, 29 S. E. Rep.
528.

of the same offence now charged against him, without vouching the record. The Attorney for the Commonwealth, moved the Court to exclude both of these pleas, which was done, and the defendant excepted. The defendant then pleaded not guilty, and issue being joined on it, a verdict was rendered for the Commonwealth, and judgment pronounced against the defendant.

The defendant then applied for, and obtained a Writ of Error to the judgment of the Hastings Court, from the Superior Court of Henrico, and an issue having been made up on the said Writ of Error, that Court adjourned to this Court the following questions: "Ought the judgment of the said Hastings Court against the plaintiff (in error) to be reversed by this Court for any of the reasons set forth in the petition, or appearing on the record?"

The case was argued by Nicholas and Williams, for the plaintiff in error, and by the Attorney General and Mayo, for the Commonwealth.

BROCKENBROUGH, J. delivered the opinion of the Court.

1. In this case, an Indictment was found against the plaintiff in error, and at the foot of it were written these words: "Wm. H. Allen, the witness called on, sworn and sent to the Grand Jury by the Court, on the motion of the Attorney for the Commonwealth. Th: C. Howard, Clk." The person indicted moved the Court to quash the Indictment, because there is no prosecutor's name and surname written at the foot of the Indictment, it not appearing from the records of the Court that the said bill of Indictment was sent to the Grand Jury, who found the same in consequence of a previous presentment by a Grand Jury, made on the information of any two of their own body, or the testimony of a witness, called on either by the Court, or the Grand Jury, which motion the Court overruled, although there was no such presentment, and an exception was taken to that opinion of the Court. Whether it was right or wrong, depends on the construction of the 45th, 46th and 47th sections of the act concerning criminal proceedings. 1 Rev. Code of 1819, p. 611. The first remark to be made is, that this law cannot properly be denominated a penal statute; it neither defines, nor creates any criminal offence, nor prescribes a punishment for one. It merely directs how certain proceedings shall be carried on in trespasses and misdemeanors, preparatory to their introduction into Court. There is no reason why, in construing such an act, we should stick to the letter, nor why we should not carry into effect the obvious intention of the Legislature.

The 45th section provides, that the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession, shall be written at the foot of every bill of Indictment for any trespass, or misdemeanor, before it be presented to the Grand Jury; and the 46th section provides, that where the defendant is acquitted, &c. the prosecutor shall be liable for the costs. It seems sufficiently clear, that these two sections apply to the

case of a volunteer witness, who, believing that he himself, or some person connected with him has been injured, undertakes of his own accord to invoke the justice of his country. But, as the motives of men are various, and it is difficult to decide whether a voluntary informer be influenced by a sense of justice, or swayed by a malicious design to oppress, or harass his neighbour, the Legislature thought it proper to guard against the prevalence of this wicked motive, and to prevent vexatious prosecutions, by requiring that the volunteer should be named as prosecutor, and that in case of his defeat he should pay to his adversary his costs. But, there are many offences injurious to public morals and to the public peace, in the punishment of which no individual feels sufficient interest to bring them before the proper tribunals, and unless the functionaries of justice notice them, no restraint will be imposed on their commission. Courts and Grand Juries are conservators of the peace, and guardians of the public morals. Grand Juries are especially required by the sanction of an oath, to present all offences, and presentments are directed to be made on the knowledge of any two of their body; they are thus compelled to be informers, but if for this information they are to be subjected to the payment of costs (in case of the failure of the prosecution,) then there may be reason to fear that they will be induced, contrary to their duty and their oaths, to withhold their information. So, too, the Court or Grand Jury may have good reason to believe that an individual can prove the commission of an offence which ought to be enquired into: he is unwilling to give evidence, but he is commanded by the process of the Court to become a witness: he cannot be called a prosecutor, nor ought he to be subjected to a penalty for doing that which he is compelled to do by the constituted authorities of his country. It was to protect these two classes of involuntary witnesses, that the 47th section was enacted. The first proviso of that section declares, that when a presentment shall be made by the Grand Jury on the knowledge of two of their own body, or when a presentment shall be made on the testimony of a witness called on either by the Court, or by the Grand Jury, then neither the informing Grand Jurors, nor the witness so called on, shall be liable to costs.

A presentment in a large sense is an Indictment, for every Indictment is a presentment; the very words of the proviso then include an Indictment made on the testimony of a witness called on by the Court, or by the Grand Jury: and does not the reason of the enactment, include the case of an Indictment? Can any reason be assigned why the involuntary witness, on whose compulsory evidence an informal presentment is made, should not be deemed a prosecutor, nor liable to costs, while he, on whose compulsory evidence, a formal and regular presentment is made, is to be deemed a prosecutor, and liable to those penalties? Or, could the Legislature have intended to make a difference between the

liability of such witness, because in the one case the Grand Jury themselves prepare the charge from his evidence, and in the other case they adopt the charge already prepared for them, and sent to them with the witness? The Grand Jury may undoubtedly make a presentment in all respects as full and formal as an Indictment preferred by the regular officer of the Court, and the only difference between them in such case is, that the former is signed by the foreman, the latter is endorsed by the foreman, under the words "a true bill." Such a minute difference in form cannot make so great a difference in the character and liability of the witness. It has, however, been argued, that as the Legislature used the word presentment in the second proviso of this section, in the restricted sense of a charge prepared by themselves, they ought to be considered as having used it in the same restricted sense in the first proviso, and it is admitted that there is plausibility in the argument: but, as we know that it is legally and technically used in both senses, and as the consequence of so restricting it would defeat the intention of the Legislature, we cannot hesitate in giving it the enlarged meaning.

675 *It cannot be doubted, that it is within the power of every conservator of the peace, to recognize a person who has committed an outrage on the peace of society, to appear before the next Court to answer an Indictment to be preferred against him, and to recognize the witnesses also to appear and testify. If the construction contended for, by the plaintiff in error, be given to this clause, then if no person is willing to become the prosecutor, one of these two results must happen; either the Indictment cannot be sent to the Grand Jury at all, or the witnesses must first be sent to the Grand Jury to enable them to make a presentment, and then the Indictment being preferred in consequence of the previous presentment, the witnesses must be a second time sent to the Grand Jury to enable them to find the bill. The first would defeat public justice, and render abortive the admitted and useful power belonging to the conservators of the peace; the second would procrastinate the proceedings of the Court, and harass the Grand Jury with a double examination, which is totally unnecessary. The Legislature could not have designed that this circuitous route should be taken, when the direct path lay before them. We are of opinion, that the Court were right in refusing to quash the Indictment on this ground. In this opinion, however, two of our brethren (Bouldin and Field) do not concur.

2. The Indictment, which is under the gaming act, charged the defendant with playing at a game called faro, at a house of public resort. &c. The plaintiff in error moved the Court to quash the Indictment, because it has not followed the words of the statute. The variance alleged is, that the 5th section of the act prohibits the playing in an ordinary, race-field, or any other public place, which last are not the exact words of the Indictment. The act undoubtedly prohibits the playing at a tavern, which is both an ordinary, and a

public place. The 16th section declares, that every house of public resort shall be deemed and taken to be a tavern, 676 within the true intent and meaning *of the act. If the Indictment had charged the playing to be at a tavern, it would have been good, because a tavern is *ex vi termini* a public place, nor has any authority been shewn to prove, that it would be necessary to lay it under a *scilicet*. But, a house of public resort is by the law a tavern, and therefore, a public place. The charge is laid in the very words of the 16th section, and is as correct as if laid in the words of the 5th. The Court properly refused to quash on this ground.

3. The defendant then pleaded *Auterfois acquit*, and in his plea he set forth, that he had been presented for the same offence in the same Court, on a day certain, and that on another day certain, at the instance of the Attorney for the Commonwealth, it was ordered, for reasons appearing to the Court, that the said presentment be dismissed; and thereupon, (the plea alleged,) that the said defendant was discharged, and thereof went thence without day, and he vouched the record. The Attorney for the Commonwealth cravedoyer of the record, (which is set out, and shews that the presentment was dismissed by the Court at the instance of the Attorney,) and demurred to the plea. This demurrer brings on the question, whether the dismissal of the presentment be an acquittal. In this order for a dismissal, there is no judgment that he be thereof acquitted, and go hence without day, nor is it believed that there is any mode by which a prisoner, even in case of felony, can be acquitted of the offence with which he stands indicted, unless by the judgment of the Examining Court, or by the verdict of a jury, or the failure to indict him after three terms of the Superior Court have passed. This dismissal is an informal *Nolle Prosequi*, which is never considered in England as an acquittal, (1 Chitty's Cr. Law, p. 480,) and was so decided here in Lindsay's Case, 2 Virg. Cas. p. 345. The demurrer was properly sustained.

4. The defendant then pleaded, that he had been presented for the same identical offence in the same Court, and that on a day certain afterwards, the Attorney 677 for the *Commonwealth withdrew the prosecution of the presentment, and he vouched the record. The Court, on the motion of the Attorney for the Commonwealth, rejected the plea. This Court is of opinion, that the decision was correct for two reasons. 1. Because the record which was vouched, shewed there was no retraxit, but a simple dismissal, or *Nolle Prosequi*. 2. Because a retraxit is believed to be unknown to the criminal law, at least as far as it regards a prosecution at the suit of the Commonwealth, although it is used in England in cases of appeal, which is a prosecution carried on at the suit of an individual. As was well observed at the bar, this power of a retraxit is a dispensing power, and the law has not entrusted it to a prosecuting attorney.

5. The defendant also pleaded, that he

had been theretofore acquitted of the same offence. This plea is general; does not set forth the Court in which, nor the time when, nor any other circumstance of the prosecution, trial, or acquittal: nor did he vouch the record of the same Court, nor shew the record of acquittal, if of another Court. This was necessary to be done according to the decision in Myers's Case, 1 Virg. Cas. p. 230. The attorney could do nothing else than when he has done. He could not plead nul tiel record, because no record was vouched or shewn; and it would not have been proper to demur, since he might thereby have admitted the truth of the plea. The Court, according to Myers's Case, pa. 232, did right to overrule the plea.

For these reasons, the following judgment is to be entered.

This Court is of opinion, and doth decide, that the judgment of the Hustings Court in the record mentioned, ought not to be reversed for any of the reasons set forth in the petition, or appearing in the record; which is ordered to be certified to the Superior Court of Law for Henrico county.

ROBBERY.

I. Definitions.

- A. At Common Law.
- B. Robbery of Crop by Employee.

II. Distinction.

- A. Robbery Distinguished from Simple Larceny.

III. What Constitutes Robbery.

- A. Intent.
- B. Existence of Intent at Time of Taking.

IV. Attemptus.

- A. Murder in Attempting Robbery.
- 1. Grade of the Crime.

V. The Indictment.

- A. Good at Common Law, Good under Statute.
- 1. Sufficient at Common Law.
- B. Bad for Robbery, Good for Assault.
- 1. Verdict Good for Lesser Offense.
- 2. Word "Felonious" Necessary.
- C. Description of Property.

VI. Clerk's Charge to Jury.

VII. Evidence.

- A. Admissibility.
- B. Sufficiency.

VIII. Instructions.

- A. Burden of Proof.
- B. Assuming Guilt.

IX. New Trial.

Cross References to Monographic Notes.

- Burglary and Housebreaking, appended to Clarke v. Com., 25 Gratt. 908.
- False Pretences and Cheats, appended to Leitch v. Com., 20 Gratt. 716.
- Indictments, Informations and Presentments, appended to Boyle v. Com., 14 Gratt. 674.

I. DEFINITIONS.

A. AT COMMON LAW.—The common-law offense of robbery is, "the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting in fear." Houston v. Com., 87 Va. 257, 12 S. E. Rep. 385.

B. ROBBERY OF CROP BY EMPLOYEE.—Where landowner contracts with one to crop his land and give him part of crop, after paying all advances, and crop has not been divided, the cropper is a

mere employee: the ownership of the entire crop is in the landowner, and if cropper forcibly, or against consent of landowner, takes the crop from possession of latter, such taking is larceny, robbery or other offense, according to the circumstances of the case. Parrish v. Com., 81 Va. 1.

II. DISTINCTION.

A. ROBBERY DISTINGUISHED FROM SIMPLE LARCENY.—In this state the distinction between simple larceny and larceny from the person, except where it is accompanied with such force and fear as will raise the crime to robbery, does not exist, and all larceny, not amounting to robbery, is simple larceny. State v. Chambers, 22 W. Va. 789.

III. WHAT CONSTITUTES ROBBERY.

A. INTENT.—To constitute a robbery it is not necessary that the prisoner should intend to appropriate the property to his own use. If he intended to deprive the prosecutor of his property that is sufficient. Jordan v. Com., 25 Gratt. 948.

B. EXISTENCE OF INTENT AT TIME OF TAKING.—The prisoner is prosecuted for the robbery of a pistol. If he snatched the pistol from the hands of the prosecutor simply to prevent the prosecutor from using it against his assailants, without at the time intending to appropriate it, though he afterwards take it away and sell it, this is not robbery of the pistol; though he and others went together to the house of the prosecutor for the purpose of committing a robbery. But, in such case, if the accused when he snatched the pistol, had the intention to deprive the owner of it, though he may have also had the purpose to prevent the use of it by him, this is robbery. Jordan v. Com., 25 Gratt. 948.

IV. ATTEMPTS.

A. MURDER IN ATTEMPTING ROBBERY.—On an indictment for murder, simply, one may be convicted of murder in the commission of, or attempt to commit, robbery. Robertson v. Com., 1 Va. Dec. 851.

1. GRADE OF THE CRIME.—And one who kills another in the attempt to commit or commission of robbery, is guilty of murder in the first degree. Robertson v. Com., 1 Va. Dec. 851.

V. THE INDICTMENT.

A. GOOD AT COMMON LAW, GOOD UNDER STATUTE.—The Virginia statute, § 3874, does not define the offense of robbery, but only regulates its punishment; and an indictment good at common law is good under the statute. Houston v. Com., 87 Va. 257, 12 S. E. Rep. 385.

1. SUFFICIENT AT COMMON LAW.—So, an indictment alleging the felonious and forcible taking by the accused from the person of another, of goods and money of a named value, by violence and putting him in fear, and that such goods and money were the property of such other persons, is a sufficient charge of robbery at common law. Houston v. Commonwealth, 87 Va. 257, 12 S. E. Rep. 385.

B. BAD FOR ROBBERY, GOOD FOR ASSAULT.—An indictment may be fatally defective as an indictment for robbery, but good for assault. Hence, if such indictment attempts to charge the offense of robbery, and is bad for that offense, and properly charges an assault, it is good for the lesser offense, and a motion to quash such an indictment is rightly overruled. State v. Howes, 26 W. Va. 114.

1. VERDICT GOOD FOR LESSER OFFENSE.—And on an indictment for robbery, charging that the prisoners "did make an assault" upon one G., and one gold watch, etc., from the person and against the

will of G., etc., "feloniously and violently did steal," etc., the jury acquitted the prisoners of the felony charged, but found them guilty of "assault and battery." On motion in arrest of judgment, it was held, the finding was valid under ch. 208, § 27 of the Code. *Hardy v. Com.*, 17 Gratt. 592; *State v. Howes*, 26 W. Va. 110.

2. WORD "FELONIOUS" NECESSARY.—At common law, it seems, the indictment for robbery should necessarily allege that the assault was "feloniously" made. *Houston v. Com.*, 87 Va. 265, 12 S. E. Rep. 385; *Hardy v. Com.*, 17 Gratt. 592.

C. DESCRIPTION OF PROPERTY.—In *Moody v. State*, 1 W. Va. 337, an indictment charging accused with the robbery of "thirty United States notes for the payment of divers sums of money, amounting in the whole to the sum of \$260, of the value of \$260," was held to sufficiently describe the property taken.

And in *State v. Jackson*, 26 W. Va. 250, it was held, that an indictment for robbery which described the property taken as "silver coin of the value of \$2.00" was sufficient.

VI. CLERK'S CHARGE TO JURY.

Where indictment charges accused with robbery by presenting of fire arms, it is proper to charge the jury that if they find him guilty as alleged in the indictment, they should fix his punishment according to the provisions of the first clause of § 3874, Code 1887. *Houston v. Commonwealth*, 87 Va. 257, 12 S. E. Rep. 385.

VII. EVIDENCE.

A. ADMISSIBILITY.

Irrelevant Matter.—On a trial for robbery occurring at 10.30 p. m. a half mile from depot, evidence offered by accused that a negro was seen at 8 a. m. next thereafter, in the railroad yard, was irrelevant. *Thompson v. Com.*, 88 Va. 45, 13 S. E. Rep. 304.

Describing Property.—And, where one is charged with the robbery of "silver coin of the value of \$2.00," it is proper to permit the party, from whom the coin was taken, to give evidence as to the number and value of the pieces taken. *State v. Jackson*, 26 W. Va. 250.

Part of Res Gestæ.—On a prosecution for a robbery, a witness gives a description of the robbers received from the wife of the prosecutor a few minutes after the occurrence, and he states that he pursued after the parties and found the prisoner and another at a place he describes. The commonwealth's attorney may then properly ask him whether the prisoner and the other person corresponded on that night, in dress and appearance, with two of the men described by the wife of the prosecutor. And his answer that they did, was proper evidence. *Jordan v. Com.*, 25 Gratt. 943.

B. SUFFICIENCY.

To Prove Taking and Genuineness.—Parties are indicted for the robbery of notes or paper, the indictment containing two counts, charging the same offense in different form. The notes or paper are produced at trial, inspected by the jury, and no suggestion made that they were spurious. It is also shown by the party robbed that he received the notes from the United States for services. On motion by accused to set aside the verdict because contrary to evidence, or for want of evidence proving genuineness of notes, it was not error to overrule the motion. *Moody v. State*, 1 W. Va. 340.

To Prove the Charge.—On a trial for robbery, the evidence showing that accused and companion assailed a party at a stated time, and that companion held the party while the accused took from his person a pocketbook of the value of fifty cents con-

taining fifteen dollars in currency, was sufficient proof to warrant conviction. *Wheeler v. Com.*, 86 Va. 658, 10 S. E. Rep. 924.

Taking Proved, Jury May Infer Intent.—And on a trial for robbery, when the fact of the taking has been proved, in the absence of satisfactory countervailing evidence by the accused, the jury may infer the felonious intent from the immediate asportation and conversion of the property. *Jordan v. Com.*, 25 Gratt. 943.

VIII. INSTRUCTIONS.

A. BURDEN OF PROOF.—Where, on a trial for robbery, an instruction was given on behalf of the accused, that the burden of proving every essential of the charge was on the commonwealth, it was not error to add, "but the burden of proving an *alibi* is on the accused." *Thompson v. Com.*, 88 Va. 45, 13 S. E. Rep. 304.

B. ASSUMING GUILT.—But, an instruction that if jury believe that defendant was present, aiding and abetting C. in robbing M., then he is guilty as principal in the second degree, though he neither beat nor struck M., nor presented fire arms "at him, nor received any portion of the goods carried away by C., as the fruits of the robbery," assumes that there was a robbery, and that C. committed it and carried off the stolen property, and was improper. *Houston v. Commonwealth*, 87 Va. 257, 12 S. E. Rep. 385.

IX. NEW TRIAL.

On trial for robbery, the evidence showing that accused and companion assailed a party at a certain time and that companion held him while accused took purse and money from his person, a new trial will not be awarded for newly-discovered evidence that a witness, who had testified at the trial, since remembered that the scene of the robbery was examined by lamplight, and not by moonlight. *Wheeler v. Com.*, 86 Va. 658, 10 S. E. Rep. 924.

678 *The Commonwealth v. Richard Turner.

November, 1827.

Criminal Law—Criminal Beating of Slave.—An indictment cannot be sustained against a Master, for the malicious, cruel, and excessive beating of his own Slave.

The defendant was indicted at the Superior Court of King George, in October, 1826, for cruelly beating his own slave. The indictment charged that the defendant, "with force and arms, in and upon one negro man slave, named Emanuel, the property of the said Richard Turner, then and there being, did make an assault, and with certain rods, whips and sticks, him the said negro man slave did then and there wilfully and maliciously, violently, cruelly, immoderately, and excessively beat, scourge and whip, against the peace and dignity of the Commonwealth."

The defendant pleaded not guilty, and also demurred to the indictment, and the attorney joined in demurrer. The Superior Court, because of the novelty and difficulty of the questions arising on the demurrer, adjourned the same to the General Court for its decision thereon.

The case was argued here by Stanard, for the defendant, and the Attorney General, for the Commonwealth.

The following opinion of the Court was prepared by

*The principal case is cited in *Souther v. Com.*, 7 Gratt. 680.

DADE, J.

In coming to a decision upon this delicate and important question, the Court has considered it to be its duty to ascertain, not what may be expedient, or morally, or politically right in relation to this matter, but what is the law. It is its duty to expound and declare the actual law; and not to make, or amend it. We have not been unaware that, in regard to misdemeanors, very extensive powers have been sometimes attributed to the Court of King's

Bench in England, as the *custos morum* of the realm; and *that the same are supposed to appertain to the General and Circuit Courts, as holding the same place, in respect to this Commonwealth. But, although both these tribunals have, upon the same principles, long exercised a control over offences *contra bonos mores*, we think it is apparent that neither has ever arrogated to itself, in the exercise of these powers, the latitude of jurisdiction, which some have supposed to belong to them, but which could not be exercised without an alarming encroachment upon the liberty of the subject or citizen. It is more just, as well as more safe, to consider this power as limited by the instances, which, in the process of ages, have from time to time occurred, and are upon record, than to regard it as a new principle applicable to every case, which, in the opinion of every Judge, may seem to be comprehended within it. This doctrine would erect a power truly inquisitorial: a power to be exercised, not within the limits of a long line of established precedents, but to be deduced according to the ever-varying opinions of its depositaries, from a course of reasoning upon a subject admitting as much diversity of opinion, as much subtlety and refinement, as any other whatsoever; the influence of the deportment of each member of society upon the general welfare of the whole.

This latitudinous doctrine we disclaim. Nor is it the first time that this Court has, in effect, made this disclaimer. The cases of *The Commonwealth v. Isaacks*, November Term, 1826, ante, 634; and *Anderson v. The Commonwealth*, ante, 627, at the same Term, rest for their decision mainly on the same principles. The first of these cases, was an indictment against a man and woman for living for many years in a state of concubinage; but, without charging a specific act of fornication. The indictment was at common law, and not under the statute. The second, was the case of abduction and seduction of a young female, (above the age of sixteen,) under such circumstances of atrocity, that the jury amerced him in \$1,000, and the Court
680 superadded a *confinement of two years and six months. In the General Court, it was attempted to maintain these prosecutions upon the ground, that the acts were *contra bonos mores*. But, this idea was repelled by the Judges, and the jurisdiction was disclaimed.

It is said to be the boast of the common law, that it continually conforms itself to the ever-changing condition of society. But, this conformity keeps on *pari passu* with those changes. Like them it is slow

and imperceptible: so that society may easily conform itself to the law. When great changes take place in the social order, a stronger hand, that of the Legislature, must be applied. Thus, when slavery, a wholly new condition, was introduced, the common law could not operate on it. The rules were to be established, either by the positive enactments of the lawmaking power, or to be deduced from the Codes of other countries, where that condition of man was tolerated. If we can derive no aid from these sources, it will not do to appeal to maxims and principles of the common law, applicable to quite different subjects. When the Courts recognize the power to punish one who should take his slave into the market place, and there violently beat him, it is not because it was a slave who was beaten, nor because the act was unprovoked or cruel; but, because *ipso facto* it disturbed the harmony of society; was offensive to public decency, and directly tended to a breach of the peace. The same would be the law, if a horse had been so beaten. And yet it would not be pretended, that it was in respect to the rights of the horse, or the feelings of humanity, that this interposition would take place.

To descend from these preliminary principles to the case in hand, it seems reasonable to suppose, that when slavery was introduced into the then English Colony of Virginia, without reference to the common law of England, which had never acknowledged it, (for villenage is not the prototype of slavery, as it has always existed
681 here,) *without the positive enactments of the Parliament of the Mother Country, or of the Colonial Legislature, but at the mere will of the buyers and sellers, the condition of the slave was that of uncontrolled and unlimited subjection to the will of the master: or, it was to be modified by the established usages of those countries, where to a great extent it still prevailed, or of those extinct nations, where it had existed, and had been subjected to well-settled and established rules; the customs of the former were but little known to a people with whom, from the influence of political and religious prejudices, they had scarcely any intercourse. But, amongst the ancients, slavery had been tolerated by the Theocratic Jews, and the polished nations of Greece and Rome. The Bible furnished to every man evidences of its existence and rules amongst the ancient Jews: History gave brief notices of its institutions amongst the ancient Greeks: but, the ample body of the Roman civil law furnished the most abundant information touching the institutions, customs, rules and enactments, in regard to this condition of man. From these sources, then, were probably derived the few and vague rules, by which the unconditional subjection of the slave to the will of the master, may be presumed to have been modified in the first stages of the existence of slavery in this Colony, and until it became the subject of positive legislative enactment.

Amongst the Jews, slavery was traced to the paternal curse of Noah upon the descendants of his grandson Canaan. Gen-

esia, (chap. 9, ver. 25.) The records of their laws respecting slaves are few and meagre, and are principally to be found in Exodus, chap. 21. They constitute a marked difference in the rights of slaves and freemen in the most important of all, life itself. For, while the punishment of death is repeatedly denounced against the slayer of a freeman, or even many inferior injuries done to him; such as attempting his life by guile, (ver. 14,) stealing a freeman and selling him, or even having him in hand to sell, (ver. 16,) &c. &c., yet, the death of a slave by whipping under 682 *the hand of the master, was merely punishable,* (ver. 20;) and if the slave survived a day or two, the master was in no wise punishable, (ver. 21.) Maiming a slave (ver. 26, 27,) seems to have been followed by a consequence rather intended to relieve the slave, than to punish the master; i. e. his freedom.

Amongst the ancient Greeks, slavery prevailed to a great extent in every of the States, from the earliest to the latest period of their history. Yet, we have no important details concerning any of them, except the Spartan Helots. These, according to Thucydides, Isocrates and others, were the descendants of Greeks, chiefly Messenians, taken in war. It is notorious, that their condition was supremely miserable. It is of little consequence to speak of their rights, when we advert to the institution of the Cryptia or Ambuscade, attributed by Plutarch to Lycurgus; (see Plut. in vita Lycurgus) according to which, in order to reduce the formidable numbers of the Helots, the young Spartans were occasionally sent out to slaughter all the men they could lay their hands on.

The great extent and vast power of the Roman Republic and Empire, her higher advancement in the arts of government and jurisprudence, and the ample records of her civil institutions, embodied and preserved to us in the civil law, furnish more abundant materials from thence than from any of the ancient nations. As subjects of property, of police, and of government, their books are in no respect deficient. Here, as in Greece and even Judea, (for it can be but little doubted, that the curse of Noah was used to justify the Jews in the slavery which arms had enabled them to impose on the people of the promised land,) slavery is to be traced to captivity in war. The uncontrolled power of the 683 captor over the life of his captive, might be readily *understood to imply every inferior power. Accordingly, we find the Roman law bottomed upon this principle. Key to the Civil Law, 177, title "Slave;" Justinian's Inst. Book 1, title 3, § 3; Vattel, Book 3, ch. 8, § 152, &c.

We have before said, that slavery in this country was not derived from villenage. This was of purely feudal origin, and was never exercised in England, as slavery was amongst the ancients, and still is here. And yet, in many respects, its condition

was very similar. Strictly, it was a tenure, whereby the inferior held lands of his superior. Co. Litt. title Villenage, sec. 172. And it was in this relation, that the subject is generally treated by the old law-writers. It is remarkable, that of the true condition of the pure villein in gross, we have only an imperfect account, and are at fault in many important particulars. Bracton, indeed, Lib. 4, fol. 208, thus defines it: "Purum villenagium est a quo praeestatur servitium incertum et indeterminatum: ubi scire non potest vespere, quale servitium fieri debet manere, viz. ubi quis facere tenetur, quicquid ei preceptum fuerit." This would seem to define slavery; yet, we know not whether the villein in gross was liable to unconditional sale by his Lord; whether he was subject to the writs of execution against chattels; nor whether, on the death of the Lord, he passed to the heir or executor, though it is more probable that they were regarded as real property. But, we know that they differed from our slaves in these important particulars. They might purchase some kinds of property which did not enure to the Lord, and even against him have an appeal of the death of the father. Litt. sec. 189. A villein might be an executor, and as such, sue his Lord. Ib. sec. 191-2. He might become a Monk, and was thenceforth free. Ib. sec. 202. And a wife became free by marrying a freeman. Ib. But that, in respect to this order of men, which is most pertinent to our present purpose, is, that the Lord might be indicted for maiming his villein. Litt. sec. 194. And the 684 remarkable reason is "given by Coke, 127, a, that the villein is a subject of the King; that *vita et membra sunt in manu regis*, "and so the Lord of the villein, for the cause aforesaid, cannot maim the villein, but the King shall punish him for maiming his subject." This reasoning excludes the idea, that in punishing the Lord for even maiming, the rights of the villein, the cause of humanity, or the good order and manners or morals of society, were at all regarded. Littleton, by enumerating maiming as the offence, for which the Lord was punishable, excludes the pretence of his being liable for a less offence: and Coke's reason, together with the old legal definition of Mayhem, shews that the true ground was, that the villein was, by the maiming, less serviceable to the King in his wars.

We, therefore, consider that the deductions from the laws of villenage are adverse to this prosecution: and we are left to enquire, what countenance it receives from the statutory law of our own land. As to this, it is not pretended that there is, or ever was, an act of the Legislature, either of the Colony or State of Virginia, made for the punishment of this offence. But, on the contrary, a just inference from our statutes in regard to slaves, furnishes an argument against the exercise of the powers, of late only, ascribed to the Courts. They are said to have been introduced into the Colony in the year 1620, and they do not appear to have been the objects of legislation, or of more than slight incidental notice in our laws, until nearly fifty

*Probably by pecuniary mulct, "as the Judges should determine," as provided in the case mentioned in the 22d verse, where nearly the same language is used.—Note in Original Edition.

years thereafter, (viz: in 1669,) when the first act of Assembly concerning injuries done to slaves, was passed, (2 Stat. at Lar. 270,) excusing the master from all punishment for killing his slave under correction for resistance.

In 1723, (4 Stat. at Lar. 132,) this act was extended to correction for any offence whatever; and owners killing their slaves, were not only punishable in case the homicide amounted to only manslaughter, but even in some cases, where at the common law, the crime would have mounted up to the degree of murder. This

685 was re-enacted *in 1748, (6 Stat. at Lar. 111,) in very nearly the same words, and was not repealed until 1788, (12 Stat. at Large, 681.)

The passage of these exculpatory acts, proves that slaves were not wholly without the protection of the law. As with the Jews, the Romans, and the villeins of England, their lives were guarded, and it is probable that these ancient laws and usages were the principal authority for it. But, after the passage of the act of 1669, and until the year 1788, there certainly could have been no pretence for maintaining such prosecutions as these. He who by statute had been declared not in any wise punishable for even homicide, ensuing from the correction of his slave, could not be regarded as amenable to the laws for any inferior degree of correction. Since 1788, the life of the slave is protected by the laws equally with that of the freeman. And the statutes for punishing maiming extend as well to the protection of the bond as the free, from this high and aggravated degree of personal injury. But, without any proofs that the common law did ever protect the slave against minor injuries from the hand of the master, with the positive assurance that, if ever the common law extended so far, it was, for more than a century, and up to a comparatively late period, nullified by the existence of statutes entirely inconsistent with it, where are we to look for the source of the power which is now claimed for us? Not in the statute book certainly; not in a species of common law growing out of usage since 1788. The time itself would be scarce long enough to give any usage within its limits, title to be enrolled in that venerable Code: but, no such usage has been cited; on the contrary, these prosecutions, with two or others springing up about the same time, the validity of which was always contested, and has never been settled, seem to be a new idea. The only remaining pretext would be the ductile and flexible character of the common law, which moulds itself to the changing condition of human society.

686 But, we have already *repelled the deductions sought to be drawn from this source: great changes are not to be made by the Courts. It is only silent, and almost imperceptible changes, which are recognized, and in due time, confirmed, and established by the judicial tribunals.

It is greatly to be deplored that an offence so odious and revolting as this, should exist to the reproach of humanity. Whether it may be wiser to correct it by legislative enactments, or leave it to the tribunal of

public opinion, which will not fail to award to the offenders its deep and solemn reprobation, is a question of great delicacy and doubt. This Court has little hesitation in saying that the power of correction does not belong to it: and, with but one dissenting voice, it declares, that it has not jurisdiction over this offence, and that the demurrer to the Indictment must be sustained.*

BROCKENBROUGH, J. dissented, and in the conference-room gave his reasons to the following effect:

The question in the present case is, whether a master may be indicted and punished by fine and imprisonment for the immoderate, cruel and excessive beating of his own *slave. It has fallen to my lot to differ in opinion from the rest of my brethren, and it behoves me to state briefly the reasons which have induced me to form that opinion; particularly, as on one occasion within a few years past, in one of the Courts of my circuit, I sustained an Indictment of this character, and pronounced judgment against the defendant.

It will not be denied that, from the first introduction of slaves into this Colony in the year 1620, to the year 1669, the homicide, of a slave by his master, whether it was murder or manslaughter, was by law punishable as felony. This is apparent from the language of the statute passed in 1669, by which it is declared, that if a slave resist his master, and by the extremity of the correction should chance to die, his death shall not be accounted felony. If the master had possessed entire control over his slave, even to life and death, or if the manslaughter of a slave had been no crime, that statute would have been unnecessary. By what law, then, was this offence prevented, and what was the Code by which our ancestors of that period regulated the conduct of the master towards his slave? Not by the Jewish law, for there is not one word in the ancient characters or statutes, by which it can be inferred that it was adopted as the law of the Colony. Nor do I think it probable that the law of nations, or the laws of the Spartans, or the laws of the Roman Empire, (even if known to them,) constituted their rule of action. As to the first, it is sufficient to say, that it is laid down as a principle of that law, that the master has the power of life and

*Note.—The opinion in this case was made up so late in the term in which the judgment was rendered, that there was not time during that Court to do justice to the reasons upon which it was founded. It was, therefore, enjoined upon DABE, J. to prepare the written opinion by the ensuing Court, when, if approved by the other Judges, it was to be spread on their book of opinions. Circumstances rendered it expedient that this case should be published with others, before the term, at which it had been proposed to submit the opinion to be prepared by DABE, J. to his colleagues. Accordingly, he was written to for the opinion, and forwarded it as requested: but, as he did not feel himself justified in being instrumental in its going before the public, as the opinion of the other Judges, who concurred in the judgment, without their approbation, he required, that (if used at all,) it should be published, either as his own opinion alone, or if as that of the Court, (for which it was prepared, and whose arguments it embodies, as well as recollected) with an explanatory note, which would free them from responsibility for the particular course of the argument.

death over his slave. Justinian's Inst. Book 1, title 8, § 1. This is a power which our ancestors did not claim, as is proved by the statute before mentioned. The laws of the Spartans seem to be still more inhuman. If they resorted to the Roman Code, they found a different rule. By that law, masters were not only restrained from killing their slaves, but by a constitution of Antoninus it was ordained, that if the severity of masters should be found 688 to be excessive, "they should be compelled to part with their slaves on equitable terms. Their power over them was to cease, and this was founded on the principle, that no one should be allowed to misuse even his own property. Just. Inst. B. 1, tit. 8, § 2. As by the first two, a greater power was conferred than they claimed, so by the last, a penalty was annexed to the exercise of severity, which to them was probably unknown. It is not probable that they resorted to these strange laws, when they had one which they brought with them from the Mother Country, with which they were familiar, and which might be easily adapted to all the varying relations of their society. This was the common law of England. It is true, that to the common law, slavery, except in the modified form of villenage, was unknown. But, the relations of superior and inferior, had their rules well established by that law. A master had the power to correct his servant; a parent, his child; and a tutor, his pupil; but the moment either of these persons transcended the bounds of due moderation, he was amenable to the law of the land, and might be prosecuted for the abuse of his authority, for his cruelty and inhumanity. When slaves were introduced, although the power conferred on the master by that relation, was much greater than that conferred by either of the others, yet the common law would easily adapt itself to this new relation. The slave was the property of his master, and every power which was necessary to enable the master to use his property, was conferred on him. He might correct him for disobedience; he might sell him to another master; and he would be liable for the payment of his debts. If he was merely property, and nothing else, he might be destroyed by his master. But, to this extent the common law would not allow his power to reach, because it was unnecessary for his full enjoyment of the right of property. The slave was not only a thing, but a person, and this well-known distinction would extend its protection to the slave as a person, except so far as the application of it conflicted with the 689 enjoyment of "the slave as a thing.

Upon this ground, was his life protected: on this ground, I apprehend, his person was protected from all unnecessary, cruel, and inhuman punishments. I see no incompatibility between this degree of protection, and the full enjoyment of the right of property.

If I am asked what evidence there is that such was the law before the year 1669, I answer, that there are no reports of the adjudications of our Courts during that period: but this we know, that the common

law was the Code of Virginia, and that its rules prevailed, unless they were repealed by legislative enactment, or dispensed with as being incompatible with the new relation created by the introduction of slaves.

In the long period between 1669 and 1788, I admit that this question could not have arisen. I admit, that whilst a statute existed which exempted a master from punishment for killing his slave, by reason of a blow given during his correction, or for the manslaughter of a slave, any beating, however cruel and severe, could not be the subject of a prosecution. But, this ferocious and sanguinary system of legislation was abolished by the act of November, 1788. 12 Hen. Stat. at Large, 681. By that repeal, the common law was expressly revived: by that repeal, that law again extended its ægis over the slave to protect him from all inhuman torture, though that torture should be inflicted by the hand of a master.

I had not supposed that I was stretching the principles of the common law to an unreasonable and unprecedented extent. I had supposed that if, in England, the mere attempt, though ineffectual, to commit a felony, or the solicitation to commit one, be a misdemeanor, (3 Bac. Ab. 549;) if an Indictment will be allowed in Massachusetts for poisoning a cow, (1 Mass. T. Rep. 59;) or in Pennsylvania for killing a horse, (1 Dall. 335,) an Indictment might be sustained in Virginia for maliciously and inhumanly beating a slave almost to 690 death.

In other words, I had supposed, "that whilst the common law protected all persons in the just exercise of any authority or power conferred on them by the law; yet, for the abuse of that authority, or an excess in the exercise of it, they were liable to be prosecuted as delinquents.

I have not thought it necessary to say any thing on the subject of the consequences of the doctrine which I have supported. I do not believe, that in those consequences any thing can be discerned injurious to the peace of society. When it is recollected, that our Courts and Juries are composed of men who, for the most part, are masters, I cannot conceive that any injury can accrue to the rights and interests of that class of the community. And with respect to the slaves, whilst kindness and humane treatment are calculated to render them contented and happy, is there no danger that oppression and tyranny, against which there is no redress, may drive them to despair?

My opinion is, however, overruled by the better judgment of all the rest of the Court, and the demurrer to the Indictment is to be sustained.

691 *The Commonwealth v. Jacob Faris.

November, 1827.

Mills—Erection—Prosecution for Injuries on Account Thereof.—Although leave has been given by the County Court to erect a mill according to the provisions of the statute, yet that is no bar to a public prosecution or private action for in-

*Mills—Erection.—See monographic note on "Mills and Milldams" appended to Calhoun v. Palmer. 8 Gratt. 88.

juries, other than those actually foreseen, and estimated by the inquest.

Nuisance—Indictment—Sufficiency.—As indictment for a nuisance, which concludes, "to the common nuisance of divers of the Commonwealth's citizens," is not sufficient.

Same—Same—Same.—It ought to be laid to the common nuisance "of all the citizens of the Commonwealth residing in the neighbourhood;" or "of all the citizens, &c. residing, &c. and passing thereby."

This was an adjourned case from the Superior Court of Law for the county of Cumberland.

The opinion of the Court was delivered by

DANIEL, J.

This was an Indictment for a nuisance, which is alleged by the said Indictment to consist in this: that the defendant, on the 10th day of February, 1821, "erected a nuisance, to wit, a mill-dam and pond, which is now, and ever has been since its erection, highly prejudicial to the health of the people residing in its neighbourhood; and the same nuisance, to wit, the mill-dam and pond so erected and built as aforesaid, at the time aforesaid, and on the creek known and called by the name of Tare-wallet, in the county of Cumberland, doth yet continue, and is suffered to remain to the common nuisance of divers of the Commonwealth's citizens, to the evil example of all others, &c."

The defendant demurred to the Indictment, and issue was taken thereon. The defendant also pleaded, that the said mill-dam and pond were erected, and built by him by leave of the County Court of Cumberland, first had and obtained according to the provisions of the act of Assembly in such case made and provided. To this plea, the Attorney for the Commonwealth demurred, and issue was joined on the demurrer. Thereafter, the Judge of the Court

adjourned to this Court the following questions: *1. Is the Indictment in this case sufficient in law to put the defendant to answer the same, and what judgment should be rendered on the first demurrer? 2. What judgment is to be rendered on the demurrer to the defendant's plea?

With respect to the last question, the Court are unanimously of opinion, that the demurrer to the defendant's plea should be sustained, the act of Assembly respecting mills, &c. having provided, that "no inquest, or opinion or judgment of the Court thereupon, shall bar any public prosecution or private action, which could have been had or maintained, if the said act had never been made, other than prosecutions and actions for such injuries as were actually foreseen, and estimated upon such inquest." 2 Rev. Code of 1819, p. 228, § 9.

As to the first question, "what judgment should be rendered on the demurrer to the Indictment?" there is more difficulty. Some of the Court are of opinion that the act complained of in the Indictment as a pub-

lic nuisance, might be regarded as such if it was alleged to be "to the common nuisance of all the citizens of the Commonwealth residing in the neighbourhood," which is not distinctly averred by the charge of its being to the common nuisance of divers of the Commonwealth's citizens. They are of opinion that the authorities (a) support the position that "divers" is not sufficient, but that "all" is necessary; and yet, there is hardly any nuisance which can affect every citizen of the Commonwealth, and that, therefore, according to the very nature of things, a nuisance may be regarded as a public one, if it affects all who reside in the neighbourhood. Others of the Court are of opinion that the Indictment is sufficient, since it is averred that the erection of the nuisance is highly prejudicial to the health of the people residing in its neighbourhood, and this may be well

intended to mean all the "people of the neighbourhood; and that the divers citizens, mentioned in the conclusion, are "all the citizens of the neighbourhood." Others are of opinion, that a common nuisance should be such as of itself necessarily to affect the public generally, or by its connection with what does so affect the public, (as in the case of its erection near a public highway,) to justify the conclusion that it might be injurious to all the citizens of the Commonwealth residing near, or passing thereby, and that such is not the offence laid in this Indictment.

A majority of the Court concur in the opinion that the offence complained of, is not sufficiently stated to be "to the common nuisance of all the citizens of the Commonwealth residing in the neighbourhood," nor to the "common nuisance of all the citizens of the Commonwealth residing in the neighbourhood thereof, and passing thereby," and that the defendant's demurrer to the Indictment ought to be sustained. In this opinion, however, JUDGES JOHNSON, DADE and FIELD do not concur.

Jacob Martin, Constable, &c. v. David Sturm, and John Sturm.

November, 1827.

Executions—Statute—Construction—Indemnifying Bond.—A Constable is not authorised, by the 25th section of the act concerning executions to take the indemnifying bond there prescribed, when he levies an execution issued by a single Magistrate on a judgment for a small debt.

Bond with Condition—Declaration—General Demurrer—Effect.—In a declaration on a bond with collateral condition, if there be two assignments of breaches, and either assignment be good, and the whole declaration is demurred to, the demurrer ought to be overruled.

This was an adjourned case from the Superior Court of Law for Harrison county. The plaintiff, for the benefit of Benjamin J. Bryce, had brought his action of debt against the defendants in the County Court, upon an indemnifying bond executed by them under the 25th section of the act of Assembly, concerning executions. The declaration set forth, that

(a) Hawk. Pl. Cr. ch. 75, § 8; 5 Bac. Ab. p. 151; See also 1 Burr. 333, and 1 Str. 660.

†See monographic note on "Demurrers" appended to Com. v. Jackson, 2 Va. Cas. 501. The principal case is cited in Henderson v. Stringer, 6 Gratt. 184.

*Nuisance—Indictment—Sufficiency.—See monographic note on "Nuisances" appended to Dimmett v. Eskridge, 6 Munf. 308; monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com. 16 Gratt. 674. The principal case is cited on the subject of nuisances in Com. v. Webb, 6 Rand. 737, 728.

the plaintiff, as Constable, had levied a Fieri Facias for eleven dollars, with interest and costs, for the benefit of David Sturm, on the goods of one Norman Randall, which goods were claimed by Bryce, and the defendant David Sturm, with the other defendant, entered into bond conditioned to indemnify the said Constable against all damages which he might sustain in consequence of the seizure and sale of the property which had been levied; and moreover to pay and satisfy to any person claiming title to the said property, all damages which such person might sustain in consequence of such seizure and sale. The declaration assigned as breaches of the said condition, 1. That the property levied on was the property of the said Bryce, and that he had sustained damage by the said seizure and sale, to the amount of \$100. 2. That the plaintiff had been liable to pay the said Bryce great damage for the seizure and sale aforesaid, and had been put to great costs, and expenditure to his damage, \$100. The defendants demurred to the whole declaration, and issue was joined on the demurrer. The County Court gave judgment for the defendant, and the record was carried before the Superior Court of Harrison, by Superseadeas. That Court "being of opinion, that the questions of law arising on the record, and the proper construction of the act of Assembly in relation thereto, ought to be settled by the General Court, as the cases arising under that act are rarely of a sufficient magnitude to give jurisdiction to the Court of Appeals," adjourned the same to this Court for its decision.

The case was argued in writing, by J. Allen, for the plaintiff, and Duncan, for the defendant.

695 *BROCKENBROUGH, J. delivered the opinion of the Court.

The principal question arising in this case is, Whether a Constable, who has levied a Fi. Fa. issued by a single Magistrate, on a judgment rendered on a warrant for a small debt, can take an indemnifying bond from the plaintiff, under the 25th section of the law concerning executions, (a) in the same manner that a Sheriff may take such bond under an execution issued from a Court of Record. The language of that section is, that if a Sheriff, or other officer, shall levy an execution, &c. The words "other officer," are sufficiently broad to include the case of a Constable. But, there are sound considerations which induce the Court to believe that the Legislature did not intend to include him. The section is placed in the revised act concerning executions, which are directed to issue from the offices of Courts of Record, whereas the section of the law which directs the Magistrate to issue executions, and the Constable to levy them, is found in the body of the act concerning the County and Corporation Courts, (b) and is included in the same section which gives jurisdiction to the single Magistrate in cases of small debts and penalties. This, however, of itself, would have little or no weight. But,

the 26th(a) section clearly indicates that the Constable was not in the legislative mind; for it directs that the bond and security shall be returned with the execution to the office of the Court from whence it issued. Now, the executions in these cases do not issue from any office, or Court. The Magistrate is not a Court, has no office, generally keeps no record, and until very lately, was not required, or authorised to keep a docket of his proceedings. When the bond is returned to the Clerk's office, it becomes an office paper, for the filing of which, or giving out a copy, the Clerk is entitled to be paid a regular fee prescribed by law, and it is accessible

696 *to any person who may claim the property which was levied on, and the doubt as to the title of which, was the cause of the bond being taken. There may be several claimants, and the bond may be put in suit in the name of the officer who took it for the benefit of either of the claimants; in such case, the Clerk ought not to give possession of the bond to either of them, but to retain it and to produce it on a trial when required by a subpoena duces tecum, or otherwise. But, if such a bond is returned to the Magistrate, it can only be filed with his private papers, and no fee is allowed for filing it away, or copying it. It is not probable that the Legislature intended to subject Magistrates to this additional trouble and responsibility, and it is probable that if they had intended to include Constables, they would have provided some office or place to which the bonds taken by them might be returned, and where they might be kept in safe custody. Although, then, these words would of themselves include Constables, yet it seems that the Legislature only intended to embrace Sheriffs, Coroners, Marshals and others, who may levy executions issuing from Courts of Record. The bond, therefore, cannot be recovered on, as a bond under the statute. This decision is not opposed by the decision in *M'Clunn v. Steel*, 2 Virg. Cas. p. 256, in which this point was not considered.

There is, however, a second breach assigned in this declaration, viz. that the plaintiff himself (the Constable) was put to great costs, and expenditures, and labour and trouble, to his damage of \$100. Although the bond is not good as a statutory bond, and no evidence ought to be given to prove the first breach, yet, as the defendants have bound themselves to indemnify the plaintiff for all damages and costs which he might sustain by reason of the premises, the plaintiff ought to be allowed to prove the damages and costs sustained by himself under the second assignment of breaches, the bond being a good bond at common law. The demurrer being to the whole declaration, it must be overruled.

697 *The following is to be entered as the opinion of the Court.

This Court is of opinion, and doth decide, that a Constable, who has levied a Fieri Facias issued by a Justice on a judgment upon a warrant, has no power to take an indemnifying bond under the 25th and 26th sections of the act concerning execu-

(a) 1 Rev. Code, p. 533. § 25. 26.

(b) 1 Rev. Code, p. 253.

tions; and that there is no error in the judgment of the County Court sustaining the demurrer to the plaintiff's declaration on that ground; but, as the bond taken in this case is good as a common law bond, and the plaintiff has in the second assignment of breaches alleged, that he has sustained damage by occasion of the defendant's breach of the condition of his bond, he ought to be allowed to support that assignment of breaches by proof, and that there is error in the said judgment on that ground; and as the defendants demurred to the whole declaration, this Court is of opinion, and doth decide, that the Superior Court of Law ought to reverse the said judgment, and remand the cause to the County Court for further proceedings to be had therein.

Henry L. Prentis v. The Commonwealth.*

November, 1827.

Privilege of Legislator—How Taken Advantage of.—

The privilege of a member of Assembly, cannot be noticed by the Courts *ex officio*. As it may be waived, it must be claimed. And it can only be claimed by plea, or on motion tendered, or made at the proper period.

Same—How Waived;—Case at Bar.—If a member of Assembly allows a judgment to be rendered against him during the existence of his privilege, and does not seek during the progress of the proceedings, either to abate or suspend them, he will be deemed to have waived his privilege, and he cannot afterwards be allowed the Writ of Error *coram vobis* to reverse the judgment.

This was an adjourned case from the Superior Court of Law for Henrico county.

It was argued by Scott, for the plaintiff, and the Attorney General, for the Commonwealth.

698 *The case is stated in the following opinion of the Court, which was delivered by

SUMMERS, J. §

On the 26th of February, 1827, the Grand Jury, impanelled before the Hustings Court of the City of Richmond, presented the plaintiff in error, by the name and description of Henry L. Prentis, of the Legislature, for unlawful gaming at a place called the Profile House, in the said City, at a game played with cards, called *faro*. On this presentment a summons issued, and was returned by the Sergeant, "executed on the 8th March, 1827." At the March Term of the Hustings Court, (29th of the month,) the plaintiff in error was called, but not appearing, judgment was entered against him for \$20, the fine imposed by law, and the costs of the prosecution. On the 27th of June, 1827, he presented a petition to the Hustings Court, setting out his election to the House of Delegates in April, 1826; his attendance as a member of that body, from the first Monday in December following, until the adjournment of the

*For monographic note on Privilege, see end of case.

†Privilege—How Taken Advantage of.—To the point that the courts cannot *ex officio* take notice of a personal privilege, but it must be claimed when relied on the principal case is cited in *Turnbull v. Thompson*, 27 Gratt. 810.

‡Same—How Waived.—It has been almost universally held that where a defendant relies on a mere privilege, he must plead his privilege, otherwise he will be considered as having waived it. *Neale v. Utz*, 75 Va. 486, citing the principal case as authority.

§Absent. *SEMPLE, J.*

Legislature on the 9th of March, 1827, and the continuance of his privilege whilst returning home, a distance of four hundred and twenty miles: Alleging his exemption from all process and arrests, except for treason, felony, or breach of the peace, during the continuance of his privilege;|| that by operation of law, all process and other proceedings against him, stood suspended for the same period; that the proceedings had in the Hustings Court, were in violation of his privilege as a member of the General Assembly, and praying that a Writ of Error *coram vobis* might be awarded, in order that the errors complained of might be corrected. On consideration by 699 *the Hustings Court, this petition was rejected, and an exception taken, making it part of the record. On the 10th of July, 1827, a Writ of Error was allowed by the Superior Court of Law of Henrico county, to the judgment of the Hustings Court, overruling the application for a Writ of Error *coram vobis*; and the cause coming on for trial in that Court, by consent of the plaintiff and the Attorney for the Commonwealth, the following questions were adjourned to this Court for its decision:

1. Ought the said Writ of Error *coram vobis*, to have been awarded by the Hustings Court, according to the petition of the plaintiff?

2. Ought the Superior Court of Law to reverse either, or both, of the judgments of the Court of Hustings, in the record mentioned; and if so, what further proceedings ought to be had thereon?

3. Ought the Writ of Error, awarded by the Superior Court of Law, to be quashed?

If the plaintiff is entitled to a reversal of the judgment pronounced against him by the Hustings Court, we have no doubt of the Writ of Error *coram vobis*, being the proper remedy. This brings us to the more immediate questions submitted to our consideration.

It is important that the administration of the government be not interrupted or delayed, by the embarrassments arising from the private affairs of those who are called into public service; and we have, therefore, examined with care, the decisions which have been made giving effect to exemptions of the character now claimed, and ascertaining the time and manner in which such exemptions must be insisted on. From this examination, we are satisfied that the Courts may not, *ex officio*, take notice of the existence of the privilege. It results, from its nature and character, that it may be waived, and therefore, ought to be claimed whenever relied on. The judicial history of this question does not furnish an example of the allowance of

the privilege, but upon plea, or upon 700 motion, tendered or *made, at the period proper for the consideration thereof, by the Court whose proceedings are sought to be abated or suspended. It is not an incapacity like infancy and coverture, where consent cannot give jurisdiction, and where the irregular exercise of it

|| Rev. Code, p. 163, § 81, by which the privilege continues till his return home, allowing 20 miles a day for travelling.—Note in Original Edition.

is void ab initio. It is urged, with some force, that the same embarrassments may be produced, by requiring a member to allege and prove his privilege during its continuance, that would result from the trial of the cause in chief. We think not. The proof of the facts upon which it rests, are easy of attainment, because they are few, and may be adduced, as well in the absence as in the presence of the party. But, if it were otherwise, we think it not the province of the Courts, to extend the law of privilege beyond the limits heretofore prescribed to it by judicial decisions, which the Legislature must have had in view at the period of the enactments on the subject, and which are unaffected by any of the provisions of the statute. Upon the whole matter, we are of opinion, that the Court of Hustings was not bound to take notice of the privilege of the plaintiff, and that his failure to claim the exemption to which it entitled him, until after judgment, was a waiver thereof.

In this opinion, JUDGES BROCKENBROUGH, DADE and FIELD do not concur.

The following is to be entered as the judgment of the Court.

This Court is opinion, and doth decide, that the Writ of Error *coram vobis* ought not to have been awarded by the Hustings Court, on the petition of the plaintiff; which is ordered to be certified.

PRIVILEGE.

Persons Entitled to Privilege from Arrest.—Judges, attorneys, suitors and witnesses are by the common law exempt from arrest in civil suits during their attendance at court, and for a reasonable time in traveling to and from the place of session. *Com. v. Ronald*, 4 Call 97; *Richards v. Goodson*, 2 Va. Cas. 381.

Statutory Privilege Does Not Protect Plaintiff.—As the plaintiff in an action does not have to be served with process, a statute allowing an exemption from service of process upon members of the legislature during its session does not protect a member, who is the plaintiff in an action, from a judgment rendered against him therein. Thus in *Botts v. Tabb*, 10 Leigh 616, a member of the general assembly, by a bill in equity obtained an injunction, before the session of the assembly, to stay proceedings on an execution at law against his property. On a motion to dissolve the injunction, made during the session of the assembly, he objected that his privilege should prevent the court from any action in the case at that time. The trial court, however, overruled the objection and upon appeal the judgment was affirmed.

Privilege Must Be Expressly Claimed.—The privilege of a member of the general assembly cannot be noticed by the courts *ex officio*. As it may be waived by the legislator if he so desires, it is incumbent upon him to claim the exemption if he wishes to avail himself of its benefit. It can only be claimed by plea, or on motion tendered or made at the proper period. *Prentiss v. Com.*, 5 Rand. 697.

Waiver of Privilege.—A member of the legislature may waive his privilege and let the cause proceed to trial. *Johnson v. Johnson*, 4 Call 38. And where a member of the legislature allows a judgment to be rendered against him during the existence of his privilege and does not seek during the progress of the proceedings either to abate or

suspend them, he will be deemed to have waived his privilege, and will not afterwards be allowed to have a writ of error *coram vobis* to reverse the judgment. *Prentiss v. Com.*, 5 Rand. 697.

Constitutional Privileges and Privilege Taxes.—As to what are the "privileges and immunities" guaranteed to citizens of the states by the federal constitution; as to the privilege of the accused in criminal cases to remain silent and refuse to give evidence against himself, and as to privilege taxes, see monographic note on "Constitutional Law" appended to *Com. v. Adcock*, 8 Gratt. 661.

701 *William R. Finn v. The Commonwealth.

November, 1827.

Criminal Law—Confession*—What Admissible as—Case at Bar.—If a prisoner, in speaking of the testimony of a witness who had testified against him, says, "that what C. said was true as far as he went, but that he did not say all, or enough;" this is not admissible as a confession of the prisoner; nor does it lay any foundation for proving to the jury what C. did swear to.

Same—Evidence—Witness Dead—Testimony on Former Trial—Admissibility.—Although, in a civil action, proof may be given of what a witness, who is since dead, did swear to on a former trial between the same parties, and on the same issue, yet such evidence is inadmissible in a criminal prosecution. And if the witness has only removed beyond the jurisdiction of the country, such proof is certainly not admissible in a Criminal case.

Secondary Evidence—What Must Be Shown.—If evidence be not prima facie admissible, but may be rendered so by circumstances, the party who offers the evidence, ought to set forth the circumstances which render it admissible.

Forgery—Scienter—Evidence.—In a prosecution for passing a forged note, knowing it to be forged, evidence, that the prisoner endeavored to engage a person to procure for him counterfeit money, that he enquired whether he had brought him any, and of declarations that he intended to cultivate the acquaintance of a counterfeiter, and intended to remove to a place near his residence, &c. is admissible as tending to prove the scienter.

This was a Writ of Error to the judgment of the Superior Court of Law for Kanawha county, by which the plaintiff in error was sentenced to imprisonment in the Penitentiary for the term of ten years. The Indictment on which he was tried, contained three counts, of which the first two charged that he feloniously passed to one John Whittaker a forged bank note, of fifty dollars, of the Bank of the United States, well knowing the said bank note to be forged: the first count charged the felony to have been committed with intent to injure and defraud the said John Whittaker; the second count, with intent to injure the President, Directors and Company of the Bank of the United States. The third count charged him with "offering to pass and exchange" the forged note, with intent to injure and defraud the said Whittaker. In each count, the tenor of the forged note was set out.

During the trial, the prisoner excepted

***Criminal Law—Confessions.**—See monographic note on "Confessions" appended to *Schwartz v. Com.*, 27 Gratt. 1025.

†**Same—Evidence—Witness Dead—Testimony on Former Trial—Admissibility.**—See principle cited on this subject in *Brogy v. Com.*, 10 Gratt. 722, 723, and *foot-note*; *Carrioco v. West Virginia Cent.*, etc., R. Co., 39 W. Va. 89, 19 S. E. Rep. 572.

‡**Forgery—Scienter—Evidence.**—See monographic note on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 865. The principal case is cited on the subject in *Walker v. Com.*, 1 Leigh 578.

to certain opinions of the Court, and the Bill of Exceptions is as follows:

"Be it remembered, that on the trial of the issue, the Attorney for the Commonwealth introduced a witness who

702 *proved that he had, during the last winter, a conversation with the prisoner while he was confined in jail concerning this prosecution: that on the prisoner's commencing this conversation, the witness reminded him that he, the witness, was recognized to appear and give evidence on his trial, and should have to detail any communications which he might make: the prisoner replied that he knew it, and wished him to do so; that he meant to explain the matter to him. The prisoner then observed, that what a certain Mr. Candler swore to at the Called Court, was strictly true, as far as he went, but that he had not told all, or enough, and as the prisoner was in the act of speaking farther as to Candler's testimony, the witness was called to the opposite side of the room, and left the prisoner with the intention of returning to him, and hearing the further remarks which he might make, and to which the one stated seemed to be introductory: that shortly afterwards, other persons came into the room, and a servant with food for the prisoners, when the witness left the apartment: without giving the prisoner an opportunity of renewing the conversation, and without recollecting at the moment the propriety of doing so, and would willingly have gone back afterwards and heard the residue of what the prisoner might have thought proper to have added, but concluded it would be of no service to him: that the prisoner did not attempt to recapitulate the testimony which Candler had given at the Called Court, but referred to it in the words above stated.

The Attorney for the Commonwealth then offered to prove by other witnesses, what the said Candler had testified to before the Called Court, having first proved, that the said Candler, although summoned to attend at this term as a witness against the prisoner, has since left the Commonwealth, and admitted that he is now living, but beyond its jurisdiction: to the admission of proof of what Candler swore at the Called Court, the prisoner, by his

703 Counsel, objected; but the Court overruled the objection, *and permitted it to be proved, instructing the jury, that although this testimony was admissible, yet it was peculiarly proper for them to consider and decide upon the weight to which it was entitled, from the interruption of the conversation in which the prisoner had spoken of Candler's evidence.

The evidence given by Candler before the Called Court, as detailed by the witnesses, was in substance, as follows: that some time before the commencement of this prosecution, the prisoner proposed to Candler, that they should join in procuring and passing counterfeit money: that Red river and Big Sandy river, (as well as the witnesses recollect,) were spoken of, in connection with the procuring and passing the counterfeit money, but the witnesses did not recollect that the kind of money,

whether coin or bank notes, was mentioned by Candler; but one of the witnesses understood, from his general recollection of Candler's testimony, that coin was meant, rather than bank notes. To the admission of this testimony, the prisoner, by his counsel, further objected, on the ground that it was irrelevant and impertinent to the issue; but the Court was of opinion, that it was admissible, as tending to prove the scilicet, and permitted it to go to the jury, with instruction, that they were to consider it as before them on that part of the issue alone. The prisoner afterwards, in the progress of the cause, introduced a witness to prove that the day after the passing of the note, in the Indictment mentioned, by the prisoner to the said John Whittaker, and three or four days before the said Whittaker procured a warrant to be issued against the prisoner, the witness received an order from the prisoner on the said Whittaker, for a small sum in goods, and presented it to the said Whittaker for payment; that while the witness was in conversation with the said Whittaker, the prisoner joined them, and in the conversation continuing between the three, the said Whittaker observed, that he had sent the said bank note to town the day before, and that some said it was

704 good, and some that *it was bad; but that he had no doubt but that it was good; the prisoner then observed to him not to pay the order to the witness until the note should be ascertained to be good; to which the said Whittaker replied, that he was not afraid of the note's being bad, and that whether good or bad, the witness might have the amount of the order, and that if the prisoner would take the residue of what was coming to him, on account of the note, in goods, that he, Whittaker, would take the note at a venture; but that the prisoner refused to do so, saying that he must have a part of the balance in money. To this conversation going in evidence to the jury, the Attorney for the Commonwealth objected, the said Whittaker not being examined as a witness on the trial, but having left the Commonwealth some time before; which objection the Court sustained, being of opinion that it was competent for the prisoner to give in evidence the conversation which took place, at the time of passing the said note, as part of the *res gesta*, and to examine witnesses as to any other conversations of his, about which the Commonwealth had given evidence; but, that his conversations with the said Whittaker, or any other persons, not falling within these rules, were inadmissible, as evidence on his part.

On closing the testimony on the part of the Commonwealth, the attorney prosecuting, announced as part of the evidence on his part, the warrant for apprehending the prisoner, in the following words and figures:

"Kanawha County, to wit: Whereas, John Whittaker of Kanawha county, hath this day made oath before me, Van B. Reynolds, a Justice of the Peace for the county aforesaid, that, on the 17th day of August, 1826, at the county of Kanawha aforesaid,

Jesse G. Ballard and William R. Finn, of said county, did feloniously pass in payment to him, the said John Whittaker, a certain false, forged and counterfeited bank note, partly printed and partly written, purporting to be a note of the Bank of the United States, of the denomination of fifty dollars, with
705 *intention to defraud the said John Whittaker; they, the said Jesse G. Ballard and William R. Finn, then and there knowing the said note to be false, forged and counterfeit. These are, therefore, to command you to apprehend the said Jesse G. Ballard and William R. Finn, and to bring them before me, or some other Justice of the Peace for said county forthwith, to answer the premises, and further to be dealt with, according to law. Given under my hand and seal, this 23d of August, 1826.

"Van B. Reynolds, (Seal.)"

And when the jury were about to leave the bar, he offered to send it out as part of the evidence, to which one of the prisoner's counsel objected, alleging that it was the first knowledge which he had of the paper being offered in evidence, and moved the Court to exclude it from the jury; but, the Court overruled this motion, and permitted the said paper to go to the jury, but accompanied it with the instruction, that it was no evidence of the truth of any of the recitals which it contained, and could only be looked into for the purpose of ascertaining the period of commencing the prosecution, and the persons against whom it was commenced. On the offering of this warrant in evidence, the counsel for the prisoner admitted, that Jesse G. Ballard named therein, was the same man, who had been previously examined as a witness on the part of the prisoner.

To sustain the issue on his part, the Attorney for the Commonwealth examined a witness in the course of the trial, who deposed, that the prisoner had, on two or three occasions within twelve months before the commencement of this prosecution, applied to the witness to procure for him counterfeit money from a person on Big Sandy river, who was reported to make it, but the witness did not recollect that either bank notes or coin were particularly mentioned; that on one of these occasions, when the witness had recently returned from that part of the country, and in which he resides, the prisoner enquired of him, if he had brought him any of the money,

and on being told he had not, the
706 *prisoner replied, he must go over himself, and spoke of obtaining employment in that quarter as a surveyor, and using it as a means of cultivating an acquaintance with the person reported to be engaged in counterfeiting, but that the witness had no knowledge of the prisoner's ever going to that quarter of the country, or his being absent from Kanawha at any time since. To the admission of this evidence, the prisoner by his counsel also objected, but the Court, being of opinion that it was admissible as tending to prove the scienter, permitted it to go to the jury; to all of which opinions of the Court, the prisoner by his counsel excepts, and this

his Bill of Exceptions is signed, sealed and reserved.

The case was argued by Johnson, for the plaintiff in error, and the Attorney General, for the Commonwealth.

BROCKENBROUGH, J. delivered the opinion of the Court.*

The plaintiff in error was indicted for feloniously passing to one John Whittaker, a counterfeit bank note, purporting to be a note of the Bank of the United States. At the trial, certain exceptions were taken to the opinion of the Court, which will be noticed in their regular order. Judgment having been rendered against him, he obtained a Writ of Error at the last term of this Court, and the question now is, whether the judgment shall be reversed or affirmed?

1. The first branch of the Bill of Exceptions sets forth, that the Attorney for the Commonwealth introduced a witness, who proved that he had, during the last winter, a conversation with the prisoner, while he was confined in jail, concerning the prosecution; the witness warned the prisoner
707 against making any communication.

informing *him that he should be compelled to detail in evidence, whatever he communicated. The prisoner replied, that he knew it, and meant to explain the matter to him: the prisoner then said, "that what Mr. Candler swore at the Called Court, was strictly true, as far as he went, but that he had not told all, or enough." An interruption of the conversation here took place, whilst the prisoner was in the act of speaking of Candler's testimony, nor was an opportunity again afforded him of renewing it. In this interrupted conversation, the prisoner did not attempt to recapitulate the testimony which Candler had given at the Called Court, but merely referred to it as before mentioned. The Attorney for the Commonwealth, then offered to prove by other witnesses, what Candler had testified before the Called Court, having first proved that Candler, though living, is beyond the jurisdiction of the Court, having left the Commonwealth soon after he was summoned to attend the Court as a witness. The prisoner objected to this evidence, but the Court admitted it, instructing the jury, however, that although the testimony was admissible, yet it was peculiarly proper for them to consider and decide on the weight to which it was entitled, from the interruption of the conversation in which the prisoner had spoken of Candler's evidence. It seems to this Court, that there is a weighty objection to the admission of the evidence which was introduced to prove what Candler had sworn to in the Called Court. The Attorney for the Commonwealth supposed that he had laid a foundation for the introduction of that evidence, in the interrupted conversation of the prisoner. The objection to the evidence is, that in reality the prisoner made no confession of guilt at all; the conversation was rather a declaration of his innocence, than a confession of guilt. Nor was it a confession that Candler's evidence was true: he said

*Absent. DADE and SEMPLE, J.

that what Candler swore to was true, as far as he went, but he did not say all, or enough. If a witness has told the truth, but not the whole truth, his evidence is not true. The conversation, then, of

708 *the prisoner, laid no foundation whatever for the introduction of the other evidence, and both should have been excluded from the consideration of the jury. A question, however, arises on this Bill of Exceptions, of a graver and more important character: it is, whether the evidence which Candler gave on the examination, can be admitted *per se*, and independently of the prisoner's confession, Candler having removed from the Commonwealth. In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial, may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him. Peake, 60; Phillips, 199. But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. Peake, 60, quoting *Fenwicke's Case*, 4 St. Trials. Nor can we find that the rule in civil cases extends to the admission of the evidence formerly given by a witness who has removed beyond the jurisdiction of the country; much less can it be admitted in a criminal case. We are all, therefore, of opinion, that there is error in the judgment of the Court, as set forth in the first part of the Bill of Exceptions.

2. Of the second exception, no notice need be taken, because it relates to the proof of what Candler had sworn to on the former occasion, and we have excluded it on another ground.

3. The third exception relates to evidence offered by the prisoner; but, as the Court is equally divided on its admissibility, it will not be noticed.

4. In the progress of the trial, the Attorney for the Commonwealth offered in evidence the warrant for the apprehension of the prisoner, and one Jesse G. Ballard, charged with this offence. The prisoner moved to exclude it, but the Court permitted it to go to the jury, accompanied with the instruction that it was no evidence of the truth of any of the recitals contained in it, and could only be

709 looked *into for the purpose of ascertaining the period of commencing the prosecution, and the persons against whom it was commenced. On offering the warrant in evidence, the prisoner's counsel admitted, that the Jesse G. Ballard named therein, was the same person who had been examined as a witness for the prisoner.

As the warrant for apprehending the prisoner does not appear to be evidence of itself, it was certainly the duty of the attorney to shew the relevancy of it: if it was wanting for the purpose of shewing the date of the prosecution, it would have answered that purpose to have stated to the jury the date which appeared on the warrant, and that might have been stated by the counsel, or a witness; but, it was improper to give it in evidence for the pur-

pose of shewing the persons against whom it was issued, without shewing that from some previous evidence, that fact became material in the cause; the rule being, that where evidence is not *prima facie* admissible, the circumstances which render it so must be set out.

5. In the course of the trial, the Attorney for the Commonwealth examined a witness, who deposed, that the prisoner had, on two or three occasions within twelve months before the commencement of the prosecution, applied to the witness to procure for him counterfeit money from a person on Big Sandy river, who was reported to make it, but the witness did not recollect that either bank notes or coin were particularly mentioned; that on one of these occasions, when the witness had recently returned from that part of the country, in which he resides, the prisoner enquired of him, if he had brought him any of the money, and on being told that he had not, the prisoner replied, that he must go over himself, and spoke of obtaining employment in that quarter as a surveyor, and using it as a means of cultivating an acquaintance with the person reported to be engaged in counterfeiting, but that the witness had no knowledge of the prisoner's ever going to that quarter of the country, or his being absent from

710 Kanawha *at any time since. The prisoner objected to this evidence, but the Court admitted it as tending to prove the scienter.

The passing a counterfeit note, may be of itself a perfectly innocent transaction; the guilt consists in passing it, knowing it to be counterfeit. If no other circumstances than those of the transaction itself are given in evidence, it would be impossible to ascertain whether it was passed with this guilty knowledge, or not. Hence Courts have been driven to the necessity in such cases, of admitting evidence of the conduct of the prisoner, so that from his conduct on one occasion, the jury may infer his knowledge on another. Thus, in *Whiley & Haines's Case*, (2 Leach, 983,) on a charge of uttering forged notes, evidence was admitted to prove that they had uttered other forged notes, knowing them to be forged. So in *Ball's Case*, it being proved that the prisoner had uttered counterfeit notes in June, 1807, proof was offered to shew that he had, in the March preceding, uttered another forged note, and that from December, 1806, various forged notes had been paid into bank endorsed with his hand-writing. In these cases, substantive felonies were allowed to be given in evidence, for the purpose of proving that he knew that the note he uttered was forged. Is not the evidence offered here, admissible on the same principle? The prisoner endeavoured to engage a person to procure for him counterfeit money; enquired whether he had brought him any, and declared that he intended to cultivate the acquaintance of a counterfeiter, and for that purpose, intended to remove to a place near his residence. This evidence taken singly, it is true, may have but little weight; but, all the evidence in the cause is not given, and there may have been

other circumstances connected with it, which would manifestly prove the guilty knowledge. The evidence given is probably a link in the chain of evidence, and being so, it would be wrong to exclude it from the consideration of the jury, the object being to infer from his conduct 711 and declarations, *his knowledge of this fact. On this ground, a majority of the Court is of opinion, that there was no error in admitting it.

But, the judgment is to be reversed for the errors contained in the first and fourth exceptions, and a new trial awarded.

John Tyler, Governor, &c. v. David Greenlaw.

November, 1827.

Justice of Peace—Power to Bail.—A Justice of the Peace, before whom is brought a prisoner charged with a felony, has power to bail him, where only a slight suspicion of guilt falls on the party; and a recognizance taken before such Justice, conditioned for the appearance of such prisoner before the Examining Court, is good, and a recovery may be had thereon, if the party makes default.

Recognizance—Declaration on—Sufficiency of.*—Although the condition of a recognizance does not specify the court-house of the county as the place at which the prisoner is to appear, and the declaration on the recognizance avers that such was the condition, yet on nul tiel record pleaded, judgment ought to be rendered for the plaintiff, because the statute points out that as the only place where the examination shall be had.

This was an adjourned case from the Superior Court of Law for the county of Richmond. It was an action of debt, brought in the said Superior Court, on the following recognizance: "Be it remembered, that on the 8th September, in the year of our Lord 1826, David Greenlaw, of the county of Richmond, labourer, James Shepherd, of the said county, labourer, Dominic Bennehan, of the said county, labourer, and Richard O. Jeffries, of the said county, labourer, came before us, three of the Commonwealth's Justices of the Peace for the county of Richmond, and severally acknowledged themselves to be indebted to John Tyler, Esquire, Governor or Chief Magistrate of the Commonwealth of Virginia, and his successors, that is to say; the said David Greenlaw, in the 712 sum of three thousand *dollars, and the said James Shepherd, Dominic Bennehan, and Richard O. Jeffries, in the sum of one thousand dollars each, to be respectively levied of their lands and tenements, goods and chattels, if the said David Greenlaw shall make default in the performance of the condition underwritten.

"The condition of this recognizance is such, that if the above bound David Greenlaw shall personally appear before the Commonwealth's Justices assigned to keep the peace, in and for the county aforesaid, on Monday, the 18th day of this month, then and there to answer the Commonwealth aforesaid, for and concerning a charge against him, on behalf of the Commonwealth, for knowingly and feloniously passing at different times, a considerable amount of notes, counterfeit on the Bank of Virginia, to James V. Berrick, with which the said David Greenlaw stands

charged before us, and to do and receive what by the said Court shall then and there be ordered and judged, and shall not depart thence without the leave of the said Court, then this recognizance shall be void, or else to remain in full force and virtue.

"D. Greenlaw, (Seal.)

"James Shepherd, (Seal.)

"Dominic Bennehan, (Seal.)

"Richard O. Jeffries, (Seal.)

"Acknowledged before us,

"John Darby,

"Moore F. Brockenbrough,

"Thomas R. Barnes."

The declaration sets forth the recognizance, and condition, according to their effect, stating the condition to be that the said David Greenlaw should personally appear before the Commonwealth's Justices assigned to keep the peace, in and for the county aforesaid, on Monday, the 18th day of September, 1826, at the court-house of the said county, &c. to answer, &c. and should do and receive what by the said Court, that is, the Court to be held

713 at *the court-house of the county aforesaid, on the 18th September, 1826, for the purpose of examining into the fact with which the said David stood charged as aforesaid, should then and there be ordered and adjudged; it refers to the recognizance as now remaining of record in the County Court of Richmond; it avers the breach of the recognizance in this, that the said David Greenlaw did not personally appear before the Commonwealth's Justices assigned to keep the peace for the said county, at the time aforesaid, and at the court-house aforesaid, at which time and place, it also avers, that the said Justices did hold a Court for the examination of the fact with which the said David stood charged, and vouches the record of the said Examining Court; and demands the penalty of the recognizance.

The defendant demurred generally to the declaration; and also pleaded nul tiel record, as to the supposed recognizance; and issue was joined on the demurrer and plea by the Attorney for the Commonwealth. The record exhibits a transcript from the record of the Examining Court, by which it appears that the default of the defendant is recorded, and the recognizance is ordered to be recorded and estreated.

The Superior Court adjourned to the General Court, the questions arising on the demurrer and plea, for its decision.

FIELD, J. delivered the opinion of the Court.*

(After stating the case.) The only question which arises on the demurrer to the declaration, is this: Had the Justices of the Peace, before whom the recognizance was taken, power to let the said Greenlaw to bail, and to take the recognizance in the declaration mentioned? The Court is of opinion, that the act of Assembly

714 concerning bail in *criminal cases. (1 Rev. Code, p. 595-6,) does authorise a Justice of the Peace to let any prisoner to bail, who may be apprehended for any crime, of which only a light suspicion of guilt falls on the party, although such

*See principal case cited in Archer v. Com., 10 Gratt. 636.

*Absent, DADN and SEMPLE, J.

crime may be punishable with death, or by confinement in the Penitentiary, such being the plain and obvious meaning of the statute. This general power is not taken away by the act concerning criminal proceedings against free persons, (1 Rev. Code, p. 596,) which directs that the Justice before whom a free person shall be charged with treason, murder, or other crime or misdemeanor, if in his opinion such offence ought to be enquired into by the Courts of his Commonwealth, to commit the person so charged to the county or corporation jail. The Legislature did not intend thereby to diminish the rights of the prisoner, nor divest the Justices of the Peace of their power in relation to bail. It would be giving too harsh a construction to this statute, to give it that interpretation, especially when there is nothing in it which cannot be reconciled with the provisions of the statute concerning bail. The very act of letting to bail, supposes a previous commitment to prison, and whether that imprisonment is by being in custody of an officer of the law, or within the walls of a jail, is wholly immaterial. The Court is therefore of opinion, that the Justices had authority to let the said Greenlaw to bail, and, consequently, the capacity to take the recognizance in the declaration mentioned.

The question arising on the issue made up on the plea of *nul tiel record*, is also adjourned. Upon inspecting the transcript of the recognizance shewn in evidence, a majority of the Court is of opinion, that there is such record as is set forth in the declaration, because, although the condition of the recognizance does not specify the court-house as the place at which the said Greenlaw is to appear, yet, as that is the place directed by the statute at which the Justices are directed to examine into offences, no other place can be intended by the recognizance. We are therefore

715 *of opinion, that judgment should be rendered for the plaintiff, on that issue.

The following is to be entered as the judgment of the Court.

The Court is of opinion, and doth decide, that the law upon the demurrer of the defendant to the declaration of the plaintiff, is for the plaintiff, and there being shewn in evidence, such record as the plaintiff in pleading hath alleged, judgment should be rendered for the plaintiff on the issue joined, which is ordered to be certified.

The Commonwealth v. Prentis Chubb.

November, 1827.

Statute—Prevention of Sale of Lottery Tickets—Rule of Interpretation.—The act of Assembly, passed 11th February, 1825, entitled, "an act to prevent the sale of foreign lottery tickets within this Commonwealth," does not come within the operation of the 29th section of the gaming law, and is, therefore, not to be interpreted as if it were a remedial law, but like other penal laws.

Lottery Ticket—What Constitutes.—A guarantee, (or written assurance or promise, whereby the warrantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery,) when sold by the proprietor of a lottery, or a duly authorized agent of the proprietor, is strictly a lottery ticket, although it

is not written in the usual form of lottery tickets; and the sale of such guarantee by such proprietor or his agent, is forbidden by the said act of 1825.

Same—What Constitutes Sale of.—If an individual opens an office, and sells guarantees as a substitute for lottery tickets, he the vendor holding the tickets themselves for the benefit of the purchaser, he sells those things which are substantially lottery tickets, and such sale is forbidden by the said act.

The defendant was indicted at the Superior Court of Law for the county of Henrico, under the act passed 11th February, 1825, entitled, "an act to prevent the sale of foreign lottery tickets within this Commonwealth." The Indictment contained five counts, but the defendant was convicted on three counts only, which are as follows:

716 "Henrico County, to wit: The jurors for the Commonwealth of Virginia, duly summoned to attend the Superior Court of Law for the trial of criminal causes, directed by law to be holden for the county of Henrico aforesaid, upon their oaths present:

"That Prentis Chubb, late of the county of Henrico, labourer, on the twenty-second day of June, in the year one thousand eight hundred and twenty-five, at the county aforesaid, and within the jurisdiction of this Court, under a false and feigned pretence of transferring and delivering to one Spotswood D. Crenshaw a certain paper writing, purporting to be signed by certain persons calling themselves Allens, and purporting to guarantee the payment of what a certain lottery ticket, in a lottery called the Union Canal Lottery of Pennsylvania, seventeenth class, would be entitled to, unlawfully did sell the said lottery ticket in the said lottery, being a lottery not authorised by the laws of this Commonwealth, to the said Spotswood D. Crenshaw, and did then and there unlawfully, bargain, contract and agree with the said Spotswood D. Crenshaw, to sell to him, the said Spotswood D. Crenshaw, and to procure to his order the lottery ticket aforesaid, and unlawfully then and there did act, directly and indirectly, as agent, attorney and proxy for the managers of the said lottery, in the sale of the said lottery ticket, and in the procurement of the same for the said Spotswood D. Crenshaw, under the false and feigned pretence aforesaid, against the form of the act of the General Assembly in that case made and provided, and against the peace and dignity of the Commonwealth of Virginia.

"And the jurors aforesaid, upon their oaths aforesaid, do further present:

"That the said Prentis Chubb afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this Court, unlawfully did open, and keep open, a lottery office for trafficking and dealing in lottery tickets other than such as are

717 authorised by the laws of this Commonwealth, and did then and there unlawfully traffick and deal with one Spotswood D. Crenshaw, in selling to, and procuring for, the said Spotswood D. Crenshaw a certain lottery ticket, in a lottery called the Union Canal Lottery of Pennsylvania, the same being a lottery not authorised by the laws of this Common-

*See principal case cited in *Shumate v. Com.*, 15 Gratt. 668. See monographic note on "Lotteries" appended to *Phalen v. Com.*, 1 Rob. 718.

wealth, against the form of the act of the General Assembly in that case made and provided, and against the peace and dignity of the Commonwealth of Virginia.

"And the jurors aforesaid, upon their oaths aforesaid, do further present:

"That the said Prentis Chubb afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this Court, unlawfully did procure for, transfer and sell to, one Spotawood D. Crenshaw a certain paper writing, signed by certain persons styling themselves Allens, purporting to guarantee the payment of what a certain lottery ticket would be entitled to in a certain lottery, called the Union Canal Lottery, seventeenth class, the said lottery not being authorised by the laws of this Commonwealth, against the peace and dignity of the Commonwealth of Virginia, and against the form of the act of the General Assembly in that case made and provided."

The defendant having been found guilty by the jury, he by his counsel moved the Court to set aside the verdict, and grant him a new trial on the ground, that the Court had, during the progress of the trial, misdirected the jury on the law of the case. Pending this motion, the defendant asked the Court to adjourn to the General Court the questions arising on that instruction; and the Court being of opinion, that the decision of the highest tribunal ought to be had on this new law, did adjourn to the General Court as a question of novelty and difficulty, the following:

"Was the instruction given by the Court a misdirection, and ought a new trial to be awarded to the defendant on that ground?"

718 *The instruction given by the Judge of the Superior Court of Henrico to the jury, was in the following terms:

"The first question in this case is, how shall this law be construed. The act of Assembly declares, that 'in every case that may arise under any laws, for the preventing, discouraging, or suppressing of gaming, the Court shall interpret them as remedial, and not as penal statutes.' It was a rule of construction at the common law, that all penal statutes should be construed strictly: but, this rule of construction, like all other common law rules, the Legislature had the competent power to change. They have expressed their decided intention to change that rule in the case of those penal laws, which are intended to prevent, discourage, or suppress gaming. Is the purchase and sale of lottery tickets an act of gaming? In common parlance it is certainly so considered, and the Legislature obviously so considered it, when they by the act of February 20th, 1812, entitled, 'an act to amend an act to reduce into one, the several acts to prevent unlawful gaming,' prohibited the offence of putting up a lottery publicly or privately, to be drawn or adventured for; and when again in 1819, on a general revision of the laws, they not only included the former provision against private lotteries, but the new provision against buying or selling of lottery tickets, in lotteries not authorised by the laws of

this State. It is, however, contended, that this rule of construction does not apply to future laws for the prevention, discouragement, or suppression of gaming, but extends only to prior or cotemporaneous laws of that kind. This idea is, however, refuted by the term of the clause itself: it extends to 'every case that may arise under any laws, &c.' clearly shewing, that all laws, future as well as present, on the subject of gaming, are to be construed by that rule. Another consideration will clearly prove the correctness of this position. When this rule was incorporated in the general law, at the revision of 1819, there was no other law in force on the subject, except that law itself. If it had

719 been intended to 'confine the application of the rule to that law only, the language would have been, 'In every case which may arise under this law, the Court shall consider it as remedial, &c.'"

"It is urged, that the Legislature did not intend by this act, to suppress or discourage gaming, because they have still tolerated the sale of tickets in our own lotteries; and that the true and only motive was, to prevent our people from becoming tributary to other States, by purchasing tickets in lotteries authorized by their laws. That this may have been one of the motives, I am not disposed to deny. One of the effects of this rage for gambling in lotteries, is to transfer a large portion of our monied capital to the northern cities, to which the Legislature were anxious to put a stop. But, I cannot admit that this was the only motive. The spirit of adventure in lotteries, had infected all orders of men: the rich man and the poor man, the merchant and the mechanic, the loungers and the labourer, the freeman and the slave, had all coveted the smiles of fortune by resorting to the lottery offices: they were all dazzled by the deceitful hope of becoming suddenly rich. Idleness, laziness and prodigality, were the effects of this disposition. To put a stop to these injuries to the morals of the community, as well as to check the northern current by which their wealth was swept away, the Legislature interposed their authority. They have assumed a guardianship over their concerns, by prohibiting, to a certain extent, one species of gambling as they have heretofore prohibited many other kinds of gambling: that they still permit the sale of lottery tickets when authorised by themselves, affords no argument to prove, that they do not consider the dealing in lottery tickets as a dangerous species of gambling. They can always prevent this species of traffic from running into excess, (so far as it consists in the purchase or sale of our own tickets,) by refusing to authorise the drawing of a lottery. But, they have no control over the permission granted by other States to set up lotteries, and they cannot, therefore,

720 prevent the gambling in 'those foreign lotteries to any excess, however mischievous, unless they prevent the sale of them altogether. These I apprehend to be the motives which actuate the Legislature in prohibiting the sale of foreign, while they permit the sale of our own, lottery tickets.

"Whether this guardianship be a wise exercise of power or not, let the moralist and

political economist discuss as much as they please. Courts and Juries have only a right to expound the law, and when rightly expounded, to enforce it.

"This act is then to be construed liberally: the Courts and Juries must put such a construction on it as may suppress the mischief intended to be remedied; as will guard against all subtle inventions and evasions intended to continue the mischief for private advantage, and give life and strength to the remedy, *pro bono publico*, according to the true intent of the makers of the law.

"This brings us to the question, whether a guarantee, or written assurance, or promise, whereby the warrantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery, be a lottery ticket, or not, within the true intent and meaning of this law. I think there can be no doubt that if the proprietor of the lottery, or a duly authorised agent of the proprietor, were to issue such guarantees, that they would be strictly and literally lottery tickets. There is no set form of a lottery ticket: it is a written promise that the proprietors will be responsible for the prize; and whether they use the usual form or not, their responsibility is the same: And I am equally clear, that if a man opens an office, from which he vends assurances, or guarantees, as a substitute for lottery tickets, and for the purpose of evading and defeating the law, although he does not strictly and literally sell lottery tickets, yet he does sell those papers which are substantially lottery tickets, if it can be proved, or inferred from the evidence in the cause, that he the vendor holds the tickets themselves for the benefit of the purchaser; for,

721 "in such case, the vendor would be the bailee of the purchaser, and would be bound to give possession of the ticket to the purchaser when required. The mischief to the public is in such case just as great as the sale and delivery of the tickets themselves.

"There is one case, in which I know that a sale of a guarantee would not come within the spirit or meaning of the act. If a vendor, without having the possession of the tickets, or without having any control over them, were to undertake to insure to a purchaser that a certain number should draw a prize in a lottery, and that he would pay the prize when drawn, he would certainly not come within the spirit of the law. Such an insurance under such circumstances, could never be effected by any man in his senses, except at a price much greater than the usual price of tickets; that increased price, and the knowledge that the purchaser must rely exclusively on the personal responsibility of the vendor, with a certainty that he has no right to, and can never obtain the possession of, the ticket itself, would deter all persons from engaging in such traffic; the evil of laying out large sums in lotteries could never exist, and there would be no reason for extending the provisions of the law to such rare cases.

"Whether the defendant comes under one or the other of these classes of cases, I leave to the jury to decide, from the evidence which they have heard."

The case was argued in the General Court, by Leigh and Chapman Johnson, for the defendant, and by the Attorney General, for the Commonwealth.

BOULDIN, J. delivered the opinion of the Court.*

The defendant was indicted in the Superior Court of Henrico, for a violation of the act of February, 1825, prohibiting the vending of tickets in lotteries not

722 authorised by the laws of this State, and prohibiting the opening of offices for that purpose. On his trial, it appeared that he sold papers signed "Allens," (of which firm he was a partner,) whereby Allen's guarantee to the holder what the number on that paper might draw: the name of the lottery appears on the papers, as also the number. After the whole evidence had been given to the jury, and the cause argued, the Judge instructed the jury that such a paper as the one above described, sold by the proprietor of the lottery, is a lottery ticket, though called by him a guarantee; and that if such paper be sold by another, as a substitute for a lottery ticket, the seller being in possession of the ticket, and holding it for the use of the buyer, and this done to evade the operation of the law, such sale is a violation of the law. But, previous to giving these instructions, the Judge discusses at large the question whether the act of 1825 should be construed as a remedial law under the operation of the act of 1802, and he concludes that it must be so construed, and says, that such conclusion brings him to the question, what is the character of the papers before described? In answer to that question, he gives one instance, in which he says, such papers are lottery tickets, when sold by the proprietor of the lottery; and one other instance, in which he says their sale would violate the law, when made by others than the proprietor, to evade the statute. He then states the case of a guarantee which would be innocent, and submits to the jury whether the defendant comes under one or the other of these classes of cases. The jury found the defendant guilty, and his counsel moved for a new trial, on the ground, that the opinion delivered by the Judge was a misdirection of the jury; and the questions thence arising are adjourned to this Court. The cause has been argued with great ability both by the Attorney General and the defendant's Counsel. On the part of the defendant, it is contended, that the act of 1825 is a penal law unaffected by the act of 1802; first, on the ground that the latter act applies to no other laws than those in existence at the time it was passed, and also that the act of 1825 is not an act to suppress or discourage gaming within the meaning of the act of 1802; and a majority of the Court are of opinion, that the act of 1825 ought to be construed as all other penal laws are construed; and in this opinion, JUDGES BROCKENBROUGH, ALLEN and SUMMERS do not concur.

It is then contended, and with great force of argument, that the opinion of the Superior Court, that the said act of 1825 should be

*Absent, DADK and SEMPLE, J.

liberally expounded, was a substantive instruction to the jury; and if so, that opinion being deemed erroneous by this Court, a new trial should be directed of course. We have given this argument our best attention. By some of the Court it is contended, that this conclusion of the Judge, from the opinion itself, forms no part of the instructions given to the jury. It is perfectly evident, that the range of argument adopted by him was wholly designed to shew the enlarged ground, on which he supposed the instructions which were to follow might be justified. We can see no distinction between this and other cases, where the argument is wrong and the judgment is right. The object of the Judge was to tell the jury what character the law stamps on the papers before the jury, with reference to the case then before the Court; and if that character be given truly and according to law, it matters not whether the Judge would have so delineated it, if he had not supposed greater latitude was to be taken in the construction of the act than is approved by this Court. But, it is contended, that the circumstances in the cause embrace questions of fact, which might have been solved by the jury in some other way, than simply giving an affirmative or negative answer to the propositions laid down by the Court; and if so, the direct opinion of the Judge, that the law should be so construed as to advance the remedy and suppress the mischief, assumes the character of operative instructions to the jury. This objection was enforced, by supposing cases with an ingenuity, from which, at the time, there appeared to be no escape, and supported by argument

724 wholly unanswerable, *if the premises be true. But, is it true that the case allows of the supposition that these guarantees (as they are called) might have been so sold as to be without the range of either of the direct instructions of the Judge? And could the jury, consistently with those instructions, find the defendant guilty, under the idea that the facts proved only a case of equal mischief? We think not.

The first and second propositions of the Judge embrace every possible case of a sale of the guarantees alluded to. The third states a guarantee not in the case. The first of these propositions is, that such a paper, sold by the proprietor of the lottery, is a ticket; i. e. the sign or symbol of the holder's interest in the wheel: the second states, what facts the jury must find to constitute guilt, if the paper was sold by any other than the proprietor; and no case can be conceived that falls not within a sale by the proprietor or some other person. We therefore think, that (this objection notwithstanding) this case must rest on the propriety of the instructions given to the jury. The objections made to the first of these instructions, are deemed by the Court by far the most important in the whole case, and the attention paid to them at the bar has been proportioned to their importance. The objection is, that the abstract general proposition is too broad; that supposing the fact, that lottery tickets might assume that form, if those who issue them so please, it should have been left to the jury to find the fact, whether they were issued as, and for, tickets; and further, the general allegation, that such papers issued by the proprietor, are tickets,

is not law; for, there are cases in which such papers might be issued, where they could with no propriety be called the sign of the holder's interest in the lottery, and so not tickets. In support of these objections, many cases were supposed, and with great propriety a demand made, that they should be fairly met and answered. The case supposed, at the time this demand was made, is extremely imposing, and an answer to it includes an answer to the whole objection. It

725 supposes the *case of a guarantee, an insurance simply, as the word imports, that the prize drawn to a particular number shall be paid: that such contract is, or may be, different from the sale of a ticket; to prove which, it is among other things supposed, that he to whom the guarantee was made, was before owner of the ticket, or that some one else was owner.

This, it is said, is embraced by the terms of the instruction, and the jury must have found the party guilty, had the supposed case been true. An answer to this objection is found in the plain, legal and common sense meaning of the instruction itself. It affirms, that these papers are tickets, when sold by the proprietor of the lottery; that in such original direct undertaking, by him who holds the prize, the words "I guarantee," have no meaning different from "I will pay;" and we can conceive no form of writing more exactly answering the purpose of evincing the holder's interest in the lottery, and securing to him the receipt of the prize drawn. There is no imaginable case, where the holder of the paper in question has not an identity of rights with the holder of any other promise to pay the prize drawn. But, what is called the real ticket might, it is said, have been sold to another, and surety a guarantee that A. shall have the prize drawn by B's ticket, is no sale of a ticket. There is nothing more true, than this objection in the form it is urged. But, we have before seen, that such papers, sold by the proprietor, are tickets, and he in that case has only sold two tickets of the same number, and bound himself to pay the prize drawn to each. Whether, therefore, the proprietor has before sold a ticket of the same number or not, the sale of the paper in the record is the sale of a ticket. But, the holder may have before purchased the ticket, and it may have been destroyed or so obliterated, as that the holder needs such a paper as the one in question. To this objection the answer is, that the instructions of the Court plainly suppose an original sale, and by no fair construction can be made to embrace the case of such collateral undertaking. There was 726 nothing *in the evidence, which, in the most distant manner, alluded to the state of facts supposed by this objection. If the ticket had been purchased out of the State, and afterwards the name or number is obliterated, and the proprietor within the State hand him another ticket of the same number, this is no sale of a ticket under the act, but evidence simply of the right acquired under a former sale and purchase: and yet, can it be seriously asked whether, when the Court is informing the jury that the sale of such tickets violates

the law, that it would be needful to qualify the remark by a statement, that a delivery of such papers, which is no sale, will not have that effect? The qualification the objection supposes, could not be annexed to the instruction given by way of exception to its general operation, because it would not be embraced in its general terms. The furnishing evidence of a former right, or giving further assurance for its enjoyment, comes with no propriety under the idea of a sale; and it was not necessary for the Court to have given that explanation to the jury, since it was entirely plain without it.

The second of the direct instructions to the jury, we think clear of difficulty. The facts there stated, constitute a sale of the ticket to all intents and purposes; nor is the sale less complete, because the ticket is not delivered. Neither does the fact of a superadded warrantee, make the least difference. The purchaser, by the legal effect of his contract, has a right to the ticket, and the seller to the stipulated price; and it is perfectly immaterial how involved and complicated a contract is; if it result in giving the seller the price, and the buyer title to the thing, it is a sale. It is difficult to place the fact of sale in a more clear light, than it is exhibited by the instruction itself; the seller holds the ticket, he sells the guarantee as its substitute; that guarantee contains stipulations binding the signer to the same effects as the ticket binds the proprietor, and the seller thenceforth holds the ticket for the buyer's use. Whether the ticket be sold by that transaction, depends on what is here

27 meant *by holding the ticket to the use of the buyer: it can mean nothing but this, that the buyer is to have the avails of the ticket, and the use thereof to get those avails; and what other title can a man have to a bond payable to himself and in his pocket? We confidently say none. The Counsel racked their invention to state cases embracing all the propositions in this instruction, and in which the ticket would not be sold; but, we think they entirely failed.

The opinion here delivered is not in conflict with the authorities cited; they prove clearly that the thing plainly forbidden must be done, or punishment cannot follow. We deem it unnecessary to go through

those cases, but will refer to some of the most prominent. In *Mary Mitchell's Case*, 2 East, 936, the Court decided in a prosecution for forgery, that the terms warrant or order in the statute, did not cover the case of an order for, or request to, deliver goods not belonging to the party in whose name the order was drawn: this was certainly a very strict construction of the statute, and subsequent Judges unwillingly have conformed to it. But, does any one think that a rule so rigid would have been adopted in a case of misdemeanor? But, after the construction of the act was thus settled, the question did not turn on the form of doing the thing, but whether it was done. In *Hunter's Case*, 2 East, 928, the defect was in the indictment which did not set forth and aver facts constituting a receipt. It is evident, that had all the actual facts been stated in the indictment, the party would have been deemed guilty, but be that as it may, the question in all these cases was, whether the instrument in itself or by proper averments and proof was the thing, the forgery of which, the Legislature declared should be felony. But, in deciding whether the form of the instrument forged was within the statute, the Courts always governed themselves by the answer to the question whether the legal effect of it, if genuine, would be the thing forbidden, and finally came to the conclusion now familiar to all, that the counterfeit might be forgery, though the instrument was *so made, as if

728 genuine, it would not be effectual to its purpose, provided it was so near like that which would be effectual, as to deceive ordinary observers. It is decided in *Locket's Case*, and several others, that the instrument charged to be forged may be called warrants, provided that in legal effect they are so; even though they pass currently under different names. The question in all these cases is, whether the thing done, is the thing forbidden, and the form of doing it is of little importance.

The following is to be entered as the judgment of the Court.

The Court is of opinion, and doth decide, that the instructions given to the jury, as applicable to this case, were right and proper; and, therefore, no new trial ought to be granted to the defendant on the ground of misdirection.

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ABDUCTION.

The seduction and abduction of a female over sixteen years of age, (being not within the statute,) cannot be punished by indictment. It would have been otherwise, if a conspiracy had been charged.

Anderson v. The Commonwealth, 627

ADMINISTRATOR.

1. An administrator de bonis non, cannot sue the representative of a former executor or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator; but such suit may be brought directly by creditors, legatees or distributees.

Coleman, adm'r de bonis non of

Wernick v. M'Murdo, &c., 51

2. This remedy was given to the administrator de bonis non, by the act of 1661; but that act was repealed by the act of 1711.

Ibid.

ADVANCEMENT.

1. Where a legacy is given to a child, and afterwards an advancement is made to that child, such advancement shall be taken as a satisfaction of the legacy; but this presumption may be rebutted by evidence.

Jones v. Mason, &c. 577

2. The rule that the thing advanced must be ejusdem generis with the thing bequeathed, may be controlled by evidence shewing that it was the testator's intention that the one should be in satisfaction of the other.

Ibid.

AMENDMENT.

1. A judgment is rendered by default in the General Court, upon notice, on a bond due to the Commonwealth; but the clerk, in entering the judgment, only allows interest from a date posterior to that from which, by the terms of the bond, interest was to run. This error may be amended, upon motion to the General Court, at a succeeding term.

Commonwealth v. Winstons, 546

2. This power of amendment applies to a motion, as well as to an action, and extends to the General Court.

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APPEAL.

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See Bail, No. 1.

ASSIGNMENT.

Where a note, not negotiable, is endorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, and not a remote assignor, before the act of 1807.

Caton & Veale v. Lenox, &c., 31

ATTACHMENT.

A Capias ad Respondendum being returned "not found," an attachment is is-

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AUDITA QUERELA.

The Audita Querela, to relieve a defendant from an execution, where the matter of discharge has been subsequent to the judgment, is an obsolete remedy, and has been substituted in modern practice by the motion.

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AUTREFOIS ACQUIT.

A plea of Autrefois acquit, which does not set forth the Court, nor the time, nor other circumstances of the trial or acquittal, nor vouch the record, nor shew it, if of another Court, should be rejected on motion. The attorney ought not to be required, either to plead or demur to it.

Wortham v. The Commonwealth, 669

BAIL.

1. There is no obligation on the assignee of a note to pursue the bail of the maker, before the assignee can sue his assignor.

Caton & Veale v. Lenox, &c., 31

2. Bail cannot be relieved in equity, against a judgment by default, without assigning some good reason why he did not defend himself at law.

Brown v. Toell's adm'r, 543

3. When a prisoner, who has been remanded for trial by the Examining Court, to the Superior Court, on a charge of felony, and against whom a bill of indictment has been found by the Grand Jury, applies to the Superior Court to be let to bail, on the ground that there is only a slight suspicion of guilt against him, the judgment, and the finding of the bill, are not conclusive evidence against the application, but the Court may examine other evidence.

The Commonwealth v. Rutherford, 646

4. But, it is a question for the exercise of the sound discretion of the Court; and if they are satisfied that there is material evidence for the Commonwealth, that is not before the court, was not before the Examining Court, or spread upon the record, the Court ought not to sustain the motion.

Ibid.

5. A Justice of the Peace, before whom a

prisoner charged with a felony, has power to bail him, where only a slight suspicion of guilt falls on the party; and a recognizance taken before such Justice, conditioned for the appearance of such prisoner before the Examining Court, is good, and a recovery may be had thereon, if the party makes default.

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1. The laws establishing Banks in Virginia, are public laws, and may be noticed by the Courts *ex officio*.

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2. See Usury, No. 1.

BILL OF EXCEPTIONS.

Where evidence, not admissible in itself, but which may become so by being connected with other evidence, is rejected by the Court, and a bill of exceptions filed; the bill ought to state that such other evidence was offered; otherwise, it will not be presumed.

Courtney *v.* Commonwealth, 666

CAVEAT.

1. The doctrine of Noland *v.* Cromwell examined.

M'Clung *v.* Hughes, 453

2. After a grant issued, any one claiming a prior equity against the grantee, can in no case, have relief in equity, unless upon the ground of actual fraud in the acquisition of the legal title; or, unless the party was prevented from prosecuting a caveat, by fraud, accident or mistake. *Ibid.*

3. By actual fraud, in such case, is meant the proceeding to procure a patent, after actual notice of a prior equity. *Ibid.*

4. See the same doctrines in the case of Jackson *v.* M'Gavock, 509

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See Juror.

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What shall be deemed a clerical error? Rees *v.* Conococheague Bank, 326

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If a prisoner, in speaking of the testimony of a witness who had testified against him, says, "that what C. said was true so far as he went, but that he did not say all, or enough;" this is not admissible 731 as a confession *of the prisoner; nor does it lay any foundation for proving to the jury what C. did swear to.

Finn *v.* Commonwealth, 701

CONSTABLE.

A Constable is not authorised by the 25th section of the act concerning executions, to take the indemnifying bond there prescribed, when he levies an execution issued by a single Magistrate on a judgment for a small debt.

Martin *v.* Sturm, 693

CONTRA BONOS MORES.

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Anderson *v.* Commonwealth, 627

CORPORATION.

In a suit brought by a corporation, it is not necessary to aver in the declaration that it is a corporation duly constituted, or that it is authorised by law to sue in its corporate name; but, these questions may be put in issue by the defendant, or raised upon the trial of the general issue.

Rees *v.* Conococheague Bank, 326

COSTS.

In a case of great novelty, the Chancery Court ought not to give costs to either party.

Jones *v.* Mason, &c., 577

COURT OF APPEALS.

A dissolved injunction is revived by an appeal taken by the plaintiff in the Court of Chancery; and it is improper in the appellee to take out execution, so long as the appeal is depending. Quare, whether the party offending should be punished by the Court of Appeals, or the Court of Chancery?

Turner *v.* Scott, &c., 332

DEMURRER.

In a declaration on a bond with collateral condition, if there be two assignments of breaches, and either assignment be good, and the whole declaration is demurred to, the demurrer ought to be overruled.

Martin *v.* Sturm, &c., 693

DEMURRER TO EVIDENCE.

1. The practice of inserting in a demurrer to evidence, the evidence on both sides, is established by repeated decisions in this State.

Green *v.* Judith, &c., 1

2. In such case, the demurrant must be considered as admitting all that can reasonably be inferred by a jury, from the evidence given by the other party; and as waiving all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence, which do not necessarily flow from it. *Ibid.*

3. If a party finds out, after a demurrer to evidence, that he ought not to have demurred, but should have left his cause to a jury, the Court cannot award a *venire de novo*. *Ibid.*

DEPOSITIONS.

A notice to take depositions is insufficient, if it omits the place where the depositions are to be taken; nor, if the Magistrates meet on the day appointed, can they resume the taking of depositions at any future day, without an adjournment to such day.

Hunter *v.* Fulcher, 126

DILIGENCE.

In general, due diligence must be used by the assignee in bringing suit against the maker, before the assignor can be sued; but, there are many cases in which no suit need be brought against the maker as where the note was a forgery, or the assignor has received the money from the maker, or where the assignor practised a fraud upon the assignee, or where exchanged notes were given between the maker and assignor as a consideration for each other, and the note given

by the assignor has never been paid by him, nor sued upon, &c.

Caton and Veale *v.* Lenox, &c., 31

DISCOUNT.

1. A loan on accommodation paper, and a discount on real paper, stand on the same footing, as to the right of a bank to deduct the interest in advance on the whole amount of the note.

Stribbling *v.* Bank of the Valley, 132

2. Taking interest in advance upon the whole of a note discounted at the bank, is lawful. Ibid.

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1. A dismission of a presentment is not a retraxit, nor is a retraxit known to the criminal law, where the prosecution is carried on by the Commonwealth.

Wortham *v.* Commonwealth, 669

732 *2. The dismission of a presentment by the Court, at the instance of the Attorney for the Commonwealth, is not an acquittal. It is an informal Nolle Prosequi. Ibid.

EQUITY.

1. See Caveat, Nos. 1, 2, 3, 4.

2. Where relief is sought in equity, on the ground of usury, the bill must put that matter directly in issue.

Brown *v.* Toell's adm'r, 543

3. Where a cause is set down for hearing by consent, upon bill and answer, the answer is to be taken as true.

Jones *v.* Mason &c., 577

4. See Costs.

ESTATE TAIL.

1. A will is made between the 1st day of January, 1787, and the 1st day of January, 1820, by which the testator gives to his sons several tracts of land, and if either of them should die without lawful issue, the part allotted to him to be equally divided among his surviving brothers, &c.; this is a fee tail, and not an executory devise.

Bells *v.* Gillespie, 273

2. By a will dated in 1778, the testator gave a tract of land to his two sons, to be equally divided between them, to them and their heirs for ever; but, in case either of his said sons should die without issue lawfully begotten, he desired that the survivor should have the whole. But, if both his said sons should die without lawful issue, he desired that his land should be sold by his executors, and the money arising therefrom should be equally divided among his daughters then living, &c. This is an estate tail in the sons, which was converted into a fee simple by the act of 1776.

Broadbuss and Wife *v.* Turner, 308

EVIDENCE.

1. Where a witness has given evidence in a suit, in which a new trial is granted, and the witness die before the second trial, the substance of his testimony may be proved on the second trial, and it is not necessary to repeat his very words.

Caton and Veale *v.* Lenox, &c., 31

2. A remote assignor of a note not negotiable, might have been a competent witness, before the act of 1807, to prove that the immediate assignor was discharged, in a suit between him and the last assignee. Ibid.

3. It seems, that if the interest of the witness was apparent on the face of the paper, and he was not objected to on the first trial but on the contrary, was cross-examined, it is too late to make the objection on the second. Per Carr, Judge. Ibid.

4. Parol declarations of a grantor, previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made. Per Carr, J.

Land *v.* Jeffries, 211

5. The book of a teller in a Bank, is not per se evidence to establish the facts appearing in that book, but may be given in evidence in connection with the evidence of the teller himself, if the said teller's evidence make it proper to refer to it, to prove that a particular entry was made.

Courtney *v.* Commonwealth, 666

6. See Confession.

7. In a criminal case, proof of what a witness (who is since dead,) swore to on a former trial between the same parties, and on the same issue, is inadmissible.

Finn *v.* Commonwealth, 701

EXECUTOR.

1. An executor cannot apply the assets of his testator to his own individual purposes, unless he is in advance to the estate to the same amount; and a purchaser, knowing of such application, purchases at his peril, &c.

Graff & al. *v.* Castleman, &c., 195

2. The rule that where a party relies on an account furnished by the other party, he is bound to take it all together, and admit the debits as well as the credits, unless he can surcharge and falsify it by proofs, is not applicable to an executor's account, nor to any case where there is a trust or confidence.

Robertson, &c. *v.* Archer, &c., 319

3. A suit by an executor against the legatees for advances made to the estate beyond the assets, will not be entertained after a great length of time has elapsed since the qualification of the executor, and the estate has been distributed with the consent of the executor. Ibid.

FOREIGN LAWS.

1. A law of another State is sufficiently authenticated under the act of Congress, if it has the seal of the State affixed thereto; and the particular officer entitled to affix the seal, depends upon the regulations of the several States, respectively.

Hunter *v.* Fulcher, 126

2. Where a party in a suit in Virginia, relies on the law of another State, to support his *claim, he may produce an authenticated copy of the section only on which he relies, without a copy of the whole law. Ibid.

FRAUD.

1. Where the grantor of personal property remains in possession, after an absolute conveyance, such conveyance will be deemed prima facie fraudulent.

Land *v.* Jeffries, 211

2. But, such possession is not conclusive evidence of fraud, but is open to explanation. Ibid.

3. Therefore, where a woman about to be married, makes a conveyance of her personal property to a third person, with the privity

and approbation of her intended husband, the marriage takes place a few minutes after the conveyance, and the husband takes possession of the property after the marriage; the property, thus conveyed, will not be subject to the husband's creditors, as his possession after marriage, was not that of his wife, (she not being *sui juris*), and her short possession between the time of the conveyance and that of the marriage, not being sufficient, or of a nature to render the deed fraudulent.

Ibid.

4. See Caveat, No. 3.

GAMING.

1. Taking a chance in a raffle, at twenty dollars, or any less sum, although the property raffled for exceeds that sum, (the raffling being at a private house,) does not bring the person within the operation of the gaming act.

Commonwealth v. Garland, &c., 652

2. The winner of the thing raffled for, (it exceeding \$20,) does come within the operation of the law, although neither of the losers (the loss of each being less than \$20,) comes within it.

Ibid.

3. If the prize is won by two or more individuals, in partnership, but the gain of each is less than \$20, neither of them is embraced by the law.

Ibid.

4. The taking a chance in a raffle, is not the same offence as the purchase of a foreign lottery ticket, and is, therefore, not liable to the penalty prescribed for the latter offence, by the latter part of the 27th section of the gaming act.

Ibid.

5. An indictment, which charges that unlawful gaming is carried on at a house of public resort, is good.

Wortham v. Commonwealth, 669

GENERAL COURT.

In general, the judgment of a Superior Court, although in favor of a prisoner, ought to yield to that of the General Court, expressed in an analogous case.

Commonwealth v. Carver, 660

INCONTINENCY.

1. Before the statute of *circumspecte agatis*, 13 Edw. 1, the Court of King's Bench punished offences of incontinency; but, since that statute, the cognizance of such offences has been transferred to the Ecclesiastical Courts.

Anderson v. Commonwealth, 627

2. The offences of adultery, fornication, and the like, cannot be punished by our Courts of law, as common law offences, unless they be accompanied with other circumstances, which of themselves constitute a misdemeanor; such as, the public commission of the act, or a conspiracy. The statutory offence must be punished according to the statute.

Ibid.

3. See Abduction.

4. The offence of fornication is not punishable as a common law offence. The statute, which prescribes a penalty for the offence, must be pursued in such case.

Commonwealth v. Isaacs and West, 634

INDEMNIFYING BOND.

A constable cannot take an indemnifying bond on an execution issued by a single

magistrate on a judgment for a small debt.
Martin v. Sturm, &c., 693

INDICTMENT.

1. See Gaming, No. 5.

2. An indictment for a nuisance, which concludes "to the common nuisance of divers of the Commonwealth's citizens," is not sufficient. It should be laid to the common nuisance "of all the citizens of the Commonwealth, residing in the neighbourhood;" or, "of all the citizens, &c. residing, &c. and passing thereby."

Commonwealth v. Faris, 691

INDORSEMENT.

A blank indorsement of a note, is sufficient to vest a title in the holder, though it be not filled up before the judgment.

Rees v. Conococheague Bank, 326

INJUNCTION.

1. Where an injunction is awarded until the answer comes in, the injunction is not dissolved by the coming in of the answer, but is a subsisting injunction until it is dissolved by the subsequent order of the Chancellor.

Turner v. Scott, &c., 332

2. A dissolved injunction is revived by an appeal taken by the plaintiff in the Court of Chancery; and it is improper in the appellee to take out an execution, so long as the appeal is depending.

Ibid.

3. Quære, whether the party offending should be punished by the Court of Appeals, or the Court of Chancery?

Ibid.

INSTRUCTION.

A Court cannot be called upon to give an instruction on an abstract point of law.

Caton and Veale v. Lenox, &c., 31

INTEREST.

Interest cannot be recovered as of course, in actions for the recovery of rent, but may be given under circumstances, to be judged of by the jury.

Mickie v. Lawrence, &c., 571

JUDGMENT.

A judgment by default, for want of appearance, founded on an instrument of writing for the payment of money, on which an endorsement of a credit is made by the plaintiff himself, ought to be entered subject to such credit; or, if the plaintiff refuses to take the judgment in that way, a writ of enquiry should be awarded.

Rees v. Conococheague Bank, 326

JUROR.

A juror, who having heard the testimony of a witness in the cause, and then formed an opinion on it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable he had expressed it, but declared at the time of the trial that he had no prejudice against the prisoner or his cause, and that he could, as he believed, give the prisoner as fair a trial as if he had not heard any thing on the subject, is an impartial juror, and a challenge against him for cause ought to be overruled.

Pollard v. Commonwealth, 659

LEASE.

1. No set form of words is necessary to

constitute a lease; and a contract between two persons that one should have, during the life of the other, land, negroes, &c. he paying therefor a stipulated annual sum is not a sale, but a rent.

Mickie v. Lawrence, 571

2. Such a contract does not lose its character of a rent, by slaves and other personal property being included in the contract.

Ibid.

LEGACY.

1. Where a legacy is given to a child, and afterwards an advancement is made to that child, such advancement shall be taken as a satisfaction of the legacy, but this presumption may be rebutted by evidence.

Jones v. Mason, &c., 577

2. The rule that the thing advanced must be ejusdem generis with the thing bequeathed, may be controlled by evidence shewing that it was the testator's intention, that the one should be in satisfaction of the other.

Ibid.

LOTTERIES.

1. The act of Assembly, passed 11th of February, 1825, entitled, "an act to prevent the sale of foreign lottery tickets within this Commonwealth," does not come within the operation of the 29th section of the gaming law, and is, therefore, not to be interpreted as a remedial law, but like other penal laws.

Commonwealth v. Chubb, 715

2. A guarantee (or written assurance or promise, whereby the warrantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery) when sold by the proprietor of a lottery, or a duly authorised agent of the proprietor, is strictly a lottery ticket, although it is not written in the form of lottery tickets; and the sale of such guarantee by such proprietor or his agent, is forbidden by the said act of 1825.

Ibid.

3. If an individual opens an office, and sells guarantees as a substitute for lottery tickets, he holding the tickets themselves for the benefit of the purchaser, he sells those things which are substantially lottery tickets, and such sale is forbidden by the said act.

Ibid.

MARRIAGE.

Quære, if a husband be prosecuted and convicted of an unlawful marriage, and the wife is not prosecuted, can a judgment of separation be pronounced on the verdict?

Commonwealth v. Leftwich, 657

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*MARRIED WOMAN.

A conveyance by a woman while sole, of her own property (even if it were a deed of trust) who afterwards marries, although not recorded, is not void under the statute of frauds against the creditors of the husband; as the statute only applies to creditors of the grantor.

Land, &c. v. Jeffries, &c., 211

MILLS.

Although leave has been given by the County Court, to erect a mill, according to the provisions of the statute, yet that is no bar to a public prosecution or private action for injuries, other than those actually foreseen and estimated by the inquest.

Commonwealth v. Faris, 691

MOTION.

If, on a motion, (to quash an execution, or enter a judgment satisfied,) the relief of the party depends on matters of fact, the Court has a discretion to direct a jury, or try the facts.

Smock v. Dade, 639

PLEADING.

1. A declaration against an administrator, containing counts charging him in his individual character, combined with other counts, charging him in his representative character, is bad on general demurrer.

Epes's adm'r v. Dudley, adm'r &c., 437

2. But, where all the counts are laid against the defendant, as administrator, they will be considered as applying to him in his representative character, and therefore good; although the declaration, in some of the counts, omits to state that the claim was for money due from the intestate of the defendant.

Ibid.

PRACTICE.

The long prevalence of a practice, not sanctioned by law, will not give it validity, if it affects the rights of persons.

Wernick v. M'Murdo, &c., 51

PRIVILEGE.

1. The privilege of a member of Assembly, cannot be noticed by the Courts ex officio. As it may be waived, it must be claimed; and it can only be claimed by plea, or on motion tendered or made at the proper period.

Prentiss v. Commonwealth, 697

2. If a member of Assembly allows a judgment to be rendered against him during the existence of his privilege, and does not seek, during the progress of the proceedings, either to abate or suspend them, he will be deemed to have waived his privilege, and he cannot afterwards be allowed the writ of error coram vobis to reverse the judgment.

Ibid.

PROHIBITION.

The County Courts have no power to grant writs of prohibition. If they exceed their jurisdiction, by granting them, the Superior Courts of Law may restrain the exercise of such jurisdiction, by prohibition.

Jackson v. Maxwell, 636

PROSECUTOR.

1. In an indictment for a trespass or misdemeanor, it is not necessary to insert the name or surname of a prosecutor at the foot of the indictment, if it appears that the indictment was found true on the evidence of a witness sent to the Grand Jury, either at their own request, or by direction of the Court, and this whether there was a previous presentment or not.

Wortham v. Commonwealth, 669

2. A volunteer informer ought to be made a prosecutor, and liable for costs in case of failure; but, one who is compelled to be an informer, cannot be considered a prosecutor.

Ibid.

RECOGNIZANCE.

See Bail, No. 5.

RECORDING.

1. See Married Woman.

2. By the act of 1814, a deed cannot be proved and recorded after eight months from its delivery, in the clerk's office; but, such deed must be proved in open Court.

Heron *v.* Bank of U. States, 426

RENT.

1. See Lease.
2. See Interest.

REPEAL.

The repeal of a law prescribing a punishment for an offence, without a proviso, that offences committed before the operation of the new law, shall be punished under the old, excuses offenders under the repealed law. This is again decided, after repeated adjudications to the same effect.

Commonwealth *v.* Leftwich, 657

736

*RETRAXIT.

See Dismissal, No. 1.

ROADS.

On an application to turn a road, where the witnesses on each side are nearly equal in number and credibility, the concurrent judgments of the County and Superior Courts ought to be approved by the Court of Appeals.

Atkinson *v.* Ball, 446

SHOOTING.

See the next head.

SLAVE.

A negro slave is a person on whom a free person may commit the offence of malicious or unlawful shooting, stabbing, &c. under the act against those offences, passed 9th of February, 1819.

Commonwealth *v.* Carver, 660

SUPERSEDEAS.

The penalty of a Supersedeas bond is to be fixed by the Judge granting it, and is not governed by the law respecting appeals by plaintiffs or demandants.

Smock *v.* Dade, 639

TIME.

See Executor, No. 3.

TRUSTEE.

1. Where one is appointed by will, trustee of the real estate, and executor of the personal, and dies, the children of the testator may file a bill against the representative of the executor and trustee, for an account of the proceeds of the real estate, without having an administrator de bonis non appointed of the estate of their testator.

Graff, &c. *v.* Castleman, &c., 195

2. A trustee cannot aliene the trust fund in payment of his own debts. Ibid.

USURY.

1. The law of usury applies to the banks, subject to the modifications produced by their charters.

Stribbling *v.* Bank of the Valley, 132

2. Where the facts are agreed or found by the jury, it is the province of the Court to say, whether they amount to usury or not. Ibid.

3. When a proposition is made for a loan of money, and the lender will only consent to lend a part of the money wanted, on condition that the borrower shall receive Bank stock, at a price much above the market value, to make up the deficiency, and the bargain is made on these terms, such contract is usurious. Ibid.

4. A note is made, and endorsed for the accommodation of the payee, and afterwards put into the hands of a broker by the payee, to be sold in the market. It is purchased of the broker by a third person, who has no knowledge that it is accommodation paper, or for whose benefit it is sold. This transaction is not usurious.

Whitworth, &c. *v.* Adams, 333

5. An intermediate endorsement of a valid note, subsequent to that of the payee, for an usurious consideration, as between the endorser and endorsee, will not vitiate the note in the hands of a subsequent bona fide holder, without notice of such usury. Ibid.

6. A note, valid in its inception, is afterwards endorsed by a party to whom it has regularly come, to a third person, at a greater discount than legal interest; such transaction is usurious. Ibid.

7. See Equity, No. 1.





REPORTS OF CASES
ARGUED AND DETERMINED
IN
THE COURT OF APPEALS
OF
VIRGINIA:
TO WHICH ARE ADDED, REPORTS OF CASES
DECIDED IN THE
GENERAL COURT OF VIRGINIA.

VOL. VI.

By the late
PEYTON RANDOLPH,
Counsellor at Law.

Eastern District of Virginia, to wit :

{ L. S. } BE IT REMEMBERED, That on the sixteenth day of July, in the fifty-fourth year of the Independence of the United States of America, Hodijah Meade, Administrator of Peyton Randolph, deceased, of the said district, hath deposited in this office, the title of a Book, the right whereof he claims as proprietor, in the words following, to wit :

"Reports of Cases argued and determined in the Court of Appeals of Virginia : To which are added, Reports of Cases decided in the General Court of Virginia.—Vol. VI. By the late Peyton Randolph, Counsellor at Law."

In conformity to the Act of the Congress of the United States, entitled "An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."

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CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia.

Brown v. Street.

August, 1827.

Judgment—Equitable Relief to—When Granted.*— Equity will not interpose to arrest a Judgment at Law, where the point has been fully decided in the Court of Law, unless there has been some surprise, defect of evidence, fraud, or some call for discovery.

This was an Appeal from the Lynchburg Chancery Court. The following opinions give a full view of the subject.

Leigh, for the Appellant.

Johnson, for the Appellee.

August 21. JUDGE CARR.

This seems to me a very plain case. On the 21st of December, 1809, Brown, by written agreement under seal, sold to

Street, a tract of land, containing 57
2 acres, more or less, in the County of Franklin, bounded by the lands of Hancock, Rives, and Brooks, with a grist mill thereunto belonging; for which Street was to pay a negro man called Juba, and \$200, to be paid on the 1st of January, 1810; Brown being bound to make and maintain a right in fee simple to the land. The negro was delivered immediately; and on the day after the contract, (22d of December, 1809,) Street executed a penal bill for the \$200, thus: 'I confess myself justly indebted to T. Brown, in the sum of \$200, to be paid to the said Brown, &c. on the 1st of January next. Yet the condition of the above is such, that the said Brown is bound to make a right in fee simple, to a certain tract of land in the County of Franklin, bounded by the lands of Hancock, Rives, and Brooks; and should the said Brown make and maintain the said right, the said Street is bound in the penal sum of \$400; otherwise, the above obligation to be held void,' &c.

On this penal bill, Brown, in 1812, brought an action of covenant, setting out the bill with its condition, and averring that he had conveyed in fee simple, the said land to the said Defendant, according to the form, tenor and effect, of the said covenant, and charging a breach in the non-payment of the money.

The Defendant pleaded, that the Plaintiff ought not to have and maintain his action, because, by the covenant, he was bound to make him a title to the land before the payment of the \$200; and he avers, that the Plaintiff has not made him a title in fee simple to the said tract of land, and this, &c.

The Plaintiff replies, that he ought not

to be precluded, &c. because he saith, that he hath made a right and title in fee simple to the Defendant, to the tract of land in the covenant aforesaid, in the declaration mentioned, and this he prays may be enquired of, &c.

This is the sole issue joined in the cause. The Jury find a general verdict for the Plaintiff for \$231; thereby falsifying the plea, and affirming that the Plaintiff
3 had made a title to the Defendant, to the tract of land which, by the covenant, he had bound himself to convey. Without having this fact expressly proved to them, the Jury could not have found for the Plaintiff; for, the covenant shewed, that this conveyance was a condition precedent to the payment of the \$200, and the pleadings rested the whole case upon that point, the Plaintiff taking the affirmative, that he had made the fee simple title. This judgment stands unimpeached. No exception, no motion for a new trial, no appeal. But a Bill of Injunction is filed to stay the judgment, and in effect to re-try the issue in Equity; and this, without stating any surprise in the trial at Law, any defect of evidence, any fraud, or making any appeal to the conscience of the Defendant for a discovery.

This brief statement is sufficient to shew, that Equity has nothing to do with the case. I shall not, therefore, trouble myself with the evidence taken on the Injunction, further than to say, that I think my brother Green's view of it is a very correct one.

The Decree of the Chancellor must be reversed, and that of the County Court affirmed.

JUDGE GREEN.

Street, on the 21st December, 1809, purchased a mill and tract of land adjoining, as containing 57 acres; for which he was to pay a negro man who was immediately delivered to Brown, at the price of \$500, and \$200 on the first of January, 1810. Articles of agreement, to this effect, were executed by the parties on the day the contract was made. The land was described as bounded by the lands of Hancock, Rives, and Brooks; and Brown covenanted to make and maintain a right in fee simple to the land, which was described as containing 57 acres, more or less. Street, on the 22d of December, 1809, gave to Brown an obligation to pay the \$200 on the 1st of January, then
next, provided Brown should make
4 and maintain to Street a right in fee simple to a certain tract of land, bounded by the lands of Hancock, Rives,

*See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 426.

and Brooks, (without naming any quantity,) to which Brown was already bound to make and maintain a title in fee simple.

In April, 1812, Brown instituted an action of covenant on this obligation against Street, and averred that he had conveyed the land according to the agreement; and issue was taken upon this single point, and found for the Plaintiff; who thereupon had judgment for the \$200 and interest.

The Defendant, Street, thereupon filed his bill to injoin the judgment at law, stating, that upon a survey, the land represented in the contract as 57 acres, turned out to be only 40 or 41 acres; and that he claimed a proportionable abatement, which the said Brown refused to allow, pretending that he had conveyed to Street the full quantity which he had agreed to sell; and the Complainant, whilst he admits the fact, that such a conveyance had been made, alleges that it embraces 20 acres or more, which did not belong to the tract he purchased, but were a part of the lands of William Brooks, which he never meant or wished to purchase, and which is of inferior value.

The Defendant, by his answer, stated that he had sold 60 acres of land, instead of 57, as mentioned in the contract: that the boundaries were known and agreed upon by the parties; and that it was agreed, that if the agreed boundaries did not contain 60 acres, the deficiency was to be made up out of the adjoining land, which he had purchased from William Brooks; and refers to the deed to him recorded, which included all the land conveyed to the Plaintiff, and that he had conveyed the 60 acres to the Plaintiff.

It is hardly possible, from the pleadings and proofs in the cause, to ascertain clearly the circumstances of the transactions involved in this suit. It seems, however, that Benjamin Brooks, the father of William Brooks, held one acre of land, on which there was a mill; and that the legal title remained in Hancock, who held

5 all the adjoining *land. B. Brooks afterwards purchased of Hancock the land adjoining the mill, by metes and bounds, supposed to contain 57 acres. B. Brooks had the land surveyed, and represented to Hancock that it contained only 31 acres; whereupon, Hancock sold or laid off to him by metes and bounds, 26 acres of the adjoining land. The first sale now turns out by survey, to be 40 or 41 acres. All these lands, including the acre upon which the mill stood, were afterwards conveyed by Hancock to William Brooks, at the request of B. Brooks; so that Brooks held in the whole, in reality, 67 acres, in the mill tract. Afterwards, W. Brooks sold the mill with 60 acres of land to Brown (called 57 in the contract between Brown and Street;) but before any conveyance was made, Brown sold to Street. The witness, who wrote the agreement, says he understood the sale to be of the 60 acres purchased by Brown, of Brooks; and that it was supposed to be 60 acres that were sold by Hancock to B. Brooks; although, in the writing, he put it at 57 acres. The Plaintiff contends that he only purchased

the 40 acres, which was the first purchase by Brooks from Hancock; that he was not bound to take any beyond the lines of that purchase, out of Brooks' second purchase from Hancock, that being Brooks' land, which he did not wish or intend to purchase.

The Defendant contends, that his purchase from Brooks was of sixty acres, out of all he got from Hancock, (which Brooks admits:) that his sale to Street was of the land he had purchased of Brooks; and that the second purchase of Brooks from Hancock, was no more Brooks' land when he sold to Street, than the mill and the first purchase, the legal title to the whole still being in Brooks; and that Brooks has conveyed to him, and he to Street, according to their respective contracts.

The Defendant's representation seems to be true. The call to be bounded in part by Brooks' land, refers to the seven acres reserved by Brooks out of the 67 acres he held; which is all, so far as appears, that he held in that neighbourhood.

6 *It is proved, that Street, after the contract, said that he was to take the difference between the quantity in the first purchase from Hancock, and the 60 acres out of the adjoining land, the second purchase from Hancock. This is proved by Brooks, Hancock, and the two Kemps. The real dispute was with Brooks, as to what particular part of his second purchase should be laid off for Brown and Street, claiming under him.

Whatever might be the merits of this dispute, it seems to have been settled by the giving of a deed, according to Brooks' survey, by Brown, and its acceptance by Street. That deed is in the record. There is no witness to it, and it is recorded upon the acknowledgment of Brown; and I think the probability is, that it was made and recorded, without the consent of Street. However this may be, it can have no influence in the actual state of the pleadings and proofs. Street does not allege, or pretend to prove, this fact; and the issue tried in the suit at Law, which was found against Street, directly involved this question. If this deed had not been proved to have been accepted by Street, the Jury could not have found that Brown had performed the condition precedent, by conveying according to his contract. It is true, if the contract was only to convey the first purchase from Hancock, by Brooks, this conveyance would have been, if accepted, a performance of the contract, although it conveyed other lands also. But, in that case, it could not be right to allow Street a credit for the deficiency, whilst he held the title to the excess conveyed to him, as is the effect of the Decree. But, in truth, the land conveyed, was according to the contract, so far as it includes a part of the two purchases from Hancock. The only description of the land, in the contract, is, 57 acres, more or less, adjoining Hancock's, Brooks', and Rives' lands. It does not refer to any particular boundaries, nor to any general description, as a particular purchase made by Brown, of any other: or by Brooks, of any other. To identify the land sold, it was indispensably necessary

7 *to resort to parol evidence. It was a case of latent ambiguity.

As to the question, how the additional land was to be laid off, if Street intended to contest that, he should have refused to accept the conveyance; and his acceptance of the deed, precludes any enquiry into that subject; no fraud or mistake being alleged. The acknowledgment of a deficiency of 17 acres, has no effect. It was only an acknowledgment that 17 acres were conveyed, over and above the quantity of the original purchase by Brooks from Hancock.

The land, (I mean the whole tract conveyed to Street,) was intrinsically of little value. One of the witnesses values it at \$1 per acre; another, at \$2; and the additional land is valued by a witness, at 70 cents. The difference between laying off the 17 or 20 acres, in the way Brooks insisted on, and in the way Street claimed, could not amount, in value, to more than \$5 or \$10. The real value of the purchase consisted in the mill.

Upon the whole, I think the Decree of the Chancery Court should be reversed, and that of the County Court affirmed.

JUDGE CABELL concurred, and a Decree entered accordingly.*

8 *Cooke v. Thornton.

August, 1827.

Trespass Quare Clausum Fregit—What Necessary to Sustain.—To maintain an action of trespass quare clausum fregit, there must have been actual possession in the Plaintiff, when the trespass was committed.

Same—When It Will Lie.—And therefore, such an action will not lie for any damages resulting from the ouster of the Plaintiff, after the trespass was committed, unless the Plaintiff has regained the possession.

Appeal from the Superior Court of Spottsylvania County, where Thornton brought an action of trespass quare clausum fregit against Cooke. The subject is sufficiently explained in the following opinions.

Johnson, for the Appellant.

Leigh and Stanard, for the Appellee.

August 21. JUDGE CARR.

Cooke leased to Thornton a tenement in

*The PRESIDENT and JUDGE CABELL absent.

+Trespass Quare Clausum Fregit—What Necessary to Sustain.—In *Blackford v. Rogers*, 2 Va. Dec. 294. it is said: "In *Cooke v. Thornton*, 6 Rand. (Va.) 8. It was held that the action of trespass quare clausum fregit could not be maintained unless the plaintiff was shown to be in the actual possession when the alleged trespass was committed; but in *Van Brunt v. Schenck*, 11 Johns. 385. SPENCER, J. says that in this country the principle, as to real property, has been carried further than in England; and we allow the owner to maintain trespass without actual entry, on the principle that possession follows ownership, unless there be an adverse possession. I am not aware of any case which overrules *Cooke v. Thornton*, supra, nor, indeed, of any case in this court which throws any doubt upon it; but it having been suggested that a different practice has grown up, more in conformity with the law as stated in the quotation from *Van Brunt v. Schenck*, supra, than with it, we have thought it prudent to refrain from any expression of opinion upon what may prove an interesting and important question, until the decision of it is called for upon the record. In the case before us it is wholly unnecessary to pass upon it, as the evidence tends to show possession in the defendant in error at the time of the alleged trespass, and negatives the claim of possession, actual or constructive, in the plaintiff in error." In this case (*Blackford v. Rogers*) it was held that, in trespass quare clausum fregit, where

Fredericksburg for seven years. He afterwards dispossessed him of the tenement, before the expiration of the term; there being about three years of the lease to run when this suit was brought. This is an action of trespass quare clausum fregit, brought by the tenant for this wrong. The declaration shews that there had been no re-entry; but, that the possession gained by the ouster, continued in the landlord.

Several points were made in the Court below, but one only was relied on in the argument here, or seems worthy of notice. It is that going out of the first Bill of Exceptions. The Counsel for the Defendant moved the Court to instruct the Jury, "that admitting the dispossession to be wrongful, they ought not to take into consideration, in their estimate of damages, the injury resulting from the Plaintiff's being kept out of possession, from the date of the writ to the expiration," (of the term) "but only from the time of the dispossession, until the suit was brought;" which instruction the Court refused to give.

9 *In this refusal, I think there was clear error. To maintain this action, there must have been an actual possession when the trespass complained of was committed. Before entry and actual possession, a person having the freehold in Law, cannot have trespass. Thus, it will not lie before entry for a conusee of a fine, or a purchaser by lease and release, or an heir or devisee against an abator. A disseisee may have it against the disseisor for the disseisin itself, because he was then in possession; but not for an injury after the disseisin, until he hath gained possession by re-entry; and then he may support this action for the intermediate damage; for, after the entry, the law, by a kind of jus post liminii, (as Blackstone expresses it,) supposes the freehold to have all along continued in him. I might quote many passages from the Books, in support of this.

Co. Litt. 257, a. "The disseisee shall

the boundary between the plaintiff's and the defendant's lands was in dispute, and the evidence failed to show that the plaintiff ever had actual or constructive possession of the disputed strip, but tended to show possession thereof in the defendant prior to and at the time of the trespass. Judgment for the defendant was proper. In *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 419, 21 S. E. Rep. 1087, it is said: "One in actual possession may maintain trespass quare clausum fregit. Formerly, to maintain that action, actual possession was necessary. Bart. Law Prac. 182; Kretzer v. Wysong, 5 Gratt. 9; *Cooke v. Thornton*, 6 Rand. (Va.) 8. and *Truss v. Old*, 6 Rand. 556. Therefore, a tenant being in possession, the landlord could not sue in trespass for lasting injury to the freehold, but must bring trespass on the case. 1 Tucker, 191. But now a constructive possession is sufficient to maintain trespass. *Snyder v. Myers*, 3 W. Va. 195; *Storrs v. Feick*, 24 W. Va. 606." When a disseisor takes possession and excludes the disseisee entirely therefrom, the former can alone recover for a direct injury to the land; but the disseisee may before his re-entry maintain trespass against the disseisor for disseizin itself. *Storrs v. Feick*, 24 W. Va. 608, citing the principal case as authority. To the same effect the principal case is cited in *Bailey v. Butcher*, 6 Gratt. 146. See the principal case also cited in *Bailey v. Butcher*, 6 Gratt. 145; *McDoddrell v. Pardee and Curtin Lumber Co.*, 40 W. Va. 567, 21 S. E. Rep. 879. On the subject of trespass quare clausum fregit, see generally, on this subject, monographic note on "Trespass" appended to *Quarles v. Lacy*, 4 Munf. 251.

The principal case is also cited in *Rand v. Com.*, 9 Gratt. 751; *Crelgh v. Boggs*, 19 W. Va. 252.

have an action of trespass against the disseisor, and recover his damages for the first entry, without any regress; but after regress, he may have an action of trespass with a continuando, and recover, as well for all the mesne occupation, as for the first entry."

Monockton v. Pashley, &c. 2 Ld. Raym. 977. Per Lord Holt. "As to the case of an entry with ouster, it may be set forth specially in the count, or not, with a continuando, or diversis diebus et visibus, between such a day and such a day; but, then you must prove, that the Plaintiff re-entered before the action brought, or else you cannot assign the mesne trespass; for, by the ouster, the Defendant has got possession, and he cannot be a trespasser to the Plaintiff: but when the Plaintiff re-enters, the possession is in him ab initio, and he shall have the mesne profits."

I have seen the rule no where more clearly laid down, than in the case of *Case v. Shepherd*, 2 Johns. Cas. 27. Per Curiam. "In this case, the trespass is laid with a continuando, but the distinction, as to the amount of damages, is this. After an ouster, you can only recover for the simple trespass, or first entry; for, where there is an ouster, every subsequent act is a continuance of the trespass. Yet, in order to entitle the Plaintiff to recover for the subsequent acts, there must be a re-entry. But, after a re-entry, he may lay his action with a continuando, and recover mesue profits, as well as damages for the ouster."

In the case before us, there was an ouster, and no re-entry. The Plaintiff, therefore, could recover for the simple trespass, or first entry only. He could not lay his action with a continuando. The Defendant, therefore, might have asked for much broader instructions than he did. He only asked that the Jury might be instructed not to give damages from the time of dispossession till the expiration of the lease, but to the date of the Writ; and by refusing this instruction, the Court virtually told the Jury, that they might give damages for the whole term unexpired at the date of the ouster. This was unquestionably wrong.

I think the Judgment should be reversed, and the cause sent back for a new trial; upon which, such instructions as result from the principles now laid down, should be given, if asked for.

JUDGE GREEN.

This is an action of trespass *quare clausum fregit*. There are five counts, all of which, except the second, lay the trespass with a continuando until the suing out of the Writ; and some of them, even until the filing of the Declaration; and in all, the continuando is laid with the allegation that the Defendant had kept the Plaintiff out of possession, during the whole time mentioned in the continuando.

To this Declaration, there was a general demurrer, and a plea of not guilty; on which issues were joined. No Judgment was pronounced on the demurrer, unless the final Judgment for the Plaintiff may be considered, as I think it may, as involving a Judgment upon the demurrer.

11 *The Jury found a general verdict for the Plaintiff. The Defendant took two exceptions to opinions of the Court, given on the trial; the first of which only is insisted on.

The proper course of practice, in the case of a demurrer and issue in fact, is, to try the demurrer first, as has been repeatedly said in this Court. For, if the demurrer to the whole Declaration was sustained, there would be no necessity for trying the issue in fact, and the expense of the trial would be saved; for, in that case, after a verdict for the Plaintiff, the Defendant would still be entitled to a Judgment upon the demurrer. If the demurrer ought to be overruled, there would be no error which would justify a reversal of the Judgment, although the demurrer were decided after the finding of the issue.

In this case, the second count, which does not lay the trespass with a continuando, is unquestionably good. All the rest are, I think, bad. In deciding upon a general demurrer to such a Declaration, I should have thought that the Judgment should be, to sustain the demurrer as to the bad counts, and that the Plaintiff take nothing by them; and to overrule it as to the good count, so as to put the bad counts finally out of the cause in respect to them; as in 1 Saund. 286, n. q., it is said, that in such case, the Plaintiff shall have Judgment for so much as is good, and of course, not upon the whole Declaration. It was, however held, in *The Duke of Bedford v. Alcocke*, 1 Wils. 248, that the demurrer in such case should be overruled in toto; by which the Defendant could suffer no injury; for, if the Plaintiff took a verdict on the whole Declaration, and any count was bad, he could not have any Judgment, but might avoid that consequence by taking a verdict on the good counts only. This rule of the Common Law, as to the effect of a verdict upon the whole Declaration, in which there is a bad count, is reversed by our Statute, which enacts that, "when there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good; but the De-

12 fendant may apply to the Court to instruct the Jury, to disregard the faulty count." Under this Statute, if there was a general verdict after a demurrer to the whole Declaration, some of the counts being bad, and some good, the Judgment could not be arrested, and the Plaintiff might in fact recover upon proof only of the bad counts, unless the Defendant had some means of avoiding this consequence upon the trial. This Court, in *Roe v. Crutchfield*, 1 Hen. & Munf. 361, adopted the rule laid down in *The Duke of Bedford v. Alcocke*, and declared, that the Defendant might still avail himself of the objection to the bad counts, by moving the Court to instruct the Jury to disregard them, or by demurring to the evidence, or objecting to the evidence applicable only to the bad counts, and taking an exception, if it be admitted, so as to show that the evidence was only applicable to the bad counts. Such a motion to exclude the evidence, would be in effect a motion to declare the counts to be bad, and to be dis-

regarded by the Jury; for, in any other view, to exclude evidence proper to support the matter put in issue by the pleadings, would be utterly inadmissible. Without some effectual means allowed to the Defendant, to avoid the effect at the trial of allowing the Plaintiff to proceed upon his defective counts, by overruling the demurrer in toto, such a demurrer ought to be sustained as to the defective counts.

The Defendant, in this case, moved the Court to instruct the Jury, that although it appeared, that the Defendant had leased the premises to the Plaintiff for seven years, of which three years were unexpired when the suit was brought, and that the Defendant dispossessed the Plaintiff; yet, they should not take into consideration, in their estimate of damages, the injury resulting from the Plaintiff's being kept out of possession, from the date of the Writ to the expiration of the term; but only from the time of the dispossession, until the suit was brought. The Court refused, being of opinion, that as the Jury had a right to give vindictive damages, they might take

13 into consideration the whole loss *resulting to the Plaintiff from the tortious entry. The Defendant might, with propriety, have asked the Court to instruct the Jury, to disregard all the counts but the second, and that under it, no evidence could be given of the continued dispossession of the plaintiff, or any other injury done by the retaining of the possession, after the first entry and taking of the goods; and for this first entry and taking only; could damages be given.

It is well settled, that in an action *quare clausum fregit*, whether by a freeholder or tenant for years, the trespass cannot be laid with a *continuando*, unless the Plaintiff has remained in possession, or regained it. If he has never been deprived of the possession, the *continuando* is to be laid *diversis diebus et vicibus*. If he has been dispossessed, and has regained the possession, he may lay the *continuando* without describing the trespass as done *diversis diebus et vicibus*. To this general rule there is an exception, in cases in which the estate of the Plaintiff has determined by lapse of time, or act of God, before the action brought; and this from necessity.

The reason of this general rule, is, that trespass can only be upon land in the possession of another. As soon as a party is put out of possession, the continued possession of the trespasser is no trespass upon him. But, when he regains the possession, he is, by relation, considered as having had a continued possession, and may then, in an action of trespass, recover the meane profits, and damages for the whole time he was dispossessed. See 20 Vin. Abr. "Trespass;" Letter K. *passim*; Trials Per Pas, 232; Co. Litt. 257, b. The case cited in 7 Vin. Abr. 267, H. 3, pl. 13 that in trespass by tenant by Statute Staple, the Plaintiff had a verdict, and Judgment for damages, before and after the Writ, up to the finding of the verdict, is contrary to the whole course of decision in England.

If the tenant by Statute Staple was con-

sidered as having any estate in the land, he could not be a tenant for years; for, the period for which he was entitled

14 to hold was uncertain, *being accountable for casual profits, which might shorten the time for which he was entitled, or circumstances might enlarge the time. 19 Vin. Abr. 572; A. a. *passim*; Ibid. 574, D. a; and the Statute declares, that "the merchant shall have such seisin in the lands and teuements delivered unto him or his assignee, that he may maintain a Writ of Novel Disseisin if he be put out, and re-disseisin also as of freehold, to hold to him and his assigns, until the debt be paid." It probably was held, that a tenant by Statute Staple and not a freehold, but a quasi freehold; and if not a freehold, then he had no estate. For, in *Dighton v. Grenville*, 2 Vent. 228, there is an elaborate argument to prove, that he has an estate, without determining what estate. The case of trespass by such a tenant, cited in *Viner*, probably formed an exception to the general rule, on account of the peculiar character of his interest.

In effect, the instruction of the Court authorised the Jury, not only to give damages for the detention of the possession up to the suing out of the Writ, (which the Defendant seems to have been willing to submit to,) but also for the detention up to the trial; and for this cause, the Judgment should be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

JUDGE CABELL.

This is an action of trespass *quare clausum fregit*. The Declaration contain five counts; all of which, except the second, lay the trespass with a *continuando*, stating, that the Defendant kept and withheld the possession, from the time of the original trespass, up to the time of suing out the Writ; and in one of them, up to the time of filing the Declaration.

The Defendant filed a general demurrer to the Declaration, and also the plea of not guilty; on both of which, issues were joined. On the trial of the issue on 15 the plea *of not guilty, the Jury found a verdict for the Plaintiff for \$950; but, as the damages laid in the Declaration were only \$500, the Plaintiff released \$450 of the damages found by the Jury; whereupon, the Court gave Judgment for the \$500.

The record does not shew, that the Court pronounced any Judgment on the demurrer; unless we are to consider the Judgment for the Plaintiff, on the verdict, as involving, or as tantamount to, a Judgment overruling the demurrer. I am of opinion that we ought so to consider it; for, unless the Court had thought the demurrer ought to have been overruled, no Judgment should have been pronounced for the Plaintiff, on the verdict.

Considering the Judgment on the verdict, as a judgment overruling the demurrer, the first question which arises is, whether that Judgment be correct.

Where there is a general demurrer to the Declaration, and also an issue of fact, the regular course is to decide the demurrer first; because, if the demurrer to the whole

Declaration be sustained, there would be no utility in trying the issue. For, whatever might be the verdict of the Jury, the Defendant would be entitled to a Judgment in his favor. *Green v. Dulaney*, 2 Munf. 518. But, although this be the regular course, yet if the Court proceed differently, and try the issue of fact first, and then overrule the demurrer, that will not be sufficient cause to reverse the Judgment; provided the demurrer was such, that it ought to have been overruled, or ought not to have been sustained.

Where a Declaration contains many counts, some of which are good and some are bad, and there is a general demurrer, the regular course, I conceive, is, to overrule the demurrer as to the good counts, and to sustain it as to those that are bad; thus putting the bad counts out of the case, and preventing any farther question as to them, in the future progress of the cause. 1 Saund. 286, note q; 5 Bac. Abr. "Pleas and Pleadings," B. 1, in a note. But,

although this be the regular course, yet a general *overruling of the demurrer, will not be a sufficient cause for reversing the Judgment, provided any of the counts be good. *Duke of Bedford v. Alcocke*, 1 Wils. 248; *Roe v. Crutchfield*, 1 Hen. & Munf. 361. If the demurrer had been thus overruled before the trial of the issue of fact, still it would have been competent to the Defendant, to avail himself of the objection to the bad counts, either by moving the Court to instruct the Jury to disregard them, or by demurring to the evidence, or by objecting to such evidence as was applicable only to the bad counts. *Roe v. Crutchfield*, 1 Hen. & Munf. 361.

It was a rule at the Common Law, that if the Plaintiff took a verdict on the whole Declaration, and any one count was bad, he could have no Judgment whatever. But, this rule has been done away by our Statute of Jeofails, which declares, that "when there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good; but the Defendant may apply to the Court to instruct the Jury to disregard the faulty counts." 1 Rev. Code, 512, sec. 104.

The second count in this Declaration was unquestionably good; and therefore, so far as relates to the demurrer, the Judgment is unassailable.

But, on the trial of the cause, the Defendant tendered a Bill of Exceptions to the opinion of the Court, which states, that "it appeared that the Defendant had leased to the Plaintiff a tenement in Fredericksburg, for a term of seven years, about three years of which were unexpired when the suit was brought, of which the Defendant dispossessed the Plaintiff before the expiration of the lease; on which, the Defendant's Counsel moved the Court to instruct the jury, that admitting this dispossession to be wrongful, they ought not to take into consideration, in their estimate of damages, the injury resulting from the Plaintiff's being kept out of possession from the date of the Writ to the expiration, but only from the time of the dispossession until the suit was brought. The

17 Court, however, being of opinion

that the Jury in this case, having a right to give vindictive damages, might take into consideration the whole loss sustained by the tortious entry; and therefore overruled the motion; to which opinion the Defendant's Counsel excepted."

The Law has wisely provided remedies suited to every possible case that can be supposed to exist. But, if a party injured resorts to a remedy not provided for, nor suited to his case, it is he and not the Law that is to blame, if he fails to obtain that redress which his case requires.

If, in the case before us, the Plaintiff had brought his Writ of Ejection Firmæ, or an action of trespass in ejectment, as originally practised, he might have recovered back his term, or the remainder of it together with damages for the trespass, and for the meane profits, during the time the term was withheld from him; or, if no portion of the term was in arrear, at the time the Judgment was pronounced, then he would have Judgment for the damages only. 3 Black. Com. 199, 200, 201.

But, he has brought an action of trespass *quare clausum fregit*; and that, without any previous entry on the disseisor, so as to regain the possession. Now, the gist of the action of trespass is the injury to the possession; and trespass cannot be supported, unless, at the time the injury was committed, the plaintiff was in actual possession. 2 Roll. Abr. 553; Com. Dig. "Trespass," B. 3; Bac. Abr. "Trespass," C. 3; 5 East. 485, 487; 3 Black. Com. 210. Thus, before entry or actual possession, a person cannot maintain trespass, though he hath the freehold in Law; as a person before induction, or a conusee of a fine, or a purchaser by lease and release, (though the Statute executes the use,) or an heir or devisee against an abator; or a lessee for years before entry. Chitt. Pl. 175-6-7, and Cases there cited. A disseisee may, before his re-entry, maintain trespass against the disseisor for the disseisin

itself, because he was then in possession. 3 *Black. Com. 210; but until he has gained possession by re-entry, he shall not have trespass against the disseisor, either for an injury done after the disseisin, or for the continuance of the possession after the disseisin; "because the franktenement is in the disseisor at all times after the disseisin;" and the Law is the same, whether the disseisee, at the time of the disseisin, held a freehold or a chattel interest. 2 Roll. Abr. 550, 553; Com. Dig. "Trespass," B. 3; 20 Vin. Abr. "Trespass," K. 447. If, however, the estate of the disseisee is determined by its own limitation, or by the act of God, so that the disseisee cannot enter, then he may maintain trespass, from necessity, without re-entry. But, if the disseisee regain the possession, he may then have trespass (laying it with a *continuando*) for any intermediate damage, and for the meane profits for the whole time the possession was withheld; for, after his re-entry, the Law, by a kind of *jus postliminii*, supposes the possession to have, all along, continued in him. 3 Black. Com. 210; Co. Litt. 257; a; 2 Lord Raym. 977.

The Defendant in this case, therefore, as

there had been no re-entry by the Plaintiff, had a right to require of the Court the exclusion of all evidence of the continued dispossession of the Plaintiff, or of any other injury done by the retaining of the possession by the Defendant, after the first entry. He had a right to require an instruction to the Jury, that in estimating the damages, they should confine themselves to the original trespass and ouster.

The effect of the instruction actually given, was, to authorise the Jury to give damages for the continued dispossession, not only to the time of bringing the suit, but to the expiration of the lease; or at least; to the time of the trial, if the lease had not then expired.

For this error, the Judgment should be reversed, and the cause be remanded for a new trial; in which, no instruction is to be given, that shall authorise the Jury to give damages for any thing after the original trespass and ouster.

Judgment reversed, &c.

Martin v. Anderson.

August, 1827.

Pleading and Practice—Statute of Limitations—Where Plea Received.—A plea of the Act of Limitations ought not to be received after issue joined on another plea, unless some good reason be assigned why the plea of the Act of Limitations was not sooner tendered.

This was an action on the case brought in the Superior Court of Caroline County, by Anderson against Martin. The Defendant put in the plea of non assumpsit, on which issue was joined. At a subsequent term, the Defendant moved the Court for leave to file a plea of the Act of Limitations, which the Court refused; whereupon, the Defendant excepted. In the Bill of Exceptions, no reason is assigned why the plea was not sooner tendered. A verdict was rendered for the Plaintiff, and Judgment accordingly. The Defendant appealed.

Stanard, for the Appellant.

W. Hay, for the Appellee.

August 21. JUDGE CABELL delivered the opinion of the Court.†

This case differs from Tomlin's adm'r v. How's adm'r, Gilm. 1, in this, that no good reason appears upon the record, why the additional plea of the Act of Limitations was not sooner tendered.

The Judgment should be affirmed.

20

*Lockridge v. Carlisle.

August, 1827.

Covenant—Construction of.—A covenant to use reasonable diligence in collecting debts, is not a covenant to pay at all events.

Pleading—Plea with Verification—Replication.—Where a plea concludes with a verification, there cannot be a joinder of issue without a replication.

*See monographic note on "Limitation of Actions" appended to *Herrington v. Harkins*, 1 Rob. 591. The principal case is cited in *White v. Toncray*, 9 Leigh 358.

†The PRESIDENT and JUDGE COALTER, absent.

‡**Covenant—Construction.**—See monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

§**Pleading—Plea with Verification—Replication.**—There cannot be an issue, where there is a plea of new matter, concluding with a verification, with-

This was an action of covenant brought in the Superior Court of Bath County, by Carlisle against Lockridge. The covenant was in these words: "Received of John Carlisle notes on men in Virginia, for collection, to the amount of nine hundred and ninety-six pounds, which I will be bound to him for the amount. Given under my hand and seal, this 27th of September, 1817." The breach stated in the Declaration was, that the Defendant "had altogether failed to comply with his said covenant on his part, and hath broken the same in the following particulars: 1. By failing to collect the said notes, and to pay the amount collected to the Plaintiff. 2. By failing to pay to the Plaintiff the sum of 996l.

The Defendant demurred to the Plaintiff's Declaration, and assigned the following causes: 1. The first breach laid is inconsistent in charging the Defendant with not collecting the notes, and with not paying the amount collected. 2. The amount collected, and the amount not collected, are not particularly set forth. 3. For not averring that any part had been collected. 4. For not averring that a reasonable time had elapsed since the Defendant's undertaking, and that he had failed to use due diligence in the collection. To the second breach the Defendant demurred, because it presented no cause of action, the Defendant not being bound, at all events, immediately to pay the sum of 996l. as the said breach supposed.

The Defendant also pleaded three several pleas, all concluding with a verification. The third was rejected by the Court, and issue was joined on the remaining pleas.

21 *The Jury found a verdict for the Plaintiff, and the Court gave Judgment accordingly.

The Defendant appealed.

Johnson, for the Appellant.

Chamberlayne, for the Appellee.

August 21. JUDGE CABELL delivered the opinion of the Court.‡

The covenant was, not to pay at all events, but that he would use reasonable diligence in collecting the debts, and would pay the amount collected, upon request. The demurrer, therefore, should have been sustained, and Judgment given for the Defendant.

Moreover, there was no issue joined on the second plea, there being no replication. There cannot be a joinder of issue, without a replication, where the plea concludes with a verification.

Judgment to be reversed, and entered for the Appellant.

22 *Stratton v. Mutual Assurance Society.

August, 1827.

Jurisdiction—Amount.—Where the principal sum

out a replication. *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 238, 21 S. E. Rep. 863, 865, citing the principal case as authority. To the same effect the principal case was cited in *Briggs v. Cook*, 99 Va. 276, 38 S. E. Rep. 148, and distinguished in *Douglass v. Central Land Co.*, 12 W. Va. 512.

†The PRESIDENT and JUDGE COALTER, absent.

‡See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

demand, together with the interest, is of sufficient amount to give jurisdiction a Court may hold cognizance of the case.

Insurance—Motion for Quotas—Statute of Limitations.—On a motion for quotas the Act of Limitations does not apply, because the Declaration for insurance is a sealed instrument.

Same—Same—Liability of Purchasers on.—A purchaser from one who has insured the property, is liable for quotas, upon motion, as well as an original subscriber.

Same—Same—Objections—When to Be Made.—If a Defendant in such motion does not object that he is not assignee, in the Inferior Court, it is too late to make the objection in the Appellate Court.

Same—Same.—Quotas due before the Act of 1822, may be recovered by motion before a sale, under that act.

Same—Usury—Case at Bar.—The 7½ per cent. imposed by the Society to indemnify them for the expenses incurred in the employment of collectors are not usury, nor in the nature of a penalty, but stipulated damages.

Same—Same—Judgment—Uncertainty.—A Judgment that the Plaintiff recover damages and expenses according to Law, and the Rules and Regulations of the Society, "without specifying the amount or nature of the damages and expenses, is erroneous for uncertainty.

This was an appeal from the Superior Court of the County of Buckingham. For a full view of the case, and the points made in the argument, it is only necessary to refer to the following opinions.

Attorney General, for the Appellant.
Daniel, for the Appellee.

August 22. JUDGE CARR.

In the Superior Court of Buckingham, the Mutual Assurance Society, by their Principal Agent, made a motion against Stratton, assignee and actual owner of buildings insured by Silas Flournoy, for quotas due from 1809 to 1822, inclusive, and a quota of deficiency, under the Acts of 1822. On the trial of the motion, it was agreed by the parties, that the General Laws, as well as the Particular Laws, Rules and Regulations of the Society, should be considered by the Court as part of the evidence in the case, and in case of appeal, should be taken as part of the case, and *that the Court might decide on all questions, whether submitted in the form of plea or otherwise; and this agreement to be considered as an appendage and part of the motion, as well for the Court, as for the Clerk. The Court gave Judgment for the Plaintiff, for the various quotas claimed, with interest, &c. and costs, damages and expenses, according to Law, and the Rules and Regulations of the said Society. From this Judgment, the appeal is taken; and many objections to it have been raised, and well argued.

We feel no doubt as to the jurisdiction of the Court. The interest is unquestionably a part of the matter in controversy.

The first point for the Appellant is the Statute of Limitations. If it applied to the case, it would certainly take in most of the quotas claimed. But in my judgment, it does not apply. The Declaration for Insurance is a sealed instrument; and this is the foundation on which the quotas rest. By the original Act of Incorporation, the Society were to assess, from time to time,

such quotas as the state of the funds might require. But by the Act of 1809, it was declared, that no quotas should thereafter be assessed on the members, but that the General Meeting, or Standing Committee, should be authorised to require the members to pay annually such part of the premium, as they may deem proper, not exceeding, for the town subscribers, one fifth of the premium, nor for the country subscribers, one seventh. In execution of this Law, the Rules and Regulations of the Society (which are its Laws, and binding on all its members) have fixed the rate of the town subscribers at one fifth, and of the country subscribers, at one seventh, of the premium. The quota thus founded on the Declaration, and fixed by the Laws, is not a subject for the application of the Statute of Limitations.

The next objection is, that one who takes the property by assignment from the original subscriber, is not liable by motion. To ascertain this, we must look at the nature of *the institution and the Laws creating and regulating it. The fundamental principle of the Society is mutual assurance and mutual risque. Every member is the insurer of every other, and has every other bound to insure him. To raise a fund for the losses which should occur, each member is bound upon declaring, to pay such premium as should be fixed, upon the property insured. As it was foreseen, that future requisitions would be necessary, it was enacted, that each member should be bound to pay such quotas as might afterwards be called for by the proper authority. It was foreseen also, that the property insured would be constantly passing from hand to hand, by sale, mortgage, &c. To meet this state of things, the Law enacts, that in every sale, mortgage or other transfer of property insured, the purchaser or mortgagee shall be considered as a subscriber in the room of the original: thus making him, to all intents and purposes, a member of the Corporation, entitled to all the advantages, and subject to all the burthens, of every other member.

The power of the Legislature to do this, has not been denied; and it will be seen at a glance, that without such a provision, the Society could never have gotten on. The original Act, which contained this provision, did not subject the members to a recovery by motion; but it was soon found, that this summary remedy was necessary; and an Act passed, stating, that whereas the Mutual Assurance Society was bound to make immediate reparation to those who might meet with loss by fire, and it was therefore just and expedient, that the said Society should be enabled to recover immediately of the delinquent subscribers or members, the premiums and quotas which might be due from them; therefore it was enacted, that the said Mutual Assurance Society should have full power to recover the whole or any part of such premiums or quotas, as were or might become due from any delinquent subscriber or member, &c. on motion and ten days notice; saving to any person, against whom such motion might be made, the right of a trial by Jury,

The principal case is cited with approval in *Arnold v. County Court*, 38 W. Va. 145, 18 S. E. Rep. 477.

*See monographic note on Insurance, *Fire and Marine* appended to *Mut. etc., Soc. v. Holt*, 29 Gratt. 612.

The principal case is cited in *Campbell v. Shields*, 6 Leigh 523.

if he should desire it. The next section gives to any person, whose property has been, or may be, insured, the same remedy against the Society. Now, upon what principle of construction can it be contended, that the assignee of property insured, is not equally liable to this motion, with the original subscriber? The former Act made him a member. It is agreed on all hands, that before the remedy by motion was given, he stood on the same ground with the other members: that the property in his hands was liable: that he might have been sued and made personally liable. Then comes the last Act, and subjects every delinquent subscriber or member, to a recovery by motion. It cannot be denied, that the words of the Act embrace him. Does not the spirit also? He has the same advantages, the same rights, with any other member. His property is insured. If destroyed by fire, he could recover of the Society by motion. Ought he not to be subject to the same remedy? Would it not violate the fundamental principle of association, (the mutual and equal risk and liability of every member,) that a portion of them should be liable to this summary remedy, and others exempt from it? That his case was tried by the Court, he cannot object; for, the trial by Jury was expressly reserved to him, if he had desired it. The case of *Greenhow v. Barton*, 1 Munf. 590, was mentioned; but that was a case of a divided Court. Neither was it like this; for there, the property was never insured, as no premium had been paid; and it will be seen, that Judge Roane places his objection to the liability by motion, principally on that ground. Upon the best consideration I have been able to give the subject, I am satisfied that the Defendant here was liable to the motion.

It was next objected, that there was no re-valuation. This, however, did not seem to be relied on; and properly, for it cannot affect the motion, either on the reason of the case, or on the express Regulations
26 of the Society, p. 22 *sec. 13, to which the Defendant, with the other members, was a party.

It was objected also, that it does not appear that the Defendant was assignee of the property insured. This was an afterthought. The Defendant received a notice, that the motion would be made against him as assignee, and actual owner, of buildings insured by Flournoy. He appeared to that notice and defended himself on various grounds; but never objected, that he was not assignee. So far from it, indeed, that his whole defence was predicated upon the admission of the fact that he was assignee. After this, it is too late, in the Appellate Court, to object that there was no proof of that fact. But, in truth, it is proved, as appears by the complete record brought up by order of this Court.

Another objection is, that no sale has taken place under the Act of 1822, and until that, there could be no motion against the country subscribers. This objection, so far as it applies to quotas due before the Act of 1822, is founded on a clear misapprehension of that Law. Its object was to

abolish the Country Branch of the Society. But justice required, that such abolition should not leave the Society chargeable with any of the debts of that Branch, without adequate funds to meet them. The Act therefore directs, that the Principal Agent shall assess a repartition on all the members of the Country Branch, agreeably to the provisions of the Acts concerning the M. A. Society, sufficient to pay all lawful demands against the Principal Agent as such, or against the Society: But such repartition shall not be made or exacted, until it shall be found that after selling all property, and estimating all dues up to this time, which belong to the said Country Branch, there is a deficiency in the funds to meet their engagements and pay their debts; nor then, but by the direction, and under the control, of the Standing Committee. If there were nothing more in the Law, this clause shows clearly, that it did not intend to suspend, or to touch, the
27 right of the Society to "coerce the payment of quotas already due.

For, it considers these as forming a part of the actual funds of the Country Branch directing the Agent to sell the property, and estimate all dues up to this time, belonging to the said Branch: and it is only when the fund thus made up shall be found deficient, that a repartition is to be made. A contrary construction would impute to the Legislature the singular and gross injustice of holding out a premium to delinquency, by placing the subscribers who had failed to pay up their quotas, on a better footing than those who had paid. But, the next section of the Law says, in express words, "that the members of the Country Branch, after complying with the requisitions heretofore and herein imposed, shall be released from all further responsibility," &c. It is most clear, then, that it is to the repartition or quota of deficiency only, that the Act of 1822 applies, leaving former requisitions untouched, or rather directing a compliance with them, before the members can be released. By a copy from the records of the M. A. Society, duly certified, it will be seen, that the Defendant Stratton, as assignee of Flournoy, owes for quotas growing due from 1809, to 1822, inclusive, \$73 60 cents, and for the quota of deficiency \$6 60 cents only. This last sum is all that can be affected by the question, whether the sale and settlement, directed by the Act of 1822, took place before the repartition was assessed. We find, in the record, a copy duly certified from the records of the M. A. Society, held August 13, 1822. "The Principal Agent laid before the Committee an estimate of the funds and debts due from the Country Branch; upon examination whereof and due consideration of the subject, the Standing Committee are of opinion, that in order to carry into effect the provisions of the second section of the Act passed on the 4th of March 1822, entitled "An Act to abolish the Country Branch of the M. A. Society," it will be necessary to assess on all the members of the Country Branch, a quota
of 20 cents on every dollar of the
28 *amount of premium assessed on the property of the said members."

Then follows a resolution requiring the said quota to be paid. At a subsequent date, the Standing Committee adopt a Preamble and Resolutions, stating, that as doubts had been entertained whether, previous to the order requiring the quota of deficiency, all the property of the said Society had been sold, and the proceeds estimated in the funds of the Society: "Resolved, that it be certified to those whom it may concern, that all property belonging to the said Country Branch, had been sold previous to the said 13th of August, 1822, and that the proceeds of the sale of the same, together with all dues, up to that time, were estimated in the funds of the said Country Branch, to meet their engagements, and pay their debts." It seems to me, that under the Laws regulating this Society, their own Rules and Regulations, and the Declarations signed and sealed by each member, these extracts from their records sufficiently show, that the sale and settlement, directed by the Act of 1822, had been made before the repartition; and that the Defendant Stratton is bound for this quota of deficiency, as well as the other quotas. See *Korn v. M. A. Society*, 6 Cranch's Rep. 192, and *Currie's adm'r v. M. A. Society*, 4 Hen. & Munf. 315, for the general principles applicable to this Corporation.

Another exception taken, is, to that Law of the Society, which enacts, that the members who, by failing to pay, shall render it necessary to coerce the payment of premium or quota by recourse to legal proceedings, shall, to indemnify the Society for expenses necessarily incurred in the employment of collectors, pay $7\frac{1}{2}$ per cent. on the premium or quota, and interest due. This was said to be usury. But, it does not seem to me to have a single feature of usury about it. The debtor may always relieve himself by paying up what is due, before the Society have been obliged by his delinquency to incur the expense and trouble of a legal proceeding. Neither is this a penalty, against
29 which *even Equity would relieve.

It is stipulated damages. The members of the Society, who made this Law, (and the Defendant among them,) knowing, that in every case where money was to be collected, persons must be employed and paid, and thinking it just that this payment should come, rather from the delinquent, than from the general fund, have agreed in General Meeting, that whenever any one of them should be in default, and collections had to be coerced, he should pay up this $7\frac{1}{2}$ per cent. to meet the expense. It is their own estimate of the damages, and is surely binding on themselves. This must have been the opinion of this Court in *Greenhow v. Buck*, 5 Munf. 263; for there, after reversing the Judgment of the Court below, they enter Judgment for the sum claimed, with interest, together with $7\frac{1}{2}$ per cent. damages on the principal and interest, and the costs.

With respect to this $7\frac{1}{2}$ per cent. another objection, (not taken in the Court below, nor in the argument here,) has occurred to a brother Judge. It is, that these damages being imposed by a Law of the Corporation,

cannot be recovered by motion. The Act of Assembly gives the remedy by motion, to recover the premiums, quotas, &c. due from subscribers. This $7\frac{1}{2}$ per cent. is a mere accessory, an appendage to that, to reimburse to the Corporation the expenses incurred in making the motion, and collecting the money from the delinquent subscriber. It is a part of the costs of the proceeding, which the subscribers have agreed among themselves that each shall pay, whenever his delinquency makes it necessary for the Society to resort to a motion. The expenses which this $7\frac{1}{2}$ per cent. was intended to meet, growing out of the motion, the members must of necessity have meant, that it should be recovered at the same time, and by the same motion, with the premium or quota. They never could have intended, that the motion should be made, and the premium or quota, with its interest recovered; and then, that a distinct action should be brought,

and a new set of costs incurred, to recover this $7\frac{1}{2}$ per cent. which, in nineteen cases out of twenty, would not exceed \$10; and the costs of which recovery, would generally equal, if not overgo, the sum demanded. To say, then, that this $7\frac{1}{2}$ per cent. shall not be recovered in the motion, would be to defeat the Law of the Corporation and the justice of the case. These were, probably, some of the considerations, which induced this Court, in the case of *Greenhow v. Buck*, (before referred to,) to give Judgment for the $7\frac{1}{2}$ per cent. on the motion. The reasons of the Court are not given in that case; but, when they (after reversing the Judgment of the Court below,) enter Judgment for the quotas claimed, with interest, "together with $7\frac{1}{2}$ per cent. damages on said principal and interest," we cannot but conclude, that the power of the Court to award these damages on motion, was considered, and decided on by them. This, then, is clear authority; and concurring with the justice of the case, I cheerfully follow it.

The last objection to be considered, and, in my opinion, the most serious, is, that the Judgment of the Court below is void for uncertainty. The Judgment is, that the Plaintiff recover against the Defendant, the several sums claimed as quotas, with interest till payment, with costs, damages and expenses, according to Law and the Rules and Regulations of the Society; thus leaving it to the Clerk to ascertain those damages. I have examined all the Books within my reach, to find some certain authority on this point, but have failed. The general rule seems to be, that the Judgment, being the voice of the Law pronounced by the Court on the matter in controversy, should be so certain as to leave nothing doubtful or unsettled. The Judgment with us is never given for a sum certain, as costs; but for costs according to Law. This is considered as sufficiently certain, because the Law is certain and fixed; and yet the Clerk may, in his taxation, mistake the Law. By analogy to this practice, it did seem to me, that the Judgment here might be sustained. The Law of the Society giving the $7\frac{1}{2}$ per cent.

damages, is just as certain as the 31 *General Law of costs; and that Law, by the express agreement of the parties, is made a part of the record. The agreement says, "it shall be an appendage and part of the case, as well for the Court as for the Clerk." There seems to me no more uncertainty here, than in all other Judgments as to costs. Nor can I conceive, why the agreement should have named the Clerk, but with a view to enable him to fix the damages by this document, this Law. This was my own idea; but, as my brethren differ with me, and think that it might be a dangerous precedent, to relax, even thus far, the strictness which, it seems to them, has hitherto prevailed in Judgments, I acquiesce in their opinions, that the Judgment, for this error, must be reversed, so far as relates to the damages; and this Court, proceeding to give such Judgment as the Court below ought to have given, &c.; the Appellee, as the party substantially succeeding, to have costs.

JUDGE GREEN.

The agreement in this case does not amount to an exception to the Judgment of the Court, upon the whole of the proofs submitted upon the motion. It states certain specific grounds of defence, and agrees to so much of the evidence as relates to those particular objections. This precludes any objection to the want of evidence, as to any other matter, which was necessary to justify the Judgment; all of which must be presumed to have been given, unless the contrary appeared by an exception. This repels the objection taken at the bar, that it does not appear upon the proofs in record, that Stratton was the assignee of the original owner, who insured the property. The Judgment is founded on the supposition of that fact; and no exception being taken on that ground, it must be supposed to have been duly proved.

I concur in the views already taken of the other points made in the argument of the cause; but, I think the Judgment is erroneous for its uncertainty. It 32 directs, that the *Plaintiff recover damages and expenses, according to Law, and the Rules and Regulations of the Society, without specifying the amount or nature of the damages and expenses. The Judgment, with us, is always for costs generally, without specifying the amount, contrary to the practice in England. *Bernard v. Scott*, 3 Rand. 526; *Tidd's Practice*, 389. There is no uncertainty or inconvenience in this, as the fee books and process, which ascertain the amount of the costs, are records of the Court. So, the damages awarded on appeals, are ascertained by the General Laws; and Judgment is given for them generally. But there is no criterion, by which to ascertain the expenses and damages, allowed by the Rules and Regulations of a private Corporation, without resorting to extraneous proofs.

If the 7½ per cent. imposed as a penalty on the members of the Society, for the purpose of compensating the Society for the damages and expenses incurred in prosecuting a suit for the recovery of what may be due from a member, had been estimated, and the amount specified in the Judgment,

I should have thought the Judgment erroneous in that particular; this penalty, being imposed, not by Act of Assembly, but by a Bye-Law of the Corporation, which can only be recovered by action. The summary remedy, given by the Act of Assembly, can only be resorted to, to the extent thereby allowed for the recovery of the premiums and quotas and interest thereon. In the case of *Greenhow v. Buck*, 5 Munf. 263, the Court gave Judgment for the 7½ per cent.; but this question was not stirred, and probably passed without observation; and I cannot, therefore, consider it as an authority upon that point.

The Judgment should be reversed, and entered verbatim as it is, leaving out the words, "damages and expenses according to Law, and the Rules and Regulations of the Society."

JUDGE CABELL concurred with JUDGE CARR, as to the merits of the case, but was of opinion that the Judgment should be reversed for uncertainty as to the damages.

33

*Smith v. Jones.

October, 1827.

Court of Probate—Function as to Facts.—A Court of Probate occupies the place of a Jury as to facts, and ought to find all proper inferences from facts proved.

Same—Admission of Will to Record—Time to Procure Evidence.—Where the Court refuses to admit a Will to record, on the ground of a defect of testimony, and it appears before them, that the desired evidence may probably be procured, if time is allowed they ought to allow such further time, even although they may have pronounced Judgment, and while the Judgment is still in their power.

Same—Will of Realty—Evidence.—What evidence is sufficient to sustain a Will of Real Estate.

Appeal from the Superior Court of Law for Henrico County, where a Writing, purporting to be the Will of Jesse Smith, deceased, was offered for probate by Lucy Smith, the widow of the deceased. The paper was deemed by the Court insufficient as a Will of real estate, but ordered to be recorded as a Will of personal estate. Both parties appealed from this decision; the widow, because the Will was rejected as to the real estate; and Samuel Jones, because the Will was ordered to be recorded as to the personal estate.

The circumstances are sufficiently detailed in the following opinion.

Forbes, and Wickham, for the Appellant Smith.

Scott, for the Appellee Jones.

October 17. JUDGE CARR delivered the opinion of the Court.†

This is a contest about the due execution of a Will before the Court of Probate. The Court below decided, that the writing was not executed as a Will of real estate,

***Court of Probate—Function as to Facts.**—A court of probate occupies the place of a jury as to questions of fact, and its province is, like that of a jury to draw all just inferences from the evidence. *Nock v. Nock*, 10 Gratt. 106, citing principal case; *Boyd Cook*, 3 Leigh 33; *Dudley v. Dudley*, 3 Leigh 436; *Clarke v. Dunnivant*, 10 Leigh 13, as authority. See the principal case also cited in *Dudley v. Dudley*, 3 Leigh 440, 441, 447, 448; *Duff v. Duff*, 3 Leigh 529; *Clarke v. Dunnivant*, 10 Leigh 33, 34; *Strudivant v. Birchett*, 10 Gratt. 89, 103.

See generally, monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

†JUDGES GREEN and COALTER, absent.

according to the Act of Assembly, and therefore, refused to record the same, as such; but ordered, that the said writing *be recorded as a Will of personal property. From this Judgment, both parties appealed.

Our Statute directs, that "such last Will be signed by the testator, or by some other person in his presence, and by his direction; and moreover, if not wholly written by himself, be attested by two or more witnesses in his presence." To the Will before us, as first published, there are two subscribing witnesses, Lawrence Pendergast and Elizabeth Jones. Mrs. Jones proves, that the testator asked his wife to get the paper: that she read it to him: that this was before signing: that the testator said it was his Will, but he could not write at that time; that Pendergast put the name and mark of the testator to the Will, and then put his own name, and took hold of the witness's hand made her mark, (she being illiterate.) The Will, as exhibited, shows the name and mark of the testator signed to it, and the name of Pendergast, with the name and mark of Elizabeth Jones, as subscribing witnesses.

Pendergast is not produced. If he had been examined, and his evidence had agreed with that of Mrs. Jones, we should have had no doubt, that a Court of Probate ought to have admitted the paper to record as a Will of lands; for, the record showing the fact that the testator could not write, being paralytic, and that he was in possession of his understanding, we think the evidence of these subscribing witnesses would have proved circumstances, from which a Court of Probate ought to have concluded, that the Will was signed by Pendergast for the testator, "in his presence and by his direction, and moreover, was attested by two witnesses in his presence." We do not mean to say, that the facts deposed to by Mrs. Jones, would, if found in a special verdict, authorise a Court acting upon it, to say that the testator's name was signed by his direction. The Court in that case could infer nothing. The actual fact must be found; and that was the case in *Burwell v. Corbin*, 1 Rand. 131. The Court there was acting on a special verdict. But, we consider
35 that a Court of Probate occupies "the place of a Jury as to facts, and that a Jury ought, from such evidence, to have found the Will duly executed.

In the case of *Bond and Wife v. Seawell*, 3 Burr. 1773, it was agreed, that the facts should be put into the form of a special verdict, for the Judgment of the Court. It appeared, that the testator made his Will, consisting of two sheets of paper, and signed his name at the bottom of each page. He also made a Codicil upon a single sheet. All was in his own hand-writing, (which, by the way, has not the effect in England that it has with us.) He called in one Harding, showed him both sheets, and his signature to every page, and told him that was his Will. He also showed him the Codicil, and desired him to attest both; which he did, and then left the room. Vaughan and Leyland came in immediately after. The testator showed

them the Codicil and the last sheet of the Will, and sealed both, before them. He took each of them up, and delivered them as his Act and Deed. These witnesses attested the same in the testator's presence; but never saw the first sheet of the Will, nor was that sheet produced to them; nor was the same or any other paper, on the table. Both the sheets of the Will was found with the Codicil, in the testator's bureau, after his death, all wrapped up in one piece of paper; but, the two sheets of the Will were not pinned together. On this case, there were three arguments; one, before all the Judges. Lord Mansfield delivered the result. He said, that "the case, as it now stands, turns only upon the solemnity of the execution; and that it had occurred to the Judges, that the way in which the parties had put the case, does not go to the whole merits; because, if the first sheet was in the room, at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good Will, and a good attestation of the whole Will. But, if the first sheet were not then in the room, a doubt might arise, whether it was or was not a good

attestation as to the real estate;
36 "a doubt about which the Judges have neither given, nor formed, any opinion. We are of opinion, that the due execution of this Will cannot be come at, in the method wherein the matter is now put.

"If this be considered as a special verdict, we think it is detectively found as to the point of the legal execution of the Will. Every presumption ought to be made by a Jury in favor of such a Will, when there is no doubt of the testator's intention. It is not necessary, that the witnesses should attest in the presence of each other; or that the testator should declare the instrument he executed, to be his Will; or that the witnesses should attest every page, folio, or sheet; or that they should know the contents; or that each folio, page or sheet should be particularly shown to them. This has been settled. But the fact, whether the first sheet of his Will was in the room or not, at the time of executing and attesting the latter, may be material to be known. If it was, the Jury ought to find for the Will generally; and they ought to find all things favorable to the Will. If it be doubtful, whether the first sheet was then in the room or not, we all think the circumstances sufficient to presume that it was in the room; and that the Jury ought to be so directed. But," (he adds,) "upon a special verdict nothing can be presumed. We are, therefore, all of opinion, that it ought to be tried over again," &c. This is high authority, and lays down very clearly the distinction between the powers of Jury, trying evidence, and of a Court acting on a special verdict. It shows, too, in a strong point of view, how careful the Court is in such cases, where a Will, the last and most solemn act of a man's life, is involved, to put the case in such a shape, as to enable them to come at the whole merits. The cases of *Hands v. James*, Com. Rep. 531, and *Croft v. Pawlet*, 2 Stra. 1109, show the power and province of Juries, in cases of this kind. We re-

peat, that we think the Court of Probate has the same power. All this is said upon the hypothesis that Pendergast had proved the same facts with Mrs. Jones; but he was not examined.

37 We think that if it had been proved to the Court, that he was dead, or that he was beyond the process of the Court and the power of the party, that the Court might have resorted to secondary evidence, and that the proof of Pendergast's hand writing, together with the evidence of Mrs. Jones, would, in that case, have authorized the Court to admit the Will to record as a Will of lands. It was proved that Pendergast was an itinerant unsettled man: that he lived in Henrico, when the Will was executed, and removed afterwards to Augusta, and after the Court had pronounced its opinion but during the same term, the party seeking probate of the Will, offered proof to the Court, that a Subpoena had been sent to Augusta, for Pendergast, and also the Affidavit of a Mr. Todd, that he had been to Campbell, where Pendergast lived in 1821, and was told there, that Pendergast had removed to Alabama. Now, though this evidence was not such, as to authorise the Court to act upon the case at once, as if Pendergast was beyond the power of the party; yet we think it was such as laid a very strong ground for the belief that the fact would turn out to be so: and that the Court ought, under such circumstances, to have recalled its decision, the cause being perfectly within its power, and to have continued the cause, to give the party an opportunity to prove that Pendergast had actually removed from the State.

If it be objected, that such a course would be dangerous, as giving the party an opportunity to accommodate his evidence to the opinion pronounced, we answer, that a Judge must in such cases be allowed considerable latitude of discretion: but that still he must exercise it soundly, and we must judge of this soundness. We do not think this one of the cases, in which there was danger, of subornation from a continuance.

If it be further objected, that there was no motion made for a continuance, but only that the Court would add to the record the evidence then offered, we answer, that

38 the "first motion was to receive the evidence. If it had been received, we do not know what motion might then have been made. But the Court refusing to receive the evidence at all, because it had rendered Judgment, the party was stopped at the threshold, and could only except to the opinion, and thus get the evidence upon the record. We think the Court ought to have received the evidence, though it had rendered Judgment; and though the form of the motion might not have been exactly right, that the Court, seeing the probable ground laid for resorting to the secondary evidence, ought to have taken the step proper for obtaining proof; and this opinion is much strengthened by the case from Burrow, where we see the pains the Court took (though the parties had made a mistake) to put the case in such a shape, as

to enable them to come at the whole merits of the question.

The Judgment must be reversed, and the cause sent back, with directions to the Court to allow the party a reasonable time to obtain evidence of the absence from the State of Pendergast, if he be absent, and if not, to obtain his evidence.

39 *Holman and Wilson v. Gilliam.

October, 1837.

Demurrer to Evidence*—Judgment on—What Considered.—A demurrer to the Declaration is filed, and also a demurrer to the evidence and the Court decide against the demurrer to the Declaration; whereupon the Jury find a verdict for the Plaintiff, subject to the opinion of the Court on the demurrer to evidence. The Court render final Judgment for the Plaintiff. This shall be considered as a Judgment on the demurrer to evidence, in favor of the Plaintiff.

Sealed Instrument—When Joint and Several.—A sealed instrument in the singular number, but signed and sealed by two persons, is joint and several.

Gilliam, assignee, &c. brought an action of debt in the County Court of Cumberland, against Holman and Wilson, on a bill penal. The bill begins, "I promise to pay," &c. and concludes, "I bind myself, my heirs," &c.; without mentioning any name in the body of it. It is signed and sealed by both the Defendants.

The Defendants demurred to the Declaration, and filed a plea, on which issue was joined. At the trial, the Defendants filed a demurrer to the evidence; and the Jury found a verdict for the Plaintiff, subject to the opinion of the Court on the demurrer to evidence. The Court gave Judgment that the demurrer to the Declaration was insufficient, &c. and "therefore it is considered by the Court, that the Plaintiff recover against the said Defendants," &c.

From this Judgment, the Defendants appealed to the Superior Court of Cumberland, where the Judgment of the County Court was affirmed; and the Defendants appealed to this Court.

Leigh, for the Appellants, contended, 1. That the County Court have never disposed of the demurrer to evidence. They simply decide against the demurrer to the Declaration, and conclude, "and therefore," &c. 2. The bond purports to be given by one person only, and is signed by two.

S. Taylor, for the Appellee, said that the bond was, in effect, joint and several. As to its being in the singular

*Demurrer to Evidence.—See monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

†Sealed Instrument—When Joint and Several.—A sealed instrument in the singular number, but signed and sealed by two persons, is joint and several. As for instance the writing begins, "I promise to pay," etc., and concludes, "I bind myself, my heirs," etc., without mentioning any name in it, and is signed and sealed by both defendants. *Keller v. McHuffman*, 15 W. Va. 67, citing the principal case as its authority. A promissory note commencing "I promise to pay" and signed by two persons is several and joint. *Keller v. McHuffman*, 15 W. Va. 80, citing the principal case as authority.

When one signs a note or bond saying, "I promise to pay," it binds any member who signs. *Morgan v. Snodgrass*, 49 W. Va., 887, 88 S. E. Rep. 667, citing the principal case as its authority.

See further, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

40 *number, the cases of *Marsh v. Ward*, Peake's N. P. Rep. 130; *Clarke v. Blackstock*, Bayley on Bills, 37, are conclusive authorities. But, if it be a joint and not a joint and several obligation, it is not bad on a general demurrer. As to the other objection, the Court will intend that both demurrers were overruled.

October 26. JUDGE CABELL delivered the opinion of the Court.*

Both the demurrers were argued before the County Court. That Court expressly pronounced Judgment on the demurrer to the Declaration; and the rendition of final Judgment in favor of the Plaintiff in the action, upon the verdict of the Jury, necessarily involved a Judgment upon the demurrer to the evidence, to which the verdict had been made subject.

The only question in the cause, is, as to the character of the bill penal, on which the suit was brought. No person is bound in it by name. The bill, in its terms, is in the singular number throughout; "I bind myself, &c.," as if executed by one person only. But, it is signed and sealed by both of the Defendants. The question is, whether it be joint and several.

A promissory note, executed in the self same terms, and signed by two persons, would unquestionably be considered the joint and several note of both and of each of them. Bayley on Bills, 37. New edition. The case of *Marsh v. Ward*, Peake's Rep. 130; *Clarke v. Blackstock*, Holt's Rep. 474, and 3 Common Law Rep. 159.

A particular form of expression which will make an unsealed contract joint and several, will not cease to make it so, merely because seals are added to it. The effect of the seals is not to change the meaning of the parties, but merely to add to the solemnity and dignity of the Instrument. The Judgment is affirmed.

41 Lyons, &c. v. Turner and Wife.

November, 1827.

Willst—Construction—Period of Distribution.—Testator devised "all the rest and residue of the money arising from the sales of my estate, and debts due to me, to all my dear grand children who shall attain their ages of twenty-one years, to be invested in Bank Stock by my trustees, for the use of my grand children, or such of them as are now born, or may be born before distribution, and who shall attain that age, &c. The period of distribution above mentioned, means the time when the first legatee shall come of age and have a right to demand his aliquot part: to the exclusion of all others, who should be born after that period.

This was an appeal from the Richmond Chancery Court.

The controversy arose on a clause in the Will of Peter Lyons, deceased, in these words: "I give all the rest and residue of the money arising from the sales of my estate, and debts due to me, to all my dear grand children who shall attain their ages of twenty-one years, to be invested in Bank Stock by my trustees, for the use of my grand children, or such of them as are now born, or may be born before distribution, and who shall attain that age, and to be paid their respective shares and parts

thereof, as they shall attain that age, and not sooner," &c. The testator appointed four persons trustees for the execution of his Will, of whom only two, to wit: John and James Lyons, acted in the character aforesaid. At the time of his death, the testator left seven grand children, (the issue of his several children,) among whom the female Appellee was one, and had attained her age of twenty-one at the time this suit was brought. All the other grand children were then under twenty-one.

Under the above clause of the Will, the Appellees claimed the proportion of the estate to which Lucy L. Turner, the female Appellee, was entitled; and the trustees, doubting whether they ought, under a just construction of the Will, to pay the share of Lucy L. Turner, before the final distribution of the estate among the grand children, refused to pay it, without having the sanction of the Court of 42 Chancery. *Upon this refusal, the Appellees filed their present bill.

The Chancellor decreed, that Turner and Wife were entitled to their participation in the residuary fund, on Lucy L. Turner, the female Plaintiff, attaining the age of twenty-one years, she being the first who attained that age. The Defendants appealed.

Stanard and Nicholas, for the Appellants. Attorney General and Leigh, for the Appellees.

For the Appellants, it was said, that all grand children born before the final distribution, are entitled to shares of the estate, under the testator's Will. The authorities were divided into three classes.

1. Where there is a devise to a certain class of persons, as to the children of A, no child is included but those born at the death of the testator. *Viner v. Francis*, 2 Bro. Ch. Cas. 658; *Singleton v. Gilbert*, 1 Cox. 68; *Davidson v. Dallas*, 14 Ves. 576; *Hill v. Chapman*, 1 Ves. 405.

2. The second class is, where there is a life-estate given to one, and after his decease, to the children or grand children of A., all children born before the death of tenant for life, are entitled, although they may be born after the death of the testator. This class is illustrated by the cases of *Baldwin v. Carver*, Cowp. 209; *Aynton v. Aynton*, 1 Cox, 327; *Attorney General v. Crispin*, 1 Bro. Ch. Cas. 537; *Middleton v. Messenger*, 5 Ves. 136; 15 Ves. 152.

3. The third class is, where there is a bequest to children generally, payable at a certain period, or on a certain event, all take who come in case before the period appointed occurs, or event happens, *Ellison v. Airey*, 1 Ves. senr. 111; *Congreve v. Congreve*, 1 Bro. Ch. Cas. 530; *Gilmore v. Severn*, *Ibid*. 582; *Andrews v. Partington*, 3 Bro. Ch. Cas. 401; *Pulsford v. Hunter*, *Ibid*.

43 416; **Prescott v. Long*, 2 Ves. junr. 690; *Hughes v. Hughes*, 14 Ves. 256; *Hoste v. Pratt*, 3 Ves. 730; *Whitebread v. Lord Saint*, 10 Ves. 152; *Gilbert v. Boorman*, 11 Ves. 238.

For the Appellees, it was contended, that in all cases where a gross fund is to be distributed among a class of persons, all persons born after the period appointed,

*Absent, JUDGES GREEN, and COALTER.

†See monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 309.

are excluded. All the cases cited by the Appellant's Counsel support this doctrine; and in the case of *Singleton v. Gilbert*, 1 Cox, 68, where there was a postponement of the time of taking, the Court adhered to the old rule. The only question is, what is the period appointed? Or, in other words, does the word "distribution" mean final distribution, or when the first legatee arrives at twenty-one? The language of the Will, and all the circumstances of the case, indicate the latter construction. *Heth v. Heth*, 2 Atk. 122, note; *Walker v. Shore*, 15 Ves. 123; *Campbell v. Prescott*, 15 Ves. 500; *Barrington v. Tristram*, 6 Ves. 245; *Godfrey v. Davis*, *Ibid.* 43; *Hoath v. Hoath*, 2 Bro. Ch. Cas. 3; *Paul v. Compton*, 8 Ves. 380; *Booth v. Booth*, 4 Ves. 399; *Walcott v. Hall*, 2 Bro. Ch. Cas. 305.

November 9. JUDGE COALTER delivered his opinion, in which the other Judges concurred.*

Without a particular examination of the authorities, none of which perhaps are entirely opposite to this case, I will submit my ideas as to the intention of the testator as disclosed by the Will itself.

He intended a present benefit, at the discretion of his Executors, to all his grand children who were or should be born before distribution, by an application of the interest of the fund to their support and education; and he intended a future interest in each one of them, who should

44 "attain twenty-one years of age; not merely to vest at that time, to be enjoyed at some remote and uncertain period, but to be then received and enjoyed. Had the bequest been simply to his grand children, who should attain twenty-one years of age, to be paid their respective shares as they shall attain that age, then I incline to think, that the grand children in being at the time of his death would alone form the class who were to take. If, at that time, they were all of age, although evidently from the terms of the Will no distribution could have been instantly made, yet the right to have the whole distributed, so soon as that could be done, would then have attached to each one, who would have had a vested right in his aliquot part, transmissible; which rights could not be affected by the birth of grand children afterwards. If, at that time, one was of age and the rest not, a right transmissible would have vested in that one, not only to an aliquot share, counting the others then in being, and he would have had a right transmissible, to such augmentation of the share as might thereafter accrue, on the death of any of the others before twenty-one. If, before a reasonable time to ask distribution, or pending a suit therefore, one or more of the class should die under twenty-one, this augmentation of what would otherwise have been the share, would also be demandable. If, however, one aliquot part had been paid or decreed, counting all, none having died, and then another came of age, one or more of the original class having died since such pay-

ment or decree, then this second one, coming of age, would be entitled to an augmented share; and the first one who came of age, or his representative, would also receive the augmentation so accruing, so as to make him equal with the second, an equality amongst the objects of his bounty being intended; and so on, from time to time, would the fund be distributed, as and when the individuals of the class severally attained their age of twenty-one.

45 "The testator, however, intended to include certain grand children, though not in being at the time of his death, and to exclude others, who might come into being after a certain event, to wit: after distribution. He knew the fact, that none were then of age, and that they might not be, at the time of his death; and therefore, that some time would probably elapse, before any distribution, either partial or final, would take place, or be called for. He therefore extends his bounty, as well to such of them as are now born, as to such as may be born before distribution, who shall attain the age of twenty-one years. It is this provision which raises the question before us.

On the part of the Appellant, it is contended, that the words, "or may be born before distribution," mean to extend the bounty to all such as are born at any time before a final distribution can be claimed. I say "can be claimed;" for, I do not understand, that if, after the last one who has come into being has arrived to the age of twenty-one, and being refused his share, has sued for it, another should be born pendente lite or before suit, but after the age of the claimant, that after-born child shall have a claim to share with that claimant, although distribution was not actually made. In such event, I understand it to be conceded, that the right to have the share, there being no other person in being entitled to claim, is a vested right to the whole remaining share, not to be affected by such posterior events. If this is not conceded, I think it must nevertheless be law.

On the part of the Appellees, it is contended, that the meaning of those words is, to exclude all who should be born after the first one came of age, and had, eo instanti, received an aliquot part or distributable share, counting those then in being and under age; or, having a right, was demanding it; the right to distribution, and the actual receipt of it, whether then or afterwards, being, according to the idea expressed, one and the same thing.

46 "According to the pretensions of the Appellant, it is urged, that when one of six in being shall attain twenty-one, that one has a vested right to one-sixth of the fund, which ought to be paid, but with this salvo; that, if final equality was intended, and inasmuch as final distribution cannot be made for a long time, some objects being of tender years, and as, before such distribution, many more may be born, the first, and every other object attaining age, must be held ultimately to a re-partition from time to time, either as the aliquot share shall increase or be diminished by

*Absent. JUDGES GREEN and CABELL, the latter of whom did not sit on account of his connexion with some of the parties.

after deaths or births. Thus; when the next one coming of age, claims partition, six more have been born; so that one-twelfth is a share, and the next must refund. When the next comes of age and claims, these six or any others, say to the number of six, are dead, then he is entitled to a sixth part, and the other two shares are augmented. When the next comes in, more are born, and then the shares are diminished, &c. &c. In the mean time, bonds are to be taken from those receiving, to refund, &c. Or, as the one first coming of age has a vested right to a share, computing the objects then in being, the executor is barred to pay him his share, and has no right to demand bond, except to refund in cases of debts, (and which he demanded in this case) and this shall be final as to him, whatever augmentation or diminution of shares may thereafter take place by deaths or birth; and should all die the next day, it would follow, I presume, that he will take no more, but that as to the five remaining shares, there shall be an intestacy.

Is a construction of the testator's Will, involving either of these consequences, a reasonable one?

He gives the fund to all his dear grand children, &c. to be paid their respective shares and parts. What shares and parts? Such as may eventually turn out to be grossly unequal? Or, share and share alike? It seems to me, that there must be other expressions or provisions in the Will, showing that inequality was intended,

47 before we can give a construction producing that effect. None such, however, are perceived; and I also think, when he gives the rest and residue of his estate to his grand-children, who shall attain twenty-one, if any one shall attain that age, there must be very cogent reasons, apparent from other parts and provisions in the Will, which shall induce a construction involving an intestacy as to any part, before we can so decide. But, I see nothing of this kind. Suppose the party, contingently entitled to the last share, according to the construction contended for by the Appellant, dies before twenty-one. Shall there be an immediate intestacy as to that, or shall it remain in abeyance, or until all the children of the testator die, so that it may be certain that no grand child can be born to take it? And on that event what will become of it? Will it be an undisposed of subject, although there are grand children in being, who have arrived at the age of twenty-one years, and who were in being at the death of the testator? A construction involving inequality an intestacy both, it seems to me, cannot be put on this Will.

But, can the other mode of distribution claimed by the Appellant, be supported as intended by the testator? This construction will so nearly amount, in ninety-nine cases out of one hundred, and probably in this very case, to a bequest to all the grand children whenever born, who shall attain twenty-one years of age, as to make the words "before distribution," of little or no avail: insomuch, that if he had suspected such a construction as is contended

for, he probably would have gone the full length of providing for all.

The testator made his Will, shortly before his death in April, 1809. It is recorded in September of that year. He had then, say seven grand children, born and alive, all under age. The eldest comes of age, and files her bill in 1812. John Hopkins, the next eldest, comes of age after 1815; for, in that year, he defends by his guardian.

Ann Eliza Lyons, the next, files her 48 petition as an adult, in *1821. All the rest seem yet to be under age;

and two grand children, then lately born, are made parties in 1815. The testator might very reasonably have supposed, that before the youngest grand child, in being at his death, would attain, twenty-one years of age, every grand child would be born, which, in the ordinary course of nature, he could calculate on being born; and if he intended by those words, that every distributable share should be liable to be opened, in order to contribute in the way contended for, until the youngest came of age, he would hardly have thought it worth his while to stop it there, but would have provided for all his grand children whenever born; as the difficulty of distribution would have been very little, if any, increased thereby. But, he intended to put some termination or limitation to the coming in, being of the class provided for; and that, I think, ought to be a reasonable and convenient termination, unless there are very clear expressions to the contrary. The time of the first one coming of age, at which time her right to a share accrued, and which *ex vi termini*, means the time of the distribution of that share, seems to me to be the most reasonable and convenient termination. Making a division and paying one share, is certainly a distribution, in one sense of the word; a partial distribution. When the last share is paid over, then there is a final distribution. Which of these is meant by the words, "bored before distribution?" Did the testator intend, by the words, "to be paid their respective shares and parts, as they shall attain that age," that when one came of age she was to receive a part, which, by after-events, might be greatly diminished, and she obliged to refund accordingly, and to give security to do so? That her interest was vested, subject to be divested? Or, did he intend her to receive a part, which the executor could well ascertain and would be justified in paying, so as to enjoy it from that time, without account, and with the privilege of coming in for a farther share, from time to time, as the claim

49 might *be augmented by death? The absolute payment that seems to me to be directed to be made them, "as they shall attain that age," is inconsistent with that conditional payment insisted upon, as resulting from the other construction. The settled and uniform construction put on Wills, if not precisely like this, yet very nearly so, goes, I think, strongly to fortify me in this construction of the present Will. On the whole, I think the Decree is right.

Decree affirmed.

Shearman v. Christian and Others.

November, 1827.

Executors—Suit against—What Pleadings State—Case at Bar.—Where the executor of one who had been executor of another, issued for a debt due by the first executor to the estate of his testator, the pleadings must state distinctly that the claim is against the second executor as representing his testator in his executorial character, in order to entitle the Plaintiff to rank as a creditor of the first dignity under the Act of Assembly. By two Judges.

This was an appeal from the Williamsburg Chancery Court, where R. C. Christian and others filed their bill against Martin Sherman and others. The whole nature of the controversy is fully explained in the following opinions, and the points made in argument noticed by the Judges.

Leigh and Wickham, for the Appellants. Stanard, for the Appellees.

November 5. JUDGE CARR.†

This is a bill filed by Christian and others, as next of kin and distributees of John Fleet, against Martin Shearman
50 *to set aside a Deed and Will executed by Fleet, conveying and devising all his estate, real and personal, to the said Shearman.

The bill charges, that Fleet was, at the time of executing the Deed and Will, and had long been, utterly incapable of making a contract, or disposing of his property: that the Defendant obtained these instruments by fraud and imposition; and prays that they may be annulled, and that Shearman may be decreed to deliver up the real and personal property of Fleet, to be divided among them according to Law; and that he may account before a Commissioner for the rents and profits of the land, the hires of the slaves, &c.

Shearman answers, averring that Fleet was of perfect capacity and ability to make contracts, and dispose of his property; that he made a contract with the Defendant, by which he agreed to convey to him his whole estate, in consideration of being maintained by the Defendant during his life: that in execution of this contract, the Deed and Will were made: that the contract was perfectly fair, and that the Defendant has fully performed his part by maintaining Fleet during his life.

While the suit was yet at Rules, Shearman died, and it was revived against Ezekiel G. Shearman, administrator with the will annexed, and Ellis, and Jno. Tapscott, devisees of Martin Shearman.

They answer, expressing their assent to a revival, and their wish for a decision. Issues were made up to try the capacity of Fleet, and the fairness of the Deed and Will.

The Jury found that Fleet was not of sufficient capacity to dispose of his property, by Deed or Will, and that both these papers were obtained by fraud. This verdict being returned into the Court of Chancery, without objection that Court pronounced the Deed and Will null and void, and ordered that they be surrendered, to be cancelled.

*For sequel of the principal case, see Shearman v. Christian, 9 Leigh 571.

†See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

‡JUDGES GREEN and CABELL, absent.

It was further ordered, that such of the Defendants as had in possession the lands

or slaves in the papers mentioned,
51 *should surrender the same to the Plaintiffs, and such Defendants as claim as distributees of Fleet. The Court further ordered, that E. G. Shearman, administrator with the Will annexed of Martin Shearman, do render before a Commissioner an account of the administration of the said Shearman on the estate of Fleet, comprising in such account, to the debit, of the said Martin, the hire of slaves, and all the personal estate (except the slaves which may be surrendered under his decree) that the said Martin derived or claimed title to, under the said Deed or Will: that he also render an account of the rents and profits of all the lands and real estate claimed or held under the said papers, accruing in the life of the said Martin: that he also render an account of his administration on the estate of the said Martin; also an account of the hires and profits of such of the slaves claimed under the said papers, as may have come to his hands; and if any of them have been sold by him, an account of the value and price received therefor, and when and how disposed of.

In pursuance of this order, the Commissioner made a very voluminous report; of which it seems only necessary to notice here, that part which stated the account of Martin Shearman as executor of Fleet, up to the death of the said Martin. The balance against the said executor stated to be \$5,714 01 cent, with interest, &c. The Commissioner also stated the account of E. G. Shearman, as administrator of Martin Shearman, making a balance against the said administrator of \$12,712 41 cents. The last balance is made by excluding from the credits of the administrator, all sums disbursed by him, in payment of the proper debts of Martin Shearman, and especially the sum of \$4,151 27 cents, paid by the said administrator, on an execution issued against him on a stay-bond executed by Martin Shearman. The exclusion is on the ground that the debt due from Martin Shearman to Fleet's estate, being due from him as executor, takes precedence of all his proper debts.

52 *It is proper to mention, that before this report was acted upon, the Plaintiffs filed a supplemental bill, making Armstrong a Defendant, upon the ground that after the Deed and Will of Fleet were set aside, he had been appointed by the County Court of Lancaster, administrator of Fleet, and, as such, ought to be a party to the suit. The administrator answered, consenting to adopt, and be bound by all the proceedings which had been taken in the case; claiming his rights as administrator, and offering to abide the Decree of the Court.

The cause coming on to be heard (as the Decree expresses it) "on the papers formerly read, an exhibit showing that Martin Shearman, the testator of the Defendant Ezekiel G. Shearman, administrator, &c. of Martin Shearman, who qualified as executor of John Fleet, to pay the administrator of the said Fleet, \$5,714, &c. A

sum is also decreed against Ezekiel G. Shearman individually, for the amount of rents and profits of the land and hires of the slaves received by him after the death of Martin Shearman.

From this Decree, the appeal is taken by Ezekiel G. Shearman alone.

In the record which has come up to this Court, there is no such paper as the exhibit (so particularly noticed by the Chancellor in his Decree,) showing that Martin Shearman duly qualified as executor of Fleet. There can be no rational doubt, that this omission is the error of the Clerk of the Chancery Court; nor can we doubt, that a Certiorari would supply the defect. For, if the identical paper which was before the Chancellor should be lost, it could be easily supplied; as it was but a copy from the records of Lancaster Court. It is equally clear to me, that we ought not to proceed in the cause without a Certiorari, unless upon the ground that the exhibit is unnecessary to a decision, or the admission, (which I understood the Counsel for the Appellants to make) that the exhibit might be considered as before us, if it could be brought up by

53 the Certiorari. *My own opinion is, that we do not need the exhibit to establish the fact, that Martin Shearman qualified as executor of Fleet. It is a settled principle, that nothing need be proved, which is admitted by the parties; and this fact is, I think, clearly so admitted. After annulling the Deed and Will, the Court of Chancery ordered, Martin Shearman's administrator to render an account of the said Martin's administration on the estate of Fleet. If this order was not made, on the admission of the parties that M. Shearman was executor of Fleet, it certainly could not have been acted upon by the Commissioner, without either an admission of that fact, or an exception taken to the report, because M. Shearman was never executor of Fleet. In the Commissioner's report, we see a long account headed thus: "Dr. the estate of John Fleet, dec'd, in account with M. Shearman, his executor." This account is extended from the death of Fleet to the death of M. Shearman; a space of thirteen years. The executor is regularly charged with the property which came to his hands, and credited by his disbursements from year to year, together with his commissions, &c.; the whole showing the usual course of administration of an estate. To all this, there is no exception that M. Shearman was not executor; but on the contrary, an express admission of the fact by E. G. Shearman; 1st, in page 3, of the report, where the Commissioner states, "that M. Shearman is debited, in his executorial account, with the hires of Fleet's slaves, from the consent of the Plaintiffs and the defendant E. G. Shearman, except as to the hires of Daniel, Harry and Lucy," &c. 2d. The fact is admitted by E. G. Shearman in page 81, where he claims (by a special statement made at his request) credits for M. Shearman, as executor of Fleet, to the amount of \$633 83 cents. I desire no better evidence than this, to establish the fact (as

between these parties) that M. Shearman qualified and acted as executor of Fleet.

54 *Taking this, then, for granted, I shall proceed to consider the objections stated in the argument, to the decree of the Court below.

1. It is objected, that the bill does not charge M. Shearman as executor of Fleet: that he does not answer as executor: that the revival against his administrator gave him no notice, that the claim was made of him as representing an executor, and was therefore, a debt of the first dignity; and that having no such notice, at any preceding stage, the Chancellor ought not to have suffered the exhibit which showed that M. Shearman qualified as executor of Fleet, to have been introduced at the hearing; and erred in founding his decree upon that document.

With respect to the original bill, it must be recollected, that M. Shearman was the man charged with the fraud and imposition in obtaining the Deed and Will, and withholding the property under them. If these charges were true, he was liable, however he held the property. But further, the Will is made a part of the bill. By the Will, M. Shearman is named as executor. The Will, too, as set out, shows that a probate of it had been taken, and this could only be by the executor, or (on his renouncing the executorship) by an administrator with the Will annexed. Martin Shearman, in his answer, claims both under the deed and Will: admits himself in possession of the whole estate, real and personal, (a house excepted;) states no renunciation of the executorship by himself, or qualification by another; and therefore, must be understood to admit himself in possession as executor, especially when the fact was, that he had actually qualified as executor. Holding thus as executor, and being thus liable, the suit was, on his death, revived against his administrator with the Will annexed, in the same plight and condition. He stood bound as representing an executor; and it was his business to take notice of all the debts, which his testator owed in that character, because the Law declares he shall pay them before any proper debt of the person he represents. Besides,

55 the *notice and responsibility, thus thrown on the administrator, E. G. Shearman, by the Law, it is a fact apparent on the record, that the first step taken by the Chancery Court, after the Deed and Will were pronounced void, was, to order E. G. Shearman to render before the Commissioner; an account of the executorship of M. Shearman on the estate of Fleet. This gave him notice in fact, as well as in Law. The same order, also, of the Court of Chancery, directed him to settle before the same Commissioner, an account of his own administration on the estate of Martin Shearman; and in this settlement, the Commissioner refused to credit the administrator, by payments made towards the proper debts of Martin Shearman, because the debts which M. Shearman owed as executor of Fleet, was of higher dignity; and there is no exception to this refusal of the Commissioner, on the ground that

the administrator had no notice that he was sued as the representative of Fleet's executor. In the case, particularly, of a debt of nearly five thousand dollars, paid by E. G. Shearman on an execution against him, issued on a staybond, given by M. Shearman to Dall, and for which the Commissioner refused him a credit; so far from objecting that he had no notice by the suit of the Plaintiffs, that he was charged as representing Fleet's executor, he puts his right to that credit expressly on different ground; attempting to prove, that when Dall's execution was levied, the weather and his health were so bad, that he could not possibly go to the Chancellor to injoin and stay the sale; which injunction must have rested on the ground, that the property was bound to pay the debt to Fleet's estate first; because the administrator was bound as representing Fleet's executor.

The administrator, having thus, both in Law and in fact, received notice of the true character in which he was charged in this suit, could not be said to be surprised by the exhibition, at the hearing, of the document proving that M. Shearman had duly qualified as executor of Fleet;

56 *nor did the Chancellor (in my opinion) err in receiving and acting upon that document.

The next objection is, that Martin Shearman held nearly all the personal property, under the fraudulent Deed; and as to this, he cannot be liable as executor of Fleet.

The first answer to this, is, that the fact is not so. There appears to have been no delivery of the property under the Deed; and E. G. Shearman, when directed to settle the executorship of M. Shearman on the estate of Fleet, brings into the account all the slaves and other property contained in the Deed, and states them to be "the slaves belonging to the estate of Fleet," and "sundry property that came to the hands of M. Shearman, executor of Fleet;" thus expressly acknowledging that M. Shearman held them, as executor under the Will. But, if M. Shearman had held under the fraudulent Deed, what would have been the consequence? In *Chamberlayne v. Temple*, 2 Rand. 384, and *Beall v. Silver*, 2 Rand. 401, it is decided, that if a man made a fraudulent Deed, and die, the fraudulent donee will be liable as executor de son tort; but here, as the fraudulent donee was appointed executor by the Will, and qualified, he was a rightful executor, and would, I apprehend, in that character, be liable for what he held under the fraudulent Deed.

But, it is denied that M. Shearman ever was a rightful executor, and insisted that the distributees could not file a bill against an executor de son tort, but must have an administrator appointed, or the estate committed to the Sheriff. I consider it settled Law, that every executor regularly appointed by a Court having jurisdiction of the matter, is a rightful executor, while his commission lasts; and though a subsequent Will should be afterwards produced, or the Will under which the executor was appointed, proved to be a forgery; yet the acts done by the executor prior to such proof, will be valid, and he will be

57 *chargeable as executor for any assets, which had come to his hands. If authority were necessary in support of a position so plain, I would refer to the case of *Allen v. Dundas*, 3 Term Rep. 125, where the very point is discussed and decided.

In our case, M. Shearman was regularly commissioned as executor, by Lancaster Court, in which the Will was proved. Until he was displaced, no administrator could be appointed; nor could he be displaced but by a suit impeaching the Will. This suit was, therefore, properly brought by the heirs and distributees. They pray that the Deed and Will may be set aside, the land divided, and the personal estate distributed. It is admitted, that this was right, so far as related to the division of the land; but contended, that as to the distribution of the personalty, the bill was wrong: that it should merely have sought to set aside the Will; and then have left it to the administrator, (who should be appointed,) to have recovered the assets. By a reference to the case of *Paul v. Paul*, 2 Hen. & Munf. 525, it will be seen, that upon a bill brought to set aside a Will, the County Court, after pronouncing the Will void, go on to direct a distribution. The Decree was reversed by the Court of Chancery; but, this Court reversed this last, and affirmed the Decree of the County Court; thereby sanctioning the order of distribution. In our case, it will be recollected, that after an administrator of Fleet was appointed, (which could only be done upon setting aside the Will,) that administrator was made a party to the suit. Here, then, were convened before the Court, all the parties interested; all praying the Court to proceed, and make an end of the matter; and I cannot conceive a solid objection to their doing so.

Taking the Defendant E. G. Shearman to be properly charged, and legally liable for the acts of M. Shearman as executor of Fleet, there can be no doubt, that under the express words of the Law, the debt incurred by Martin Shearman, as executor,

is of the first dignity, and to be

58 *paid by his administrator, before any proper debt of the said Martin. The Commissioner was therefore right, in reporting the full balance of 5,714, with interest, against the administrator; and the Court right in decreeing against him the same sum.

With respect to the sum decreed against E. G. Shearman individually, for the rents of the land and hires of the slaves received by him, after the death of M. Shearman, there was no objection taken at the bar; and properly, because this part of the account seems to have been admitted by E. G. Shearman before the Commissioner.

Upon the whole, I am for affirming the Decree.

JUDGE COALTER.

The only question in this case, arises out of the principle adopted by the Commissioner in his report, whereby the Appellant is charged with the greatest part of the demand of the Appellees, as a debt of the first dignity due from his testator, so as to exclude from his administration account,

debts to a large amount, which he had paid, and by which a devastavit is thus established on him by the Commissioner, and the final Decree in the cause.

The original bill was filed in this case, by the Appellees, against Martin Shearman, the Appellant's testator, alleging that they were heirs at law and distributees of John Fleet: that Fleet was a man of unsound mind, incapable of making contracts or a Will; and that shortly before his death, the Defendant had, by fraud, imposition and threats, obtained from him a Deed purporting to convey the whole of his property, for the consideration of \$5,000; none of which was paid; and had, about two months before, in order to fortify his title, also procured him to sign a paper purporting to be a Will, when he was utterly incapable of making one, which he had procured to be recorded in Lancaster Court in January, 1801, in consequence of no person appearing to contest it; although, if

59 *The Deed had been valid, there could have been no necessity for recording it, because it would have passed only the same property. This was not contested, they say, because many of the Plaintiffs then were, and some now are, infants, &c. They ask a Decree for their proportion of the lands, slaves, and other personal estate: that the Defendant may render an account of the slaves and hires, and of the rents of the lands, which came to his possession on the death of the said Fleet; and pay the same to them, &c.

The Deed purports to bear date on the 25th of April, 1800, and conveys, for the consideration of \$5,000, a tract of land of six hundred acres, ten slaves, by name, also twenty head of cattle, four horses, and a variety of household furniture, hogs, sheep, &c. This Deed was admitted to record in September, 1800, on the acknowledgment of Fleet in Court.

The Will purports to bear date on the 17th of February, 1800, giving all his estate both real and personal, to the said Shearman, and appointing him executor. This was simply proved and admitted to record, on the 19th of January, 1801. No one, at that time, however, appears to have qualified as executor.

The answer denies the fraud, and insists that Fleet was of sound mind when he made both the Deed and Will. It admits that the consideration in the Deed was not the real one, which was, that he was to maintain the grantor, &c. He denies that the Will was made, as was alleged in the bill, to fortify his claim under the Deed; but that, after the Deed was made, it was discovered by Fleet that there was a negro and some outstanding debts, which were not embraced by it; and it being the intention of the parties to the contract that all his property was to be conveyed, the Will was executed to cure this omission. He says, that the recording of the Will was contested by some of the parties, and denies their right to come in to contest a Will three or four years more than seven (the time limited by Law) after it was recorded.

60 *Nothing further was done in the case, until Martin Shearman's death,

which happened in 1814, except to take depositions.

In 1815, a bill of revivor was filed by the Appellees, to make the present Appellant, who was administrator with the Will annexed of Martin Shearman, a Defendant; and also to make the devisees of the land in question, Defendants. This bill merely states, that the Plaintiffs had theretofore filed their bill against Martin Shearman, for the purpose of setting aside a Deed and Will for a tract of land lying in Lancaster, made, as was said, by John Fleet, in favor of the said Shearman, on the ground that they had been obtained by fraud, in which certain proceedings had been had, &c.: that he had since died: that the Appellant was his administrator, and the others, devisees of the land. They are made Defendants; and the prayer is, that the suit may be revived and stand in the same plight, &c.

The Defendants answer, the one admitting that he was the administrator, and the others, the devisees; and agree to a revival.

After this, to wit, in May, 1817, an issue was directed to try the question of fraud, &c.; which was found in favor of the Appellees, both as to the Deed and Will. The verdict was rendered on the 12th of April, 1820; and being certified to the Chancery Court, there was a Decree pronounced on the 27th of the same month, setting aside both Deed and Will, and directing various accounts, both as to the real and personal estate, a surrender of slaves, &c.

It may be proper here to remark, that on the death of Martin Shearman, the regular course would have been, to have had someone qualified as administrator of Fleet, so as to represent the personal estate. This was not done, however, and the bill of the revivor above noticed, seems in its terms, to limit the case, as to the Plaintiffs, to the controversy so far as it regarded the real estate: and it seems to me, that legitimately, whatever to the contrary might have been intended, the controversy

61 between the parties then *before the Court, could only extend, so far as ultimate relief could be given, to the real estate. To be let in to the enjoyment of this, the heirs had a right to an enquiry into the alleged fraud, both as to the Deed and Will; for both must be set aside or nothing is gained. When they had succeeded as to both, they could only claim to be let into the enjoyment of the lands, and to have an account of the rents. All beyond this, could alone be claimed by the personal representative of Fleet. But no such representative was then before the Court, and none such existed. The Court, however, in the same Decree which vacated the Deed and Will, directs accounts, and amongst others, an account of the administration of Martin Shearman, on the estate of Fleet, directing the Commissioner to comprise in such account, to the debit of the said Martin, the price of slaves, and all the personal estate (except the slaves that may be surrendered under the Decree,) and that the said Martin claimed title to, by, or under the said papers; thereby, as it seems to me, very properly recognizing

only his title as purchaser or legatee, no claim or possession, as executor, having been suggested in any of the pleadings.

Accounts were also directed of the rents and profits of the land, both in the lifetime of the said Martin, and since; reserving liberty to those claiming to be heirs or distributees of Fleet, whether Plaintiffs or Defendants, to interplead, &c. with a view to a division or distribution of the real and personal estate.

The Commissioner reported, and, in taking the accounts of the Appellant's administration, rejected his disbursements in payment of debts, so as to subject him, as aforesaid, for a devastavit. At the same time, and at the instance of the Appellant, he reported an account, according to his pretensions, allowing him those credits; and in this way, the point has been presented to the Court. In order to fortify these his pretensions, I presume, he files

62 several depositions to prove, that when a large execution of one *Dall, which issued on what is commonly called a stay-bond, executed by Martin Shearman, as security for Edmunds the debtor, was levied, late in December, 1818, the weather was very inclement, and he confined to his house by indisposition, so that he could not travel to Richmond or Fredericksburg. Whether any resistance to the execution, which such a journey would have enabled him to make, or what kind of resistance was thought of, does not appear. The object of these depositions seems merely to be, to prove that if he could, in any way, have made resistance, it was then out of his power to seek advice concerning it.

It is pertinent to my view of this case, here to remark, that at the time this Decree was pronounced, there was not only a want of a personal representative of Fleet's estate, but there had been no allegation in the pleadings or proceedings in the cause, that Martin Shearman had ever qualified as executor of Fleet. The original bill seems to negative such idea, by the allegation merely, that the Will had been obtained and recorded, for the purpose of fortifying the claim to the whole property, under the Deed; and is relied on as a circumstance of fraud in regard to that. There is nothing in the bill, charging any thing beyond a tortious intermeddling with the estate, on the pretence of a fraudulent Will. The bill of revivor seems also to negative any pretence to charge his administrator for his acts as executor, by confining the case to the land, as in Law it was then confined.

The Chancellor's Decree for account, it seems to me, therefore can only have gone on the ground, that as Martin Shearman was confessedly in possession of the whole estate, pretending to hold the greater part as purchaser, and the residue as legatee, and as those papers were both declared void, his estate should be answerable for the whole property, under whichever of those papers he claimed title; but, that however fraudulent or improper that possession was, yet a Court of Equity would allow him all just disbursements.

63 *It is true, that in the final Decree

it is stated, that an exhibit was then before the Court, showing that he had qualified as executor; but at what time, does not appear; nor do we know when this exhibit was filed. It is not now in the record. The copy of the Will, with the certificate of the proof of it, shows that he did not qualify as executor when the Will was proved; and it is highly probable, that when the bill was filed, and probably not until long after, it was not known to the Plaintiffs that he ever had qualified, as executor, and that, therefore, he was not charged by them in that character. It is not improbable, however, that when about to take the accounts, search may have been made as to the credits collected by him, and his qualification then discovered, and the document produced to the Commissioner, as has been suggested at the bar; who thereupon took the account in the manner aforesaid. Be this as it may, the report of the Commissioner, and this document, presented the question to the Chancellor on the final hearing, and he supported the Commissioner. I shall therefore consider the case, as if there was a document now in the record, proving that he did qualify as executor.

There is also another circumstance belonging to the statement of the case. The report and account were returned in February 1821; and in May following, the Plaintiffs had leave to file a supplemental bill, for the purpose of making one Armstrong, who was agent for a number of them in prosecuting the suit, a Defendant; alleging, that since the last continuance, he had taken administration on the estate of Fleet. This was done after the accounts were taken, as aforesaid, and preparatory to a final Decree. The bill was in fact filed at the same term the final Decree was pronounced. It alleges that the Plaintiffs are advised, that it is necessary to make him a Defendant, that a Complete Decree may be made, binding the rights of all parties. They agree, that any part of the estate, necessary for his administration, may be decreed to him, subject to their

64 eventual rights as distributees; and if none is necessary, *but if he is willing that an immediate distribution may be made, that the same may be decreed, &c. referring to the preceding proceedings.

To this bill, that Defendant answered instantler. He admits the statements it contains, and adopts all the proceedings in the suit, agreeing to be bound thereby, and agrees that distribution may be made.

In this way, and at this time, the personal representative of Fleet is finally brought into this cause. Up to this time, then, there is not only an absence of any charge in the bills of proceedings, setting out a claim against the Defendant, as representing an executor, but there was no party to the suit that could regularly make any such claim, which could at all affect the question under consideration. For, although Martin Shearman's estate would be answerable for the rents of the land, and to which alone the Plaintiffs were then entitled, it is admitted on all hands, and so decreed, that the occupation of the land

was not as executor, and consequently, that rents and profits would not be considered a debt of the first dignity, under the Act, but only payable when assets.

Although Martin Shearman, then, may have committed a fraudulent spoliation on the rights and properties of these parties; yet, unless the Appellant has also been guilty of improper conduct, it can only be strict Law which will remunerate them therefor, out of the estate of an innocent man.

This statement of the case presents two questions:

1. Was Martin Shearman a qualified executor as to the personal estate comprised in the Deed, within the meaning of the Act of Assembly, 1 Rev. Code, 389, which declares, that executors or administrators of any person who shall have been chargeable with the estate of a dead person, committed to their testator or intestate, by a Court of Record, shall pay so much as shall be due from their testator or intestate to the ward, idiot or lunatic, or to the legatees or persons entitled to distribution, before any proper debt of their testator or intestate?

65 *2. If an account of this part of the estate could have been claimed and charged on the estate of Martin Shearman, as a debt of the first dignity, so as to take precedence of other proper debts of his, and to charge his administrator for a devastavit in paying such other proper debts, can such pretension be supported under the bill and proceedings above stated?

The Act of Assembly, I presume, must have intended one of two or three things; either that an executor or administrator, or an executor, administrator or guardian, &c. is bound to take notice of every case in which his testator or intestate acted in such fiduciary character, and must likewise be presumed to have knowledge of the state of the accounts, and whether any thing is due or not, and also of all claims which may, by possibility, be asserted in consequence of such trust: or, that he shall only be bound to take notice of such trusts as shall be actually made known to him, together with the extent and nature of the claim, by suit or otherwise; or, if he is bound to notice the trust itself, as one committed by a Court of Record, he is not bound to notice any claim, which may be asserted by the cestui que trusts, unless in cases where accounts have actually been settled by the Court, and made a matter of record, showing monies due; or, unless a specific claim has been made, by suit or otherwise, in such a way as to show that the claim is one within the Act.

It has been thought rather a hard case, that executors or administrators shall be bound by, and obliged to take notice of, all Judgments, wherever rendered within the State, though they are not only matters of record, but show precisely what is due, and enable the executor at once to defend himself against claims of inferior dignity. But where, so far from there being a Judgment to guide him, there is not even notice by suit or otherwise, actually given, either that there was such trust in relation to the matter claimed, or that there had been a

breach of that trust in whole or in part, it would seem to me an intolerable 66 hardship, to make "the executor or administrator answerable, as he would be to judgment creditors. If you do this, you ought to extend to him the correlative benefit of pleading this trusteeship, and all possible claims arising under it, as a bar to all other actions, until such claims shall be exhibited and adjusted. All this would be monstrous, and was never intended by the Law. A trust of this kind may even be settled up by the Court, and the amount paid accordingly, but that account may afterwards be surcharged and set aside, and a much larger sum found due; but, before such claim is made known, the executor or administrator of the trustee may have paid his proper debts. It cannot be, that this is a devastavit under the Act.

If actual notice of the breach of trust, then, is necessary to be given in some way or other, this of course involves notice of the trust itself, and consequently, implied notice of it is not necessary to be inferred, in order to effect the purposes of the Law, as it is in case of Judgments; unless, indeed, it should be in the case I have above put, of a settlement of accounts, showing a particular balance, returned to Court and made a matter of record. As to this, I give no opinion. But it seems to me, that where the case depends on actual notice of the claim, the party cannot derive aid from any implied notice in Law, so as to charge another beyond the actual notice given. The notice given ought to show the nature and extent of the claim; and the party ought not to be permitted afterwards, by evidence or otherwise, to vary it so as to have a retrospective operation. The nature of the claim, as first announced, is that to which the attention of the executor or administrator is drawn; and he proceeds accordingly. The claim, for instance, as originally made, is, in substance, a charge of a trover and conversion by the testator or intestate, of the goods of the deceased. But, it turns out afterwards, that he held them as executor or administrator or guardian, and had not accounted for them. In the mean time, his executor or administrator has paid debts, &c. Is

67 *he bound to know contrary to the claim set up, that this is a trust fund, within the Act? And can he defend himself against other creditors on this ground? It seems to me not.

In general, then, before an executor or administrator or guardian, &c., can be subjected to a devastavit under the Act, he must have actual notice of the nature and extent of the claim, and that it is a charge which pertains to the fiduciary character of his testator or intestate.

The fair way, then, and the most, it seems to me, that can be asked by the Appellees, is to examine this case precisely as if this suit had, for the first time, been instituted at the time the bill of revivor was filed: that the administrator de bonis non of Fleet had united with the heirs at law in the bill; and that it had been couched in the same language, making the same charges, and no more, than those

contained in the original bill above referred to.

The question then recurs, is the personal estate conveyed by the Deed, and held and claimed by Martin Shearman under it, as a purchaser thereof for value, a portion of the estate of Fleet, committed to him by a Court of Record, and which can be charged on his estate as a claim of the first dignity, under any bill that could have been filed in the cause? Would he have been bound by his oath, even if his claim was under a voluntary Deed, to make an inventory and appraisement of these goods, as of the goods of Fleet? I presume not. No one could have claimed this of him. The Court would not estimate his risk by its value. If there was not enough besides for the payment of debts, creditors could resort to this fund for that purpose; but, the Deed would only be void as to them. Actual fraud, as to them, would not be necessary. It would be enough that the Deed was voluntary. They can go against the fund, whether the volunteer is executor or not. The executor or administrator cannot sue the volunteer to set aside the voluntary Deed, in order to pay debts. It is no part of their duty, because it is no
68 *part of the estate committed to them; and if it is not in this case, I cannot see how it would be, if the executor or administrator was himself the donee. If he makes an inventory of it as part of the estate, it must be subject to distribution, as well as to payment of debts.

But this is not a case of creditors. It is a claim by an administrator and distributees, in which it is not enough to show the Deed voluntary; actual fraud in obtaining it, must be the ground of the claim. And though this ground of claim goes to show, that as well as it regards creditors as distributees, no title passed: but that as to both, the goods are to be treated as the goods of Fleet; yet, I have not been able to perceive how this will vary the case from that of a mere voluntary Deed, above put. In some respects, it seems to me to be a stronger case than that, in favor of the opinion I have advanced as to it. I can see no reason why, as to creditors, actual fraud shall make it a part of the estate committed by the Court, if the voluntary consideration or legal fraud would not. But, it is the estate of the deceased, because he to whom the estate of the deceased is committed has fraudulently obtained a Deed, vesting the legal title to it in him, before the death of him to whose estate it is said to belong. Suppose, when Martin Shearman qualified, the Court had been told by the Appellees, "This man holds the greater part of the estate of Fleet under a Deed obtained by fraud, and we intend to sue to set it aside, and now desire you to direct the appraisement of that property, and to take security for its amount." Could the Court have done either? It seems to me not. But would Shearman be bound to render an inventory, and thereby accuse himself of the alleged fraud? Surely not. When, then, does it again become part of the estate of Fleet? Not until the moment when the Deed is vacated; and even if this had been

done in the life-time of Martin Shearman, and if there had been no Will also giving it to him, but he had been administrator, I would pause before I
69 would say, that his sureties should *be responsible for it. But, in this case, and as to these parties, both Deed and Will must be set aside, or nothing is done; and had that taken place in the life-time of Martin Shearman, the very act which made this property again a portion of Fleet's estate, would have virtually annulled all his power over it as executor. But, this Decree was not in the life-time of Martin Shearman. When he died, the legal estate was in him; and his administrator was bound to give security to its extent, to return an inventory of it, and to pay debts, &c., accordingly. From this latter, he will be excused, now, as soon as these goods are recovered from him, by those having a paramount title. This has been done, and they have got possession.

During his possession, then, and during his life, the legal title was in Martin Shearman, not as executor, but under the Deed. This state of things continues until the Decree. Up to that time, they are a part of Martin Shearman's estate, and liable for his debts. How then can it be said, that they were committed to him by a Court of Record, as part of the estate of Fleet?

For these reasons, as at present advised, I think that no bill could have been framed, so as to bring this case within the Act of Assembly. The necessary charge, in this case, of actual fraud in getting the legal title from one who did not intend to convey it, or was incapacitated to do so, is a charge which admits the legal title in him, but which seeks to avoid it. It charges an act in the nature of a tort by which an injury has been done; and, when prosecuted against Martin Shearman alone, it is only charged as a personal injury of this kind, as a fraud subjecting him to certain consequences; not as a violation of his duty as an executor, in not returning an inventory, and rendering an account of his property. If apprehensions had been entertained that he would remove the slaves, and an injunction or sequestration had been asked, would it have been refused

because the sureties in the executorial *bond would be liable? I presume not; even if it had appeared in the bill, that he had qualified as executor. It is to the consequences arising from this fraud, then, that the estate of Martin Shearman is liable; and I have therefore been unable to perceive, how it could have been charged, as arising from his acts as executor, in relation to property committed to him, as such, by a Court of Record.

But, if it could have been so charged, it has not been; and if the administrator ought to have notice of the claim, so as to justify him in withholding the assets from other creditors, it ought to be so given or charged, I presume, that he would not only have notice that the demand was claimed as one of the first dignity, but presented in such a shape, that he might plead its pendency, in bar of debts of inferior degree. But, the bill treats the case simply

as one of the nature I have above described, simply as a tortious possession under a fraudulent Deed and Will. The bill, in fact, was against Martin Shearman himself, filed in a case, in which, if he could have been charged as executor, in regard to this part of the estate, he was not so charged, and in which the party had a right to waive charging him as executor, had a right to exonerate his sureties, and to look to him personally, from the consequences of a fraud committed by him, before he was executor, and for which they could equally charge him, whether he had ever qualified as executor or not.

If a doubt had existed, whether the bill could have been filed in any other shape, the party had a right not to risque the consequences of that doubt, of a demurrer to his bill, &c. He had a right to go against Martin Shearman alone, in his individual character. If he did this from ignorance that he had qualified as executor, it is the same thing. That might have led to an amended bill, if indeed, it could have been amended. But, then, it could not have operated retrospectively, so as to make previous payments a devastavit. The bill was originally filed as a mere individual charge against Martin Shearman.

71 No other *part of the pleadings has changed the nature of that charge; nor is anything to the contrary perceived in the case, until the Decree vacating the Deed and Will. But even this, as I have above stated, does not seem to me necessarily to involve that question. If it does, however, the payments which have been rejected by the Commissioner, were all before that Decree.

On the whole, though I am not without my doubts, I cannot vote in support of this Decree subjecting this administrator to a devastavit. That, I believe, is the only point in contest. At all events, I do not perceive any other error.

The PRESIDENT.

My first impression of this case was, that the objections urged by Counsel to the Decree might be obviated by a minute attention to the pleading and facts in the record; but on a full examination of them, I have come to a different conclusion. The proceedings, nether expressly nor by intendment, exhibit any claim against E. G. Shearman administrator of Martin Shearman, who was executor of John Fleet; but charge him solely as administrator of Martin Shearman. The bill recites the Will of Fleet, but founds no claim on it, as its object was to set it aside, as well as the Deed; and though it be admitted, that E. G. Shearman had notice of the probate, and must be presumed to know that Martin Shearman, his testator, was the rightful executor of Fleet until the probate was repealed, no claim, founded on these facts, is exhibited against him in any of the pleadings. Nor do I think that his admissions (in the character of administrator of Martin Shearman, in which he is charged) on the adjustment of the accounts directed by the Chancellor, can obviate that objection; as the credits claimed by him, for the payment of the proper debts of Martin

Shearman as his administrator, including
72 Dall's debt, were anterior in date to these *admissions before the Commissioner. There is nothing in his admissions, therefore, to deprive him of the right to insist, that until suit was brought against him as the administrator of Martin Shearman who was executor of Fleet, claiming the balance due by his testator to Fleet's estate by the personal representative of Fleet, he could not resist the claims of Martin Shearman's proper creditors, on the ground that that balance, whatever it might be, was a debt of superior dignity to theirs. Such a pretence would delay, infinitely, the creditors of every one who was executor or administrator, and lead to great frauds.

But, in another point of view, E. G. Shearman, ought to have been allowed the credits claimed by him as administrator of Martin Shearman. The bill was brought to set aside the Deed and Will of Fleet, as fraudulent. It is admitted, that the Deed included all the property of Fleet, except an inconsiderable part of it, which passed by the Will. Until the Deed and Will were set aside by the Chancellor, Martin Shearman was in possession of the property included in them, according to their tenor and effect. When he qualified as executor of Fleet, he could not be said to be in possession of the property included in the Deed, as executor of Fleet, but in his own right, such as it was. As to that property, he could not have been required to give security by the Court of Probate, but as to the property in the Will only. That he might have been charged as executor in his own wrong, as regarded the property in the Deed, if he had lived until it was set aside, is admitted; but he died before that event; and his administrator can, I think, only be charged as representing him as executor de son tort, as regards the property in the Deed. In relation to it, a debt due by Martin Shearman to the representatives of Fleet, was a proper debt of his own, and not of no higher dignity than any simple contract debt. If the bill and pleadings in the cause, therefore, had charged E. G. Shearman, as administrator of Martin Shearman, the rightful
73 executor of Fleet, the *property in the Deed could not have been charged to him in that character. As regarded the property in the Will, the proceedings have been very irregular. To have attained the object of the bill, after the death of Martin Shearman, the personal representative of Fleet ought, by supplemental bill, to have been made a party, and on his answer, coming in, an order to settle the accounts should have conformed to the different responsibilities of E. G. Shearman, charged in the supplemental bill.

In every point of view, therefore, E. G. Shearman, when he was accounting both for the property in the Deed and Will, ought to have been allowed a credit for the payment of the proper debts of Martin Shearman, either as his representative as executor de son tort, as to the property in the Deed; or as rightful executor of Fleet under the Will.

I think the Decree, therefore, is erroneous

in not allowing him these credits; and so much ought to be reversed; and there is no substantial objection to the residue, it ought to be affirmed.

Ball v. Payne.

November, 1827.

Wills—Construction—Fee Tail—Docking.—A devise of lands to the son of the testator for life, "and in case he should have heirs lawfully begotten, that he shall or may dispose of the said land, to either or amongst the said heirs, as he shall think proper; but in case that my son should die without such heirs, then my Will is, that the said lands be equally divided amongst my daughters," gives a fee tail, converted by the Act of Assembly into a fee simple.

This was an ejectment brought in the Superior Court of Lancaster County, by Ball against Payne. The question between the parties, depended on the construction of a clause in the Will of Jas. W. Ball. The Superior Court gave Judgment for the Defendant, upon a special verdict found by the Jury, and the Plaintiff appealed.

The case was argued by Leigh and Wickham, for the Appellant, and by Starnard, for the Appellee.

The Counsel for the Appellant, cited Pells v. Brown, as it is reported in Fearné on Cont. Rem. 395, Butler's Ed.; Warner v. Mason, 5 Munf. 242; Smith v. Chapman, 1 Hen. & Munf. 300, Roane's opinion; Goodrich v. Harding, 3 Rand. 282.

The Counsel for the Appellee, cited Doe v. Smith, 7 Term Rep. 531; Doe v. Goldsmith, 7 Taunt. 209; Doe v. Chandler, 7 Term Rep. 531.

November 9. JUDGE CARR delivered his opinion.†

This case depends upon the construction of the following words in the Will of James W. Ball: "At the death or marriage of my wife, I give unto my son Cyrus Ball, the use of all the remainder of my lands that I possess in the County of Lancaster, during his life, and in case he should have heirs lawfully begotten, that he shall or may dispose of the said land, to either or amongst the said heirs, as he shall think proper; but in case that my son should die without such heirs, then my Will is, that the said lands be equally divided amongst my daughters." The use of his land given to Cyrus in the first branch of the clause, and the power of appointment in the second, I do not consider as affecting at all the character of the devise. We know that an appointee takes immediately under the Deed or Will treating the power, and just as if he had been named in that Deed or Will. Southby v. Stonestreet, 2 Ves. 610; Fearné on Cont. Rem.

***Wills—Construction—Fee Tail—Docking.**—In Callis v. Kemp, 11 Gratt. 86, it is said: "That the power of disposing to such of his issue as he should think fit would not operate to restrict the general words, is shown, by the case of Ball v. Payne, 6 Rand. 73, where a similar power of disposing amongst or to either of the heirs of the body, was contained in the devise: but the tenant for life was held to take an estate tail which by our statute was converted into an estate in fee simple." On this subject the principal case is also cited with approval in Griffith v. Thomson, 1 Leigh 829; Seekright v. Billups, 4 Leigh 96, 98, 99, 112; Doe v. Craigen, 8 Leigh 452; Tinsley v. Jones, 18 Gratt. 297, 298; Hood v. Haden, 82 Va. 597.

†JUDGES GREEN and CABELL, absent.

100. It was acknowledged by the Counsel for the Appellant, that the word heirs, as used by the testator, must be understood heirs of the body. This, then, is a devise to Cyrus for life, and if he have heirs lawfully begotten of his body, to such of them as he shall appoint; and if he should die without such heirs, the lands to be divided among the daughters of the testator. The question is, what estate Cyrus took; and that depends on another question, whether the words heirs, &c. in the second branch of the clause, are to be taken as words of purchase, or words of limitation.

Words of purchase, are such as give the estate, originally, to the heirs, &c. and not through the medium of, or by descent from, the ancestor. Words of limitation, are such as do not give the estate imported by them, originally, to the heirs, &c. described, but only extend the ancestor's estate to an estate of inheritance, descendible to the heirs described. As far back as Shelly's Case, it has been laid down as a rule (never since questioned) "that wherever in the same instrument, there is a limitation to the ancestor for life, and one to his heirs general or special, the heirs shall not take by purchase, but by descent." To this rule, there are a few, and but very few exceptions. They are all very learnedly and accurately defined by Mr. Fearné, in his Essay on Contingent Remainders, and have so often been the subject of discussion and decision in this Court, that it would be worse than useless, to attempt to enumerate them. Suffice it to say, that neither in a Deed, nor in a Will, would the words used in the case before us, present an exception. In Wills, it is true, a greater latitude is taken; for there, the intention of the testator, unless it violate some rule of Law, is the standard. But cases innumerable might be quoted, to show, that devises clothed in the same words with ours, to wit: to A. for life, then to the heirs of his body, and on his death without such heirs, over, have been construed to give A. an estate tail; the words heirs of his body, being, in all

76 such cases, *taken as words of limitation, and not of purchase. This is done, not because the testator did not intend to give A. an estate for life; for, it is admitted that he did mean to give him such estate; but it is equally clear, that he intended to provide, not only for the immediate, but the remote issue of A. and that the estate should not go over, before such issue was extinct; and to effectuate this, the general intent, the words heirs, &c. are taken as words of limitation, extending the estate of A. to an estate of inheritance descendible to the heirs described.

The latest English case I have seen on this subject, is that of Doe on the demise of Cole v. Goldsmith, cited by the Counsel for the Appellee from 7 Taunt. 209. That was, I think, a stronger case than ours. It was "a devise to F. G. and his assigns for life, and immediately after his decease, unto the heirs of his body lawfully to be begotten, in such parts and shares as the said F. G. should by Will or Deed appoint; and in default of such heirs of his body,

then immediately on his decease, over to J. G." The Court, without the least doubt, held it to be an estate tail in F. G., and destroyed by the recovery which he suffered.

Under the doctrines of the English Law, then, there is no doubt on my mind, that the son Cyrus Ball would take under this Will an estate tail, enlarged by our Statute into a fee.

But it was insisted, that under our Statute dispensing with words of inheritance in Deeds and Wills, a different construction ought to prevail: that by it, we must consider a fee simple given to the heirs of Cyrus Ball, which they take as purchasers; and which prevents the enlargement of the estate of Cyrus into a fee tail. The words of the Law are, "Every estate in lands, which shall hereafter be granted, conveyed or devised to one, although other words, heretofore necessary to transfer an estate of inheritance, be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not

77 appear to have *been granted, conveyed, or devised, by construction or operation of Law." I have considered this Law as meaning simply to dispense with words of inheritance, and transferring the fee, in those cases, where before, for want of such words, an estate for life only would pass. But, I have never supposed it was intended by it, to break up from their foundation, the ancient and general rules of construction, and convert those into words of purchase, which, for centuries, had been settled as words of limitation. So far from disturbing ancient rules, the framers of that Law seem to have taken especial care to preserve them.

Before, then, we can bring our Statute to bear upon any case, we must ascertain that by the established rules of construction, an estate for life would have passed. But, we know that where land is devised to one for life, then to his heirs or the heirs of his body, and on failure of such heirs, over, no estate passed to the heirs or issue; but, these words are used as words of limitation, describing the estate of the ancestor, and extending it to a fee tail. Here, then, is no case presented for the operation of our Act. In the same Statute of 1785, from which the clause above quoted is taken, we find a declaration, that every estate in lands which hereafter shall be limited, so that as the Law aforesaid was, such estate would have been an estate tail, shall be deemed to be an estate in fee simple. Now, we know, that by the Law, as it had long before been settled, if an estate had been given to A. for life, then to the heirs or issue of A., and if he die without such issue, over; A. took an estate tail; and this, the Statute says, shall be a fee. But, if we say, that under the Law dispensing with words of inheritance, the heirs of the body of A. become purchasers, and take the fee, we prevent A's life estate from being enlarged into a fee tail, and thus withdraw it from the Act. This would be setting one clause of the same act in direct opposition to another. This, too, would violate the rule laid down and steadily adhered to by this Court, in all the

78 *cases which have come before it. In the case of *Bells v. Gillespie*, 5 Rand. 273, I have more particularly noticed these cases, to which I refer.

I conclude, that Cyrus Ball took an estate tail, converted by the Act into a fee; which fee was conveyed to the Defendant Payne; and that the Judgment of the Court below be affirmed.

The other Judges concurred, and the Decree was affirmed.

Glasscock, &c. v. Batton.

November, 1827.

*Conveyance of Personalty—Retention of Possession by Grantor—Fraud.**—Where a slave has been mortgaged, and afterwards sold absolutely to the mortgagee, but the Bill of sale not recorded, and possession permitted to remain with the vendor, such sale is fraudulent, as against a subsequent purchaser; and Equity will, (under the particular circumstances,) entertain such purchaser to recover the slave against the fraudulent vendee who had clandestinely gotten possession of him. Nor can such fraudulent vendee prevent a recovery, by showing, that the Plaintiff did not take possession at the instant of the purchase: as such omission cannot make good the fraudulent sale.

This was an appeal from the Chancery Court of Clarksburg, where Thomas Batton filed a bill against John F. Singleton and Enoch Glasscock, alleging the following facts: That in 1820, the complainant Batton purchased of John F. Singleton a negro boy named Garrison, of about 13 or 14 years of age, at the price of 440 dollars, 340 dollars of which were paid by the complainant to the said Singleton, leaving 100 dollars still due: that Singleton shortly afterwards delivered possession of the said slave to the complainant: that some time after he held the said slave, and had paid the said 340 dollars, he

79 found that *Glasscock held a conveyance by Bill of Sale or Deed of Trust from the said Singleton, bearing date a few days prior to the complainant's purchase, conveying, or purporting to convey, the said negro boy, with one or more other negroes, which conveyance, as the complainant is informed, was in fact given to secure a debt, or supposed debt, of about 600 dollars, which Singleton owed to Glasscock; and Singleton, notwithstanding such conveyance, was suffered to retain the entire possession of the said negro boy, and to remain as the visible owner, without any notice or knowledge, on the part of the complainant, of the said conveyance: that the said Glasscock, (who resided in Loudoun County,) heard of the complainant's purchase, and about six months thereafter, came to Lewis County, to see the said Singleton on that subject, and came to some agreement or compromise with him, with the terms of which the complainant is not acquainted; although he is now informed, and charges, that Glasscock received property or security, or both by way of substitute, or in lieu of the said

*Sale of Personalty—Retention of Possession by Grantor—Fraud Per Se.—See on this subject, discussion in *foot-note* to *Davis v. Turner*, 4 Gratt. 422; monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348. The principal case is cited in *Sydnor v. Gee*, 4 Leigh 549; *Rose v. Burgess*, 10 Leigh 197; *Davis v. Turner*, 4 Gratt. 450; *Benjamin v. Madden*, 94 Va. 68, 26 S. E. Rep. 392.

negro boy, and perhaps by way of satisfaction or security for his whole demand; that Glasscock then received of the said Singleton two other negro slaves, and also a bill of exchange, or draft, or written order, on some person in Loudoun, or elsewhere, for about \$300, which order was paid to Glasscock, or he made the order his own by retaining the same, without returning it to Singleton, or giving him any notice of the dishonor thereof: that Glasscock, while in Lewis County, publicly declared, and sent word to the complainant, that he had no claim to the said negro boy; because Singleton had settled his business otherwise, and to his satisfaction: that the complainant continued to hold and possess the said negro boy, till the night of the 19th of November, 1821, when he was clandestinely taken from his possession by Glasscock, who had privately traveled to Lewis County, in which he lurked, till that night furnished an opportunity for the seizure, and the complainant has never since been able to regain him,

80 or to ascertain *what Glasscock has done with him. The bill prays for a Decree for the said slave with his profits, or, if that cannot be obtained, that the money paid by the complainant, with interest may be decreed, &c.

The answer of Singleton states, that it is true, that the complainant purchased the negro in question, and that the Defendant had previously given a lien on the same to Glasscock, and had paid the debt, by letting Glasscock have two other slaves, and giving him an order to a certain W. Byrne of Fauquier County for \$440: that the said Byrne accepted the order, as the Defendant has heard, upon some terms agreed on between him and Glasscock: that Glasscock has never returned the said order, or called on the Defendant for payment thereof; but has, as the Defendant is advised, made the order his own, by detaining it: that the Defendant delivered the said boy to Batton, and that the latter lost his possession of the boy, without the previous knowledge or procurement of the Defendant.

Glasscock answered, saying, that about the end of 1819, or beginning of 1820, Singleton being largely indebted to him, executed a Deed of Trust on three negroes, one of which was the boy in question: that the Deed was duly recorded: that the Defendant went to the County of Lewis, for the purpose of having the said negroes sold under the Deed of Trust, and Singleton proposed to sell the negroes to the Defendant, in preference to have them sold under the Deed of Trust: that this proposition was accepted, and the negroes were sold to this Defendant, in discharge of the debt; and a Bill of Sale was executed by Singleton, and the negroes delivered: that at the time of this transaction, Singleton had a large crop to manage, and at his earnest solicitation, the Defendant was prevailed upon to leave two of the negroes with Singleton, one of whom was the boy Garrison, until about the succeeding Christmas, at which time Singleton undertook to return them; at the same time, the Defendant promised Singleton, that if he

paid him \$600 at Christmas, he would

81 let him have *the negroes back again, and indulge him further for the balance of the purchase money: that at the time last mentioned, Singleton failed to send on the negroes, as he had promised, or to send the \$600; in consequence of which, the Defendant, after taking legal advice, went out to Lewis County to take possession of his negroes: that upon arriving at the house of Singleton, he got one of the negroes and received from Singleton, a letter directed to the complainant, directing him to deliver up the boy Garrison, stating that the negro was the property of the Defendant; and that although he had sold the said negro to Batton, he had no right to do so: that the Defendant accordingly called upon Batton for the negro, who denied that he had the negro, and stated that he had sold him, and that he was then half way to New Orleans, which statement the Defendant did not believe: that the Defendant returned to Singleton, and informed him of the fact: that the Defendant then proposed to Singleton to give him an order on his Agent in Fauquier County, William Byrne, for \$440, the amount he was to receive for the boy; with an understanding, that if he received the amount of the order, the Defendant should not trouble himself further upon the subject; but, if he did not receive it, he should enforce his right to the boy: that Singleton accordingly gave the order hereto annexed; but, upon application to Byrne, there were no funds in his hands to meet the order: that Byrne offered a conditional acceptance depending on the event of a suit in Chancery; which the Defendant refused to accept, but was content to receive the money if it came to the hands of Byrne, by the time contemplated, to avoid litigation: that the Defendant, some time afterwards, was informed that the negro was in the possession of Batton, and that he had deceived him by a false statement of his having been sold: that in consequence of the advice of Counsel, he repaired to the neighborhood of Batton, and took the boy from the kitchen of Batton, &c.

82 *The Chancellor decreed that the Defendant Glasscock, should deliver to the complainant the slave Garrison, and that the Defendant should render an account of the profits of the said slave. The Defendant appealed.

Leigh, for the Appellant.

Wickham, for the Appellee.

November 13. JUDGE COALTER delivered his opinion, in which the other Judges concurred.*

The jurisdiction of a Court of Chancery, I think, can be maintained in this case, if on no other ground, on the one taken in the argument, that if the Plaintiff in Equity had sued at Law, he could have been successfully resisted by the mortgage, which was duly recorded. Even if the Bill of Sale had been produced there, it might not have been a clear case at Law, that it was a release of the mortgage, so as, in that Court, to divest the legal title, and leave the Defendant simply on his title under the Bill of Sale. This, however,

*The PRESIDENT, and JUDGE GREEN, absent.

would be the consequence in a Court of Chancery, where substance is looked to, as decided in the case of *Clayborne v. Hill*, 1 Wash. 177. There it was decided, that the mortgage, being recorded, was not fraudulent and void by reason that the possession remained with the mortgagor; but that the subsequent absolute Bill of Sale operated as a release of the mortgage, and became the title under which the bargainee held; and that a continued possession in the bargainor afterwards, rendered that conveyance void. But the Defendant could have kept that Bill of Sale in his pocket, so that a resort must have been had to a Court of Equity to extract it; and if, for this purpose, the Appellee had a right to come into Equity, I can see no reason why he should not claim relief also there;

83 so as *to have possession restored, and an account of hires and profits. Besides, he had a right to go into Equity, in order to enquire into the compromise between the Appellant and Singleton the bargainor, and the compensation received under that agreement. Had the slave not been taken from the possession of the Appellee in the manner he was, the Appellant must have sued at Law; and had he recovered there under his mortgage, the Appellee surely could have enquired into these matters, in a Court of Equity. The manner of that possession, admitting that it was not a stealing, (as it has been denominated at the bar) and was not absolutely illegal, provided the party could have shown a better title, is nevertheless such a procedure, as does not deserve the countenance of Courts of Justice, and cannot be insisted on, in Equity, as placing the party on higher ground than he would have occupied, had it not taken place.

As to the merits, it seems to me, that on both points, they are equally clear for the appellee. *Twyne's Case*, 3 Co. 80, where it was held that absolute conveyances of goods, not accompanied by possession, are fraudulent and void, "for that the donor continueth in possession, and useth them as his own, and by reason thereof he tradeth and trafficketh with others, and defrauds and deceives them," followed up by the cases of *Edwards v. Harbin*; *Hamilton v. Russel*, and by the case of *Clayborne v. Hill*, above noticed; *Fitzhugh v. Anderson*, 2 Hen. & Munf. 289, and *Alexander v. Deneale*, 2 Munf. 341, and other cases in this Court, clearly show, that the Bill of Sale to the Appellant was fraudulent and void as to the Appellee, at the time he made his purchase.

But, it is argued, that the Appellee cannot avail himself of this, because he also permitted the property to remain with the seller, and that his purchase therefore was void.

In the first place, it does not appear to me, that this is proved. Delivery at the moment of the sale, is not necessary. The possession must remain, and if it

84 did so, it *was a matter very susceptible of proof. The Appellee was found in possession by the Appellant, and although it does not appear when that possession was acquired, yet, as this Court will not presume a fraud, there ought to have been proof of it by him,

who seeks to avail himself of such fraud. But, if it were otherwise, and if we must take it that it did so remain, still if he got possession before any one was deceived, and became a purchaser thereof, it is not void. I speak of subsequent purchasers, not of creditors. The Appellant is not such a purchaser, and I cannot perceive how this prior purchase, which was void as aforesaid at the time the Appellee purchased and paid his money, can be reinstated, so as to place him in the condition of a subsequent purchaser.

This seems, indeed, not to be contended for to this extent; but, it is said, that there is *par delictum*, and that there is equal Equity, and the Appellant, not only being prior in time, but being Defendant in Equity, must prevail. But, it seems to me, that this is not so as to either point. It is true, if there had been a subsequent purchaser to both, neither could have prevailed against him, if possession remained, as has been alleged. He would have advanced his money, and must have held the property; but, the Appellant was not so deceived, did not so advance his money. The Appellee, however, was so deceived by the conduct of the Appellant, and so there is no *par delictum*, and the Equity is not equal.

As to the compromise and compensation received by the Appellant from Singleton, it is clearly proved by many witnesses, and it is admitted, that it would have put this case to rest, had it not been entered into, as is alleged, in consequence of a false suggestion by the Appellee, that the slave was not in his possession when demanded. This suggestion, true or false, could only have operated on the Appellant, so as to prevent his summary mode of redress, afterwards resorted to. It could no more have

85 prevented a suit against the Appellee, or caused the appellant *to resort for satisfaction to Singleton, than if he had simply refused to deliver him. But, how was the fact? The Appellant admits in his answer, that he did not believe this statement; and he also admits, that before he made the compromise, he had taken the advice of Pindal, as to this summary redress. But he wished, probably, to avoid the scandal of such a transaction, and preferred trying to obtain satisfaction from Singleton. This he did, and procured an order for \$440, bearing interest, the price which the Appellee gave for the slave. The price of the three negroes sold to this Appellant, being about \$1,100, and the two he received, being about twenty years of age, and one about eighteen, whilst the one in dispute was about twelve, it is fair to presume that he considered he obtained more than he gave for him. Nor is it at all unlikely that he should so have expressed himself, when speaking of the transaction. The witnesses, who testify to this, are in no otherwise discredited, and ought not to be disbelieved from the mere improbability of such a conversation, especially as many others prove his declarations, that he had made the compromise and was satisfied.

On every ground, therefore, the Decree must be affirmed.

November, 1827.

Bond—Promise to Pay—Suit on—Case at Bar.—A. being indebted to B. transfers, without written assignment, two bonds due by C. to A. In a conversation between B. and C. the latter promises to pay the amount of the bonds when they should become due. This conversation was previous to the transfer. When the bonds become due, B. brings an action against C. on the bonds, in the name of A. C. pleads non est factum, and B. is cast in the suit. B. then sues C. on his promise to pay the bonds. Such action may well be maintained.

Pleading and Practice—Non Est Factum—Conclusion of.—The plea of non est factum, whether general or special, must conclude to the Country; and in such case the Plaintiff cannot reply any new matter. He must either accept it by a similer, or demur.

Bonds—Alteration—Non Est Factum.—A consent given by an obligor to the alteration of a bond, given after the alteration is made, will not repel the plea of non est factum; but, a consent given before, or at the time of, the alteration, will be considered as a re-execution.

Pleading and Practice—Former Judgment—How Advantage Taken.—The mode in which a party must avail himself of a former Judgment for the same cause of action, is by plea in bar, or in an action of assumpsit, by evidence on the general issue.

Same—Same—Same—Plea in Bar.—A former Judgment cannot be pleaded in bar, unless it was directly upon the same point, and between the same parties, or privies.

Same—Same—Effect as Evidence.—A Judgment be-

*For monographic note on Alteration of Instruments, see end of 6 Rand.

Nonnegotiable Instrument—Assignment—Promise of Payment to Assignee—Rights or Assignee.—In *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 786, 28 S. E. Rep. 586, it is said: "While the law yet is that a simple assignment of a nonnegotiable instrument gives the assignee only equitable title, yet it is true that where the debtor, with notice of such assignment, promises payment to the assignee, the assignee may sue in his own name, not because of the statute which gives the assignee right of action in his own name, but because of the debtor's promise to the assignee, based on the consideration of pre-existing liability and its assignment to the assignee, giving to the assignee by such promise a legal title in place of what, until the promise, was only equitable title." 2 Rob. Prac. (New) 256, 256, and cases cited: *Cleaton v. Chambliss*, 6 Rand. (Va.) 86; *Pierce v. Ins. Co.*, 60 N. H. 297; opinion of Shaw, found in 2 May. Ins. § 378, from case of *Fogg v. Insurance Co.*, 10 Cush. 387." See further, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

Deeds—Alteration—Effect.—In *Preston v. Hull*, 28 Gratt. 615, it is said: "In *Cleaton v. Chambliss*, 6 Rand. 86, this question arose incidentally. According to my understanding, the proposition then announced, is, that any material alteration of a deed invalidates it, unless made under such circumstances of consent by the obligee as amounts to a re-execution or reacknowledgment of the writing. The reason is obvious: the alteration changes the contract. The writing is no longer the deed of the obligor or grantor. In its altered state, it must be re-executed by him, and then it takes effect from the re-execution. Now whether it be the re-execution of an altered deed, or the execution of a new one, or the completion of an imperfect one, there can be no well-defined distinction; and the same principles must govern in each case in respect to the act necessary to a valid instrument." See principal case also cited on this subject in *Rhea v. Gibson*, 10 Gratt. 220. See further, monographic note on "Deeds" appended to *Floitt v. Com.*, 12 Gratt. 564; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

Pleading and Practice—Former Judgment—Effect as Evidence.—In *Ches. & O. R. Co. v. Rison*, 99 Va. 33, 27 S. E. Rep. 386, it is said: "A distinction has been taken in England, and in some of the United States, and several times recognized in this state, between the effect of a judgment as an estoppel where it is pleaded, and where it is only relied on in evidence. In the first instance, it is held to be conclusive; in the last instance, it is held that the jury are not estopped, but must find their verdict upon the whole evidence in the case, and may find against the former judgment." *Cleaton v. Chambliss*, 6 Rand. 94; *Craddock v. Turner*, 6 Leigh 129; *Carroll County v. Collier*, 22 Gratt. 809; *Hayes and Wife v. Va. Mut. Ass'n*, 76 Va. 231." See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 426.

tween the same parties, upon the same point, which, if pleaded; would have been a perfect bar, is, when used as evidence under the general issue, not conclusive on the Jury, but only evidence to be weighed by them.

This was an appeal from the Superior Court of Law for Greensville County, where John Chambliss brought an action of trespass on the case, against Thomas Cleaton, junior. The Declaration contains nine counts. The first three are common money counts. The remaining six are stated with sufficient minuteness in the opinion of Judge Carr, which follows. The subsequent proceedings will also be found in the same opinion.

Johnson, for the Appellant, contended:

1. That the sustained counts in the Declaration are bad, because they do not allege that the bonds were not paid. The general averment at the conclusion of the Declaration is not sufficient.

2. The assumpsit is merged in the bond. *Ashbrook v. Snape*, Cro. Eliz. 240; 87 Com. Dig. tit. Action K. 2, 3, "is a very short and loose note, and is opposed by 1 Com. Dig. 233, 240; *Reade v. Johnson*, Cro. Eliz. 242; *Symcock v. Payn*, Ib. 786; *Clerk v. Palady*, Ib. 859; *Cowp. Rep. Anonymous*, 128; 1 Com. Dig. 321, 316.

3. The seventh and ninth counts are bad, because the Judgments set forth in those counts are conclusive, and a complete bar to this action. Chambliss had an election to bring assumpsit or debt; and he has made his election by bringing debt in the first instance, which was decided for the Defendant. 1 Com. Dig. 228, 229. The parol agreement might have been given in evidence in an action on the bond. It would be a legal estoppel to the Defendant, to plead that the bond had been forged. *Buckner v. Smith*, 1 Wash. 296; *Shep. Touchstone*, 68; Ib. note 1, p. 79; 4 Com. Dig. 294, tit. Fait. F. 1; *Woolley v. Constant*, 4 Johns. Rep. 54; *Penny v. Corwithe*, 18 Johns. Rep. 499; *Speake v. U. States*, 9 Cranch, 28.

4. This was an agreement to pay the debt of a third person, and ought to be in writing.

5. The demurrer to the second plea ought to have been overruled. 1 Chitt. on Bills, 307.

6. The Judgment on the plea of nul tiel record is erroneous, on account of a variance between the Judgment recited in the declaration, and the Judgment itself.

The Attorney General, for the Appellee, said, that the variances between the Declaration and record, are unimportant. *Cabell v. Vaughan*, 1 Saund. 291; see *Hall's Dig. tit. Variance*. The second plea was clearly demurrable. It was not important whether the bonds had been altered before the promise or not, as proved by the case of *Buckner v. Smith*, and 1 Mass. Rep. 139.

The 6th and 8th counts of the Declaration, and the 7th and 9th counts, are not uncertain, in alleging whether the bonds were valid or not. It must be taken that they were valid, as the promise gave an assurance that they were so.

88 **Mackie v. Davis*, 2 Wash. 219; Com. on Contr. 208, 209; *Meredith v.*

Short, Salk. 25-7, 2 Ld. Raym. 759, S. C.

As to the merger, see Calvin v. Cooke, Com. on Contr. 283; Noy's Rep. 83; Latch. 53. The case in Cowper says, that a man cannot sue upon a promise to pay a bond; but says, at the same time, that a promise by a third person is not extinguished. In a Bill of Exchange, the holder may sue each of the parties before him, and one right of action does not extinguish another. Com. on Contr. 204; Cotterel v. Hooke, Doug. 97; 1 Com. Dig. 224 to 249; Foster v. Allanson, 2 Term Rep. 479; Com. Dig. 306, C.; Cro. Car. 314; 2 Term Rep. 483, note; 1 Caine's Rep. 47; Fenner v. Meares, 2 Wm. Black. Rep. 1269; Harria v. Richards, Cro. Car. 272.

The passage in Buckner v. Smith, is a mere dictum; but if it is Law, it could not apply to this case, because here, the suit was brought in the name of the obligee, and not of the transfer. No form of pleading could allow such a defence. Cox v. Prentice, 2 Mau. & Selw. 344.

November 27. JUDGE CARR.

This is an action of trespass on the case, founded on the alleged promise of the Defendant to pay the amount of two bonds, which the Defendant and another had executed to one Wessen, and of which the Plaintiff had been induced by the said promise, to take of Wessen a verbal transfer. The Declaration sets out the case in nine counts; the first three, money counts; the others, founded on the special promises and assurances of the Defendant. To all the special counts, there is a special demurrer, assigning ten causes of demurrer. The Court sustained the demurrer as to the 4th and 5th counts, and overruled it as to the others. The Defendant also pleaded six pleas. First Non Assumpsit, on which issues was joined. Then four special pleas to the special counts; and last, Nul Tiel Record to the 9th count.

89 *To the second plea, the Plaintiff demurred, and the Court sustained the demurrer. To the third plea, he replied specially, the Defendant demurred, and the Court overruled the demurrer. To the fourth plea, the Plaintiff replied specially. The Defendant rejoined specially. The Plaintiff demurred, and the demurrer was sustained. The issue joined on the plea of Nul Tiel Record was found by the Court for the Plaintiff, to which the Defendant filed exceptions, making the record a part of his bill. The Defendant also filed exceptions to the opinion of the Court, refusing certain instructions asked, and giving others not asked for.

This brief outline fully supports the assertion of Counsel, that there has been much ink shed in this case, fairly attributable to the rage for special pleading, which seems to have possessed the parties in the Court below; for the merits, as it seems to me, lie within a narrow compass, and might have been presented by short and simple pleadings.

The argument here, was chiefly on the demurrer to the four last counts. These counts, I consider all good, and to be supported by the same reasoning. I will, therefore, confine my examination to one

of them; and will take the ninth, as it seems to present most exactly the real case between the parties.

The case made by this count is substantially as follows: that Wessen was indebted to the Plaintiff, and being possessed of two single bills, purporting to have been executed by the Defendant and Thos. Cleaton, senr. his surety, for the sum of \$440 each, proposed to transfer them to the Plaintiff, in payment of the sum due him, and a further sum to be paid to the said Wessen by the Plaintiff: that in a conversation between the Plaintiff and the Defendant, concerning the debt due the Plaintiff from Wessen, and concerning the said single bills, the Defendant promised the Plaintiff, that if he would take the single bills from Wessen, he the Defendant would pay him the sums of money specified in the same, when they

90 should *become due: that the Plaintiff, confiding in this promise, did take a transfer (without written assignment) of the said single bills in payment of the money that Wessen owed him, and paid him the excess: that the Plaintiff afterwards brought suits in the name of Wessen (but for his own benefit) on the said single bills, against the Defendant: that the Defendant pleaded to each non est factum; and issues being joined on the said pleas, such proceedings were had, that in each case a Jury found the issue for the Defendant, and Judgments were rendered by the Court in his favor; as, by the records, &c., more fully appears; and the Plaintiff saith, that the single bills which were the subjects of the said verdicts and Judgments, were the same which the Plaintiff had previously shown to the Defendant, and which he had promised to pay, if the Plaintiff would take a transfer of them, and further, that they had not been in any manner altered from the time of the said promise, till the rendition of the said Judgments, whereby the Defendant became bound and liable to the said Plaintiff to pay, &c., with the usual conclusion. The demurrer admits all these facts to be true; and the question is, are they sufficient in Law to support the action?

The general rule is, that "any damage, or any suspension or forbearance of his right, or any possibility of a loss, occasioned to the Plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party undertaking." 3 Burr. 1673; 3 Term Rep. 24; 2 H. Black. 312; 1 Saund. 211, b.; 2 Saund. 136. There can be no doubt, that the promise here comes within the rule; and indeed, I understood this to be admitted at the bar.

But, it was insisted, that the count was demurrable, because (setting out the records of the Judgments on the bonds) it showed on its face, that the promise to pay them might (if available at all) have availed the party in those actions; and therefore, could not be the foundation of a
91 *separate and distinct action. The examination which I have been able to give this subject, leads me to a different conclusion, both as to the position taken,

and the consequence derived from it. I do not think, that in the actions on the bonds, the promise of Cleaton to pay them to Chambliss could have been resorted to; nor if it could, does it seem to me, as at present advised, a necessary conclusion, that therefore the promise would support no separate action. It was contended, that in actions on the bonds, the promise might be resorted to in two ways: 1st, by way of replication to the plea of non est factum; 2, by way of evidence to rebut the plea of non est factum, if issue was taken on that plea.

As to the first, a little attention to the form and nature of the plea of non est factum, will show, I think, that no such replication could have been taken to it. Every plea, which amounts to a negation of the existence of the cause of action set out, must conclude to the Country. If it confesses and avoids, it should conclude with a verification. The plea of non est factum, whether general or special, is a denial of the existence of the Deed; and therefore, the uniform conclusion is to the Country. See 2 Chitt. Pl. 460-1-2-3-4, where various forms are given, and many cases referred to. See also Rastal's Entries, 179, a. b., 180 a. b., where many forms are given, such as that the writing was delivered as an escrow, &c. and so is not his Deed; or that he is illiterate, and the writing was read to him as if given for ten marks to A., which he believing, sealed and delivered it; and so he says, that the writing now brought into Court, expressing that he is bound to the said A. in twenty marks, is not his Deed; and of this he puts himself upon the Country. This (I repeat) is the uniform conclusion of every plea of non est factum; and so are Cleaton's pleas to the bonds concluded. Now, we know, that when a plea concludes to the Country, the Plaintiff can never reply any new matter. He must either accept, by a

92 similiter, the issues tendered, or demur. There could, *then, have been no replication, that Cleaton had promised to pay the bonds to Chambliss.

Could this have been given in evidence on the issue joined? That issue was, whether it was the Deed of Cleaton or not. The plea admitted the original execution of the bond, but averred that it had been, since the delivery, materially altered, without the knowledge or consent of the Defendant, and so was not his Deed. It was contended, that if the alteration had been made with the assent of the Defendant, he would still have been bound by the bond; and that the promise to Chambliss, that if he would get a transfer of the bond, the Defendant would pay it, was proof of such assent, and proper, on that ground, to be resorted to. To prove that an alteration of the Deed, if assented to by the obligee, would not vitiate it, Shepherd's Touchstone, 68; 11 Co. 27. Com. Dig. 294; 4 Johns. 54; 18 Johns. 499; and 9 Cranch, 28, were referred to. I have examined these cases. Some of them say, that the alteration, if made by the obligor, will not annul the bond; others, if made by his consent. But all contemplate a case of consent given prior to, or at the time of, the altera-

tion made; and it seems to be considered as a re-execution, or re-acknowledgment, of the Deed. In our case, the promise of Cleaton to pay the bonds was made after the alteration, to a third person, and without a knowledge that any change had been made in the bonds. How then could this promise avail to prove, that Cleaton authorised such change, or assented to it; that he re-acknowledged or re-executed the bonds, with a view to make that change a part of them?

But, suppose this the case, and I cannot think it follows, that no separate action can be sustained on the promise. It does not seem to me to be one of that class, relied on at the bar, where the party has his choice of two remedies, and is bound by his election. In those cases, the cause of action is the same, it is one; here it is not so. Cleaton had bound himself to Wes-

sen in two bonds. It was these 93 *bonds which Chambliss bought. His natural and proper course was, first, to sue on them; if he recovered, it would be by force of the sealing and delivery of the bonds; and the promise of Cleaton, which induced him to take them, would be entirely out of view. If Cleaton, by his defence to these bonds, defeated the recovery, then would seem to be the time to resort to the promise; for then only, would it be ascertained, that by that promise the Plaintiff had sustained loss. Then Chambliss might well say to Cleaton, "You have induced me to take these bonds by your assurances. They have proved nought, and you must answer it."

But is not this whole discussion misplaced? How can we, in considering the demurrer to the Declaration, take into view the effect of the Judgment on the bonds, or the evidence which might or might not be admitted on that trial? The mode in which a party must avail himself of a former Judgment for the same cause of action, is by plea in bar, or in an action like this, by way of evidence on the general issue. If pleaded, it operates as an estoppel, unless the Defendant can avoid it by demurrer or replication. Suppose the Judgment on the bonds had been pleaded in bar here. The plea must have averred that the verdict and Judgment were directly upon the same point, and between the same parties, or privies; for, as it is well expressed by Lord Ellenborough in Outram v. Morewood, 3 East, 358, the question on such plea is, "whether an allegation on record, upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties respectively from again litigating that fact, once so tried and found." Suppose then, that the former Judgment had been thus pleaded, concluding (as it must do) with a verification by the record, and the Plaintiff had replied, that there was no such record. Would the production of the record of the Judgment on the bonds have supported the plea?

94 Would it have shown an issue *taken and found on the same allegation, and between the same parties, or their privies? The parties here are

Chambliss v. Cleaton; there, *Wessen v. Cleaton*, and it seems questionable, whether the privy of estate between *Wessen* and *Chambliss* (not appearing upon the record) could have been averred in the plea; such is the strictness in pleading matter in estoppel. See 2 H. Black. 530; Doug. 159; Com. Dig. "Estoppel," E. 4; Co. Litt. 352, b. But take it, that the privy could have been averred and shown, as it would seem reasonable that it might. Yet the record must also show, that issue was taken and found, on the same allegation, which is the foundation of the second action. Here, the foundation of the action is the promise of *Cleaton* to *Chambliss*; there, the foundation is the bond of *Cleaton* to *Wessen*. The issue there, was upon non est factum; that was the point decided, the allegation taken and found; an allegation not put in issue, and which could not possibly be put in issue, in the case before us. If then, the Judgment on the bonds had been pleaded, the plea could not have availed; for, if it had stated the record correctly, a demurrer would have lain; and if incorrectly, the replication of nul tiel record would have overthrown it.

Whether the records of the Judgments on the bonds would have been admissible evidence; on the plea of non assumpsit in this action, need not be discussed; for, if admissible, we must presume that they were before the Jury; and they having found for the Plaintiff we must take that finding to be right. For, we know, that even a Judgment between the same parties, upon the same point, and which, if pleaded, would have been a perfect bar, is, when used as evidence under the general issue, not conclusive upon the Jury, but only evidence to be weighed by them; the doctrine being, that though the party is estopped if the matter be pleaded, yet that the Jury, upon the general issue, are not estopped, but must find their verdict upon the whole

evidence in the case, and may find
95 against the former * Judgment.

Outram v. Morewood, 3 East, 346; *Vooght v. Winck*, 2 Barn. & Ald. 652, and the cases there cited. Thus, it would seem, that if the party had made the most of the former Judgment, either by pleading it, or using it as evidence, it could not have availed him. Much less can it have that effect in a demurrer to a Declaration, where it is stated merely as inducement, and where we can neither estimate its force as an estoppel, nor its weight as evidence.

We are next to consider the second plea of the Defendant. This is a plea to the special counts; that the Plaintiff ought not to have his action, because he says, that the single bills, in the said counts mentioned, had, subsequently to their execution, and before the promises in the said counts mentioned, been forged, erased, and materially altered, by the said *Wessen*, without the knowledge or consent of the said Defendant, &c. and were then and there, (unknown to the said Defendant,) void in Law, and this he is ready to verify, &c. To this plea there is a demurrer. We must, therefore, in considering this point, take the facts of the plea as true. What are they? 1st. That the bonds, after exe-

cution, and before the promise, were, without the knowledge or consent of the Defendant, materially altered by *Wessen*; and 2ndly, that they were (unknown to the Defendant) void in Law. I had thought from the argument, that this plea averred, that the Defendant was ignorant of the alteration of the bonds, when he promised the Plaintiff to pay them. But there is no such allegation. On the contrary, the Defendant seems cautiously to have avoided putting that fact in issue. He may have been fully apprised of the alteration in the bonds, when he promised to pay them to the Plaintiff, and yet every allegation in his plea be true. For instance; he alleges that the alteration in the bonds was made without his knowledge or consent. This may be entirely true, and still, before he made the promise, he may have been fully informed of the change. Again; he

alleges that he was ignorant that
96 *the alteration rendered the bonds void in Law. Now, this ignorance

of the legal effect of the change, is not only consistent with, but seems to suppose, a knowledge of the fact. May we not, then, from the plea itself, fairly and rationally take this as the state of the facts; that the Defendant executed the bonds to *Wessen*: that he made such an alteration in them as would support the plea of non est factum, (which we know, a change of date, or even the most trivial change made by the obligee, will do:) that afterwards, when *Chambliss* was about to trade for the bonds, an examination of them took place, in which *Cleaton* probably discovered the alteration, but conscious that he owed the money, and ignorant that he could get clear of it, promised *Chambliss* to pay the bonds? Taking this as the true state of facts, there could not be the hesitation of a moment, (I should think,) in supporting the demurrer; for, the Defendant's ignorance of Law could never be supposed to invalidate his promise. Even if we suppose that the plea meant to aver an ignorance of the alteration at the time of the promise, I do not think that that alone would render the promise invalid. The plea (we must remember) acknowledges the execution of the bonds, without alleging that the sums originally stated in them were less, than they now bear on their face. The plea also admits a promise to pay the bonds to *Chambliss*; and whether this promise was made after an examination of the bonds or not, common sense, and the uniform course of such transactions, assure us, that the amount of the bonds must have been mentioned. It could hardly have happened otherwise. *Chambliss* would naturally say to *Cleaton*, "Here are your two bonds to *Wessen*, for \$440 each. They are offered to me in trade; are they good?" If the amount was truly stated, and he had no objection to make, he would answer, "The bonds are good, and if you get them, I will pay them." When, upon the faith of this promise, *Chambliss* has given the full value for these bonds, is the promise to be gotten over and ren-
97 dered null, simply by the *fact, that at the time of making it, some change in the bonds had been made by

the obligee, which would support the plea of non est factum? After inducing the Plaintiff to expend his money, ought not the Defendant to show something more than this, before he can escape from his promise? Ought not his plea to allege, in addition, that he does not owe the money in conscience? If he does not do this, must we not conclude, that though from the strictness and severity of the Law, pointed against forgers and spoliators, he has been able to defeat the action on the bond, yet that in justice and conscience, he owes the money? And if so, ought he not to be held to the promise, by which he had induced an innocent man to take his paper; paper, for which he had himself received value? This is clearly my opinion; and therefore, I think on every ground, that the demurrer was rightly sustained.

Let me not be misunderstood. In supporting the recovery of the Plaintiff, I mean to decide, that where a man, by his promise of payment, has induced another to take his paper, he shall not release himself from the obligation of that promise, by a legal objection taken to the bond, while it is apparent that in conscience he owes the money. To show what I do not mean to decide, I will state another case. A. gives his bond to B. for \$100, in payment of a horse. The day after the purchase, C. comes to A. and says, "Your bond to B. for \$100 is offered to me. Is it good?" A. says, "Yes, I know of no objection to it, and will pay it when due." Upon this, C. gets the bond. Soon after comes E. who claims the horse, and proves that he is his property, and was stolen from him. Here, the consideration of the bond wholly fails; and which of these two innocent persons shall lose it, I do not mean to decide. It will be time enough to do that, when the case comes before us.

I have taken up so much time already, that I shall say nothing further, except, that I think the Court were right, both in their decision on the plea of nul tiel record, and *in the instructions they gave to the Jury. I am for affirming the Judgment.

JUDGE COALTER concurred on every point; and JUDGE CABELL concurred on the general ground presented by the seventh and ninth counts; but dissented as to the sixth and eighth counts, which he thought not good on demurrer.*

ALTERATION OF INSTRUMENTS.

- I. Kinds of Alterations.
 - A. Material Alterations.
 - B. Immaterial Alterations.
- II. Effect of Alterations.
 - A. In General.
 - B. Material Alterations.
 - 1. In General.
 - 2. By Grantee or Promisee.
 - a. In General.
 - b. Without Consent of Promisor or Grantor.
 - (1) General Rule.
 - C. Immaterial Alterations.
 - 1. By Grantee or Promisee.
 - 2. By a Stranger to the Contract.

*The PRESIDENT, and JUDGE GREEN, absent.

III. Materiality of Alterations.

A. In General.

1. Examples.

IV. Filling Blanks.

A. By Express Parol Agreement or Authority.

1. Perfecting Merely Incomplete Instruments.
2. Implied Authority.
3. Ratification of Alteration.

V. Pleading and Practice.

Cross References to Monographic Notes.

Bills, Notes and Checks, appended to Archer v. Ward, 9 Gratt. 632.

Bonds, appended to Ward v. Churn, 18 Gratt. 801.

Deeds, appended to Flott v. Commonwealth, 12 Gratt. 564.

I. KINDS OF ALTERATIONS.

A. MATERIAL ALTERATIONS.—An alteration is material when it changes the legal effect of the contract—changes the contract in a material particular. *Dobyns v. Rawley*, 76 Va. 537.

Hence, an alteration, to be material, must be of an essential stipulation of the instrument and not of a mere memorandum only endorsed thereon for convenience, as an earmark. Thus a memorandum of a collateral agreement between maker and endorser, endorsed on a bill, is not a material alteration. The same is true of added words, which are senseless and inoperative, either for the injury or benefit of anybody, especially when the note or bill is complete in itself. *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 302.

For examples of material alterations, see *Bank v. Lockwood*, 13 W. Va. 431.

B. IMMATERIAL ALTERATIONS.—From the foregoing statements, it may be inferred that an immaterial alteration may be defined as an alteration of some collateral or inoperative part of an instrument which has no bearing upon its execution. *Bank v. Lockwood*, 13 W. Va. 412.

II. EFFECT OF ALTERATIONS.

A. IN GENERAL.—The effect of an alteration depends upon the materiality or immateriality of such alterations. *Dobyns v. Rawley*, 76 Va. 537.

B. MATERIAL ALTERATIONS.

1. IN GENERAL.—After determining that the alteration is material it is, nevertheless, necessary to inquire by whom or by whose authority it was made.

2. BY GRANTEE OR PROMISEE.

a. *In General*.—Whenever a material alteration is made wilfully by the promisee or grantee; only the consideration, that it was made with the knowledge of the other contracting party, will prevent it from having a vitiating effect. *Connor v. Freshman*, 4 W. Va. 693. See also, *Newell v. Mayberry*, 3 Leigh 250; *Dobyns v. Rawley*, 76 Va. 537; *Bank v. Lockwood*, 13 W. Va. 392.

b. Without Consent of Promisor or Grantor.

(1) *General Rule*.—Thus any material alteration of a written instrument, made after its execution by one of the parties to the contract, without the knowledge or consent of the others, will invalidate the instrument as to the nonconsenting parties to such an extent that the party procuring such alteration will not be permitted to recover either upon its altered form or original terms. *Newell v. Mayberry*, 3 Leigh 260. See also, *Dobyns v. Rawley*, 76 Va. 544; *Batchelder v. White*, 80 Va. 106; *Bank v. Lockwood*, 13 W. Va. 417; *Yeager v. Musgrave*, 28 W. Va. 111; *Piercy v. Percy*, 5 W. Va. 199; *Elgin v. Hall*, 82 Va. 680; *Keen v. Monroe*, 75 Va. 426; *Morehead v. Nat. Bank*, 5 W. Va. 77; *Consumers Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. Rep. 880.

Reason for the Rule.—The chief reason of this rule is in the fact that the alteration destroys the identity of the contract; and, therefore, if a party to the contract who has not consented to the alteration, were to be held bound by it, it would be, in effect, imposing upon him against his will a new contract, to whose terms he had never agreed. *Dobyns v. Rawley*, 76 Va. 537.

And further, 1st, because the alteration must affect the question of identity; and 2d, because such an unauthorized act of a party having the custody of a deed, should be construed most strongly against himself, and if legalized, might facilitate injuries and irremediable frauds. *Piercy v. Piercy*, 5 W. Va. 199.

For no man will be permitted to take the chances of gain by the commission of a fraud without running the risk of loss in case of detection. *Newell v. Mayberry*, 3 Leigh 250; *Elgin v. Hall*, 83 Va. 684.

Application of Rule.—Though the effect of the alterations of a legal instrument is generally discussed with reference to deeds, yet the principle is applicable to all other instruments. The early decisions were chiefly upon deeds, because almost all written engagements were anciently in that form; but they establish the general proposition that written instruments which are altered, in the legal sense of that term, are thereby made void. *Elgin v. Hall*, 83 Va. 683; *Piercy v. Piercy*, 5 W. Va. 199; *Bank v. Lockwood*, 13 W. Va. 392.

Deeds.—Material erasures and interlineations made in a deed after its acknowledgment will vitiate it, thereby rendering it null and void. *Deem v. Phillips*, 5 W. Va. 168. See monographic note on "Deeds" appended to *Flott v. Commonwealth*, 12 Gratt. 564.

Bonds.—And the authorities are numerous that, if the bond is altered by the obligee in a material point, it thereby becomes void. *Piercy v. Piercy*, 5 W. Va. 199. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

Negotiable Instruments.—But, owing to its general use of negotiable paper, the rule is probably more rigidly enforced with regard to it than any other form of written instruments.

For a full list of examples, see *Bank v. Lockwood*, 13 W. Va. 421. Also monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 632.

Receipts.—Likewise, if a receipt is materially altered by the party holding it, or by the procurement of such party, it is thereby vitiated as an instrument of evidence. *Elgin v. Hall*, 83 Va. 680.

As to Sureties.—And so also the doctrine that a material alteration of a written instrument renders it void, applies *a fortiori* in favor of a surety. *Batchelder v. White*, 80 Va. 108.

C. IMMATERIAL ALTERATIONS.

1. **BY GRANTEE OR PROMISEE.**—An immaterial alteration made by a grantee or promisee, innocently and without any fraudulent intent, even though the other party has no knowledge of it, will not render the instrument void. *Keen v. Monroe*, 75 Va. 428; *Whiting v. Daniel*, 1 Hen. & M. 390.

As where it is obvious on the face of a paper, that a word or phrase has been omitted by mistake, or inadvertence, and such words are obviously and naturally suggested, upon the mere inspection of the paper, as the words which the parties might have intended to use to express their meaning, such word, or words of like import may be supplied. *Peyton v. Harmon*, 23 Gratt. 643. And so the fact that a deed has immaterial interlineations will not exclude it as evidence. *Va., etc., Iron Co. v. Fields*, 94 Va. 102, 26 S. E. Rep. 426.

2. **BY A STRANGER TO THE CONTRACT.**—And so it is

universally agreed, that, if a bond, deed, or other agreement be altered in an immaterial part by a stranger without the privity or knowledge of the obligor, it will not avoid the deed or other instrument. *Yeager v. Musgrave*, 28 W. Va. 90.

III. MATERIALITY OF ALTERATIONS.

A. **IN GENERAL.**—An alteration to be material must be of a material part of the instrument and affect the rights of the parties thereto. *Newell v. Mayberry*, 3 Leigh 250.

1. **EXAMPLES.**—Hence an alteration which changes the legal effect of the instrument will be material. *Dobyns v. Rawley*, 76 Va. 537.

Erasures of Names of Parties.—So the erasure or exclusion of the name of one of the principal obligors in a bond is a material alteration thereof, which vitiates it as to the other obligors. *Piercy v. Piercy*, 5 W. Va. 202.

Change in Amount of Principal.—And an alteration which increases the amount of the principal of an instrument conditioned for the payment of money is a material alteration. *Batchelder v. White*, 80 Va. 108.

Change in Place of Payment.—Accordingly, where a bill of exchange was, without the privity of the acceptor, altered by inserting the words "payable at the Bullhead, Aldgate," and afterwards endorsed to the plaintiff for value, who took it *bona fide*, and without knowledge of the alteration, it was held that this was a material alteration, which discharged the acceptor. *Moorehead v. Nat. Bank*, 5 W. Va. 77.

For further examples, see *Bank v. Lockwood*, 13 W. Va. 421; monographic notes on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 632; "Deeds" appended to *Flott v. Commonwealth*, 12 Gratt. 564.

IV. FILLING BLANKS.

A. **BY EXPRESS PAROL AGREEMENT.**—Undoubtedly blanks in an immaterial part of an instrument may be filled in by express parol agreement without the knowledge and consent of the grantor whether the instrument is sealed or not. *Keen v. Monroe*, 75 Va. 424; *Whiting v. Daniel*, 1 Hen. & M. 390.

But with respect to insertions which are material the converse of the above rule is true, especially as to instruments under seal. *Preston v. Hull*, 23 Gratt. 600.

1. **PERFECTING MERELY INCOMPLETE INSTRUMENTS.**—Thus the insertion, by parol authority, of the name of an obligee in a bond otherwise perfect, but without the knowledge of one of the obligors, as to him such bond is invalid. *Preston v. Hull*, 23 Gratt. 600.

And so, a blank piece of paper signed by sureties and afterwards filled in by principal is the deed of the principal but not binding upon the sureties. *Penn v. Hamlett*, 27 Gratt. 337.

2. **IMPLIED AUTHORITY.**—A promissory note sent to the payee with the amount left blank to be filled in by him is good as evidence of *nil debet*. *Jordan v. Nelson*, 2 Wash. 164.

Filling in Amount after Indorsement in Blank, as to Bona Fide Purchaser.—It is well settled, that a blank indorsement on a negotiable instrument, blank as to date or amount at the time of the indorsement, if made for the purpose of giving credit to the drawer, is as effectual to bind the indorser for any amount with which the instrument may be filled up by the drawer, or an innocent holder for value, as if the instrument had been complete at the time of the indorsement. *Orrick v. Colston*, 7 Gratt. 194; *Douglas v. Scott*, 8 Leigh 43.

2. **RATIFICATION OF ALTERATION.**—And where an obligor in bond, knowing the fact of its alteration by the obligee, promised the transferee of the bond that he would pay it; the fact of such alteration will not support a plea of *non est factum* in a suit by the transferee on such promise. *Cleaton v. Chambliss*, 6 Rand. 86.

V. PLEADING AND PRACTICE.

Question of Law and Fact.—Whether an alteration is material or not, should be decided by the judge, while all questions, involving a determination of the existence of an alteration should be submitted to a jury. *Ramsey v. McCue*, 21 Gratt. 349; *Newell v. Mayberry*, 3 Leigh 250; *Keen v. Monroe*, 75 Va. 424; *Connor v. Freshman*, 4 W. Va. 693; *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. Rep. 880.

Burden of Proof of Alteration.—And if on the production of the instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit and renders it suspicious, and this suspicion the party claiming under it is bound to remove. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which, the alteration was made, as matters of fact to be ultimately found by the jury upon the proofs to be adduced by the party offering the instrument in evidence. *Hodnett v. Pace*, 84 Va. 873, 6 S. E. Rep. 217; *Keen v. Monroe*, 75 Va. 427; *Elgin v. Hall*, 82 Va. 680; *Ramsey v. McCue*, 21 Gratt. 349; *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. Rep. 880. See also, *Priest v. Whitacre*, 78 Va. 151; *Piercy v. Piercy*, 5 W. Va. 202.

But while it is incumbent on party offering instrument as evidence to explain any appearance of alteration on its face, if a witness mentions a written contract and the opposite party demands its production, it is not incumbent on the other party who does not offer, or claim under it, to explain any appearance of alteration on its face. *Priest v. Whitacre*, 78 Va. 151.

Presumption as to Time of Alteration.—It is generally agreed, that, inasmuch as fraud is never to be presumed, therefore, if no particular circumstances of suspicion attach to an altered instrument, the alteration is to be presumed innocent, or made prior to its execution. *Ramsey v. McCue*, 21 Gratt. 364. But see *Hodnett v. Pace*, 84 Va. 873, 6 S. E. Rep. 217.

Objection to Alteration Must Be Made in Lower Court.—The objection that a material alteration has been made in a note in suit cannot be made for the first time in the appellate court. *Tate v. Bank*, 96 Va. 766, 33 S. E. Rep. 476.

Auld v. Alexander, &c.

December, 1887.

Chancery Practice—Assignment of Specific Portion of Debtor's Property.—There is no case in which a Court of Equity can assign to a creditor a specific portion of his debtor's property.

Same—Substitution.*—How far the doctrine of substitution extends.

This was an appeal from the Winchester Chancery Court, where Colin Auld filed his bill against Alexander and others. The whole case is stated in the following opinion.

Nicholas, and Johnson, for the Appellant.
Leigh, for the Appellees.

December 18. The PRESIDENT delivered the opinion of the Court.†

In 1792, John Alexander, together with his son Richard B. Alexander, and his son-in-law, John Brown, as his sureties, executed his bond for a considerable debt, to one Donaldson, and also a mortgage 99 on a tract of land of "about 1800 acres, to indemnify his sureties in the bond. In 1795, he sold 314 acres of the land to one Wilson, and conveyed to him, with general warranty and covenants against all incumbrances, and for a good title, and further assurances. Wilson, it is alleged, paid the purchase money to Donaldson by the order of Alexander, in part payment of the debt due him by Alexander; in consequence of which, the sureties released their lien on the land sold to Wilson. The bill charges that John Alexander, in surveying the 314 acres sold to Wilson, fraudulently carried the surveyor to a corner, so as to include 139 acres of land, which did not belong to him. In 1800, Wilson sold to one Ramsay, with general warranty and covenants against all incumbrances by him. When this conveyance was made, one Greenup was in possession of 139 acres, (wrongfully included in the survey as it is alleged,) claiming a fee-simple title in it; and in the same year, Ramsay brought an action of ejectment for the recovery of the possession; and in 1804 he sold to Auld, the plaintiff. In 1807, he conveyed to Auld, with special warranty against himself, and all persons claiming under him; after which, Judgment was rendered against him in the action of ejectment.

The bill of Auld is against Wilson, Ramsay, and the heirs of John Alexander, claiming to have assigned to him so much of the 1800 acres out of which the land was sold to Wilson, as will compensate him in value, for the 139 acres, lost by Greenup's title; or, to have the remainder of the 1800 acres sold under the Deed of Mortgage to Alexander's sureties in the bond of Donaldson, which, it appears, had been before released by the sureties; and for general relief, &c.

The mortgage is not exhibited; though its existence is admitted. Nor does it appear, that it has been regularly recorded, being only proved by one witness. It seems that all the residue of the 1800 acres of land, was conveyed by John Alexander to his children in severalty, for 100 what "consideration does not appear; except that Charles B. Alexander, one of the sons, says, that the portion conveyed to him, was in consideration principally of money paid by him for his father, and that he purchased Richard B. Alexander's part. None of the other heirs of John Alexander hold any part of the land, which he at any time held; the residue of his real estate having been sold in his life time to other persons. Nor are any of the Deeds from him to his sons impeached by the bill. There is, therefore, no ground on the pleadings, on which the Plaintiff is entitled to relief, unless he is entitled to a specific lien on the land in the

*See monographic note on "Subrogation" appended to *Janney v. Stephens*, 2 Pat. & H. 11.

†JUDGE CARR did not sit in this cause, having decided it as Chancellor.

possession of Charles B. Alexander, paramount to his title. His claim to have satisfaction for the loss of the 139 acres held by Greenup, by an assignment to him of a portion of the 1800 acres of equal value, has no foundation.

There is no case, in which a Court of Equity can assign to a creditor a specific portion of his debtor's property, in satisfaction of his demand. His claim to be substituted for Wilson and to have his rights, by which to get a lien on the land of Alexander, paramount to the title of Charles B. Alexander, one of his sons, is not better founded. Wilson himself, had no claim to the lien given for the benefit of Alexander's sureties, for the debt to Donaldson. If he did pay the purchase money to indemnify them, (which is not satisfactorily proved,) he did not pay it for the sureties. The money was due by himself; and though paid for Alexander, it was not paid for his sureties. But, if it had been so paid, there is no ground on which Auld, the Plaintiff, could be substituted for him. He had no claim to indemnity from Ramsay, from whom he purchased, nor upon Wilson. Not upon Ramsay, because his warranty was special, and never broken; nor upon Wilson, for whatever claim Ramsay might have upon him, none was assigned to Auld. Wilson's covenants were with Ramsay and his assigns of the land, and could only pass to an assignee of the land, as incident to it. That being in the adverse

possession of Greenup when the conveyance was made to Auld, no title nor interest in the 139 acres passed to him; and though Ramsay might be estopped by his Deed to say that no title passed from him, yet others, not claiming under him, are not estopped.

Decree affirmed.

Payne v. Britton's Executor.

January, 1828.

Bail Bonds—Recitals—Immaterial Errors in.—A Bail Bond which recites a Writ at the suit of A. B., administrator, &c. while the writ is at the suit of A. B. executor, &c., is not an error for which a Judgment will be reversed.

Same—Sufficiency of.—A Bail Bond given to the Sheriff of — County, without naming the County, is good.

Same—Same.—The condition of a Bail Bond need not designate the time and place of appearance. **Bond with Penalty—Necessity of Demand on.**—A special demand need not be made before the Writ issued on a single bill under a penalty: and interest may be recovered without such demand.

Pleading and Practice—Venue.—In this State, it is not error that the venue is laid in one County, and the action brought in another, unless the Defendant is an inhabitant of another County and moves to dismiss the suit for that cause.

This was an appeal from the Superior Court of Law for the County of Fauquier. The executor of Britton brought an ac-

tion of debt against White on a bill penal executed by the latter to the Plaintiff as executor. The bill was for \$181 57 cents, payable on demand, and the penalty, in case of failure to pay, was in double that sum. The Writ is in the name of Joseph D. Smith, executor of George Britton. Payne became the appearance bail of White; and executed a Bail Bond to the Sheriff of — County, without mentioning any County; it recites the Writ as being at the suit of "Smith administrator of George Britton; deceased."

102 *&c., and the condition only requires the Defendant to "make his appearance agreeably to Law, as the said Writ requires." Judgment was entered by default, against the Defendant and the said Payne, for the penalty, but to be discharged by the payment of \$181 57 cents, "with six per centum interest thereon," &c. The Declaration lays the venue in the county of Culpeper.

Payne obtained a Supersedeas from a Judge of this Court.

Harrison, for the Appellant.

Briggs, for the Appellee.

January 23. JUDGE GREEN.

In this case, the Judgment was by default for want of appearance; and according to the former decisions of this Court, the Statute of Jeofails does not apply to it.

The first objections taken, are to the Bail Bond; and first, that the Writ, being at the suit of Joseph D. Smith, executor of George Britton, and the Bail Bond reciting a Writ at the suit of J. D. Smith, administrator of G. Britton, the bond is, for this variance, fatally defective and void, under the 20th section of the 78th chapter of the Revised Code of 1819. It is doubtful, whether the hieroglyphic in the bond, of which the Clerk gives a fac simile, was intended for exor or admor; but, if it were the latter, I should not think that it vitiated the bond. The suit was by J. D. Smith, in his individual right, upon a bond given to him as executor of Britton. The addition of executor in the original bond, and of administrator if it was so, in the Bail Bond, were merely descriptive; and a variance in that description was not material. Under the Statute of 23 Hen. 6, ch. 7, from which this provision of our Statute is taken, it has been held, that an immaterial variance of the Bail Bond from the Writ, does not vitiate the bond;

103 *as where the Writ was to answer A. in a plea of debt for 300l. and the Bail Bond, to answer of a plea of debt only, not mentioning 300l. it was held to be good; "for, the Statute does not prescribe any strict form, but that it ought to be made to the Sheriff by his name of office, and to express the day and place of appearance; and though it vary in other

brought anywhere the defendant can be found. Thus, for instance, an assault and battery committed, or a contract made. In one state may be the subject of an action in another, if process can be served on the defendant in the latter state. 3 Bl. Comm. 294. *Mostyn v. Fabrigas*, Cowp. 161. *Livingston v. Jefferson*, 1 Brock. 308. *Payne v. Britton*, 6 Rand. 101. *Watts v. Thomas*, 2 Bibb (Ky.) 488. *McKenna v. Fleck*, 1 How. 441; 2 Smith Lead. Cas. (9th Ed.) 967." See further, monographic note on "Jurisdiction" appended to *Phlippen v. Durham*, 8 Gratt. 457.

*Bond Payable on Demand—When Due.—A bond payable on demand is due and payable from its date. The case of *Payne v. Britton*, 6 Rand. 104, is a distinct authority to sustain this proposition. *Carter v. Noland*, 86 Va. 570. 10 S. E. Rep. 605. To the same effect, the principal case is cited in *Chapman v. Shepherd*, 24 Gratt. 383. See further, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

*Personal Actions—Jurisdiction.—In *Nelson v. Ches. & O. R. Co.*, 88 Va. 974. 14 S. E. Rep. 838, it is said: "At common law all personal actions, whether *ex delicto* or *ex contractu* are transitory, and may be

circumstances, it is not material." *Villena v. Huatinga*, Cro. Jac. 286; 2 Saund. 78.

The next objection is, that the bond is given to William Gibson, Sheriff of ——— County, without naming the County, of which he was Sheriff. By the English Statute, the bond was required to be given to the Sheriffs, "only to themselves and by the name of their office;" and in *Male v. Cowper*, 2 Roll's Rep. 365, and in the same case in Palm. 378, it was held, that the name of the County being in the margin, and the bond being given to A. B., Sheriff of the aforesaid County, was void, not being given to the Sheriff in his name of office, which required that he should not only be named as Sheriff, but of what County. But, in a subsequent case, *Kirkebridge v. Wilson*, 2 Lev. 123, it was held, that a bond given by N. W. and T. R. of the County of C. to J. R. Sheriff, (without saying of what County,) to answer the Plaintiff generally, (without saying in what action,) was good. But, however this might be under the English Statute, which in terms requires the bond to be given to the "Sheriff by his name of office," it is not necessary under our Statute, that the Sheriff's name of office should appear; that requiring only, that the bond shall be payable "to the Sheriff as Sheriff;" and such is this bond.

The last objection taken to the Bail Bond, is, that the condition does not sufficiently designate the time and place of appearance. It recites the date and return day of the Writ issued from the office of the Superior Court of Law for the County of Fauquier; and that the Defendant shall "make his appearance agreeably to Law, as the said Writ requires." The words of the

Court in *Gardner v. Dugdale*, 104 *2 Show. 51, are a sufficient answer to this objection. "The Bail Bond to the Sheriff is to make the party appear according to the Writ; and not according to the condition of the bond; and the bail are, by virtue of the bond, engaged that he shall answer according to this Writ." "Every bail ought, at his peril, to see and take notice of the Writ, before he be bound, and thereby he may know what it is he engages for. If he do otherwise, he is bound to do he knows not what; and he must suffer for it." In respect to the condition of the bond prescribed by the Statutes, the English Statute and ours are verbatim the same.

An objection is taken to the proceedings at Rules; that it does not appear from the record, that the 2d day of July, the 6th day of August, and the 3d day of September, 1821, were the first Mondays of those months respectively, or the succeeding days; as if the Rules could not legally be taken on any day but the first Monday of a month, or the next day. Those days must have been within six days after the first Mondays in those months (within which the Rules may be taken) if the first Mondays occurred on or before the 2d, 6th, and 3d days of those months respectively; and I think that the Clerk stating that the Rules were taken on those days it ought to be presumed, that they were taken on the

legal Rule days. If there had been any irregularity in this respect, the Court below was the proper tribunal to correct it. At all events, a Judgment should be reversed on that ground, without resorting to a Certiorari, or inspecting the Almanacs of that year.

The next objection is, that this being a bill, promising to pay a sum of money on demand, under a penalty, and there being no averment of a special demand, the penalty was not incurred; nor could Judgment be rendered for interest, without a Writ of Enquiry ascertaining the time of the demand; since the party was not in default until demand made and refusal to pay. The cases to which we have been referred,

only prove, that an obligation to 105 *do something collateral upon demand, under a penalty, cannot be the foundation of an action, until demand made, and a failure to do the thing stipulated to be done. But, an obligation to pay money on demand, is evidence of a present debt payable instant, and the Writ is a demand, which entitles the Plaintiff to the penalty. The interest is allowed, not because the penalty is forfeited, but because the debt was, from the beginning, due and payable. However refined the doctrine may be, that the institution of the action is a demand which entitles the party to sue, it is so convenient and just, and so settled by authority, that I yield a ready assent to it.

The last objection taken, is, that the venue is laid in the County of Culpepper, whilst the action was in Fauquier.

In England, the venue is material as serving for a direction as to what County, the issue, if any should be made up, is to be sent for trial; but even there, it is of such little consequence, that the venue generally determined by the name of the County written in the margin of the Declaration, as with us, if it be wrong, does not hurt; and if it be right, helps; as, if the venue in the margin be wrong, and that in the body of the Declaration be right, or vice versa. With us, it is of no consequence whatever, in transitory actions, as I believe all personal actions are. For, upon a Declaration filed in the Court of Fauquier, stating the contract to be made in Culpepper, the Court of Fauquier is the proper tribunal to try it, if the party is arrested in that County, unless he is an inhabitant of another County, and moves to dismiss the suit for that cause.

The Judgment should be affirmed.

JUDGES CARR and CABELL concurred, and the Judgment was affirmed.*

106 *Gardner's Administrator v. Vidal.

January, 1828.

Administrators—Suit against—Plea of Fully Administered—Verdict.—A verdict upon the plea of fully administered ought to ascertain the amount of assets in the hands of the Defendant, at the commencement of the suit, and at the time of the plea pleaded.

Same—Same—Judgment—To What Time it Refers.—The Judgment when assets refers to the time of

*The PRESIDENT, and JUDGE COALTER, absent.

Administrators—Suit against—Plea of Fully Administered—Verdict—Judgment.—In *Brizendine v. Tisdale*, 5 Leigh 51, there was an action of debt on

the plea pleaded, and, as to 'assets received after that time, no inquiry can be made in that suit.

Same-Same-Verdict-Sufficiency.—A verdict which merely finds that assets sufficient to pay the Plaintiff's demand, "have come" to the Defendant's hands, without saying, when, is erroneous.

Verdict-Setting Aside.—When a verdict is set aside, as to one issue, it must be set aside in toto.

This was an appeal from the Superior Court of Law of Caroline County, where Vidal brought an action of debt against Rowe, administrator of Gardner, on a bill penal, said to have been executed by the said Gardner in his life-time. The Defendant pleaded, 1st, that the writing aforesaid is not the Deed of the said Gardner; 2d, payment; and 3d, fully administered. On these pleas, issue was joined. The Jury found a verdict, "that the writing obligatory in the Declaration mentioned, is the Deed of the Defendant's intestate; and the debt in the Declaration mentioned hath not been paid, &c., and that "assets sufficient hath come to the hands of the administrator to pay the same: that he hath not fully administered the said assets." The Court gave Judgment for the amount of the penalty in the Declaration mentioned, &c., to be discharged, &c.

A Bill of Exceptions was also filed to the opinion of the Court, excluding from the Jury, sundry papers containing, as alleged, the hand-writing, and particularly the signatures of the attesting witness, Benjamin Faulkner, and of the obligor, Anthony Gardner, with the evidence of certain witnesses, that they saw the said Faulkner and Gardner sign the said papers; for the purpose of enabling the Jury to compare the said writings, when so proved to be authentic, with the signatures of the said attesting witness and obligor in the bill penal, on which this action is founded.

This evidence was offered, after conflicting evidence *had been given by the Plaintiff and Defendant, of the hand-writing of the subscribing witness and obligor. As this question, however, is expressly waived by the Court, in their opinion, no further notice need be taken of it.

The Defendant appealed.

bond against an administratrix. The administratrix pleaded fully administered: the verdict was in general terms, that the defendant had not fully administered; and judgment was rendered thereupon for the debt demanded to be levied *de bonis testatoris*. An appeal was taken, and the supreme court, referring to the cases of *Sturdivant v. Raines*, 1 Leigh 481, and the principal case, reversed the judgment of the lower court, and ordered *a venire de novo*.

The plaintiff may admit the defendant's plea of fully administered, and take judgment, to be levied of the goods and chattels of the testator or intestate which may hereafter come into the defendant's hands to be administered; and, if he take issue upon the plea, and it is found against him, he will still have the like judgment *quando acciderint*. *Braxton v. Wood*, 4 Gratt. 35, citing the principal case as authority.

See principal case also cited in *Sturdivant v. Raines*, 1 Leigh 482; *Burnett v. Harwell*, 8 Leigh 96.

See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Verdict-Setting Aside.—See the principal case cited in *Bush v. Campbell*, 26 Gratt. 406.

New Trial.—To the point that a new trial will be granted when it appears that the jury ought to have found other facts differently, the principal case is cited in *Williams v. Ewart*, 29 W. Va. 668, 2 S. E. Rep. 866.

See generally, monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 823.

Stanard, for the Appellant.

Johnson, for the Appellee.

January 25. JUDGE GREEN.

The verdict in this case is clearly insufficient, in respect to the plea of fully administered. The verdict upon that plea should ascertain the amount of assets in the hands of the Defendant, at the commencement of the suit, and at the time of the plea pleaded, to enable the Court to pronounce the proper Judgment. If, at the institution of the suit, there be outstanding debts of superior dignity, or unsatisfied Judgments, the Defendant must plead them specially, or he cannot avail himself of them upon the general plea of plene administravit, unless he has actually paid them before pleading; in which case, those payments would be embraced in the terms of the plea and issue. So, if assets came to the Defendant's hands after the commencement of the suit, and before pleading, he would be chargeable in respect to them, in that suit: for, the plea must allege that there were no assets in the hands of the Defendant to be administered, either at the time of the commencement of the action, or at any time since; and the Judgment when assets refers to the time of the plea pleaded; so that, as to the assets received after that time, no inquiry can be made in that suit: and upon a Scire Facias upon a Judgment when assets, such assets can be subjected, although received pending the former suit after pleading; and payments made after the same

108 time, to debts of equal *or superior dignity to the Plaintiff's Judgment, would be available as a defence to the Scire Facias. The verdict ought, therefore, to find, not only the amount of assets in the hands of the Defendants at the commencement of the suit, or that they were sufficient to pay the Plaintiff's demand; but, also the amount in his hands at the time of pleading, or that they were sufficient to pay the Plaintiff's demand; since the Defendant might have received or duly disbursed assets, or both received and disbursed, between the commencement of the action and the time of pleading. If the Defendant is found to have in his hands, assets not sufficient to pay the Plaintiff's demand, at the time of pleading, the Judgment would be for so much of the debt as the amount of assets in hand, *de bonis testatoris*; and for the residue of the debt, out of the assets of the testator, which came to the Defendant's hands since the plea pleaded, or might thereafter come to his hands. And as to the costs, they would depend upon the fact, as it appeared upon the record, whether the Defendant was in default or not. 2 Chitt. Pl. 451; 1 Saund. 336, a., note 10; *Booth's ex'r v. Armstrong*, 2 Wash. 301; *Rogers' Adm'r v. Chandler's adm'r*, 3 Munf. 65.

The verdict in this case finds, that assets sufficient to pay the Plaintiff's demand "hath come" to the Defendant's hands, without saying when. It might have been between the institution of the suit, and the filing of the plea; in which case, it might affect the question of costs, in some cases, if not in this: or after the plea pleaded, in which case, they could not have

been subjected in this suit, and would have been entirely out of the issue. Nor does this part of the finding negative the allegation, that the Defendant had fully administered the assets which came to his hands; but, the verdict proceeds further to find, that the Defendant hath not fully administered, without ascertaining how much remained unadministered, at the time of the plea pleaded. If a Judgment de bonis testatoris were entered on this verdict, 109 such a Judgment would not, *it is true, bind the Defendant in respect to the quantum of assets, for which he was responsible, in a subsequent action suggesting a devastavit; but, would leave the question entirely open, as if the issue on that point had not been joined in this cause. But, the Defendant had a right to have that question tried, and finally decided in this suit; a right, of which the Court cannot deprive him.

For these reasons, the Judgment must be reversed in toto, the verdict set aside, and a venire de novo awarded. There is no example of a verdict being set aside as to one issue, and suffered to stand as to others, and trying a cause by piecemeal.

The Court purposely avoids deciding the point raised by the Bill of Exceptions; that question being of great importance, and the Court not being full, and it may not occur upon the new trial, or may be presented in another or more distinct form.

The other Judges concurred, and the Judgment was reversed in toto, the verdict set aside, and a venire de novo awarded.*

110 *Garrard, &c. v. Henry, &c.

February, 1828.

Writ of Right—Verdict—Surplusage.†—In a Writ of Right brought by several Demandants, the mise is joined on the mere right, and the Jury find for the Demandants, with the addition of this fact, that one of the Demandants was dead before the institution of the suit, leaving children. This latter clause shall be rejected as surplusage, and the remainder of the verdict received.

Same—Nonjoinder of Demandants—Must Be Pleaded in Abatement.‡—So, if the Jury add that one of the Demandants was tenant in common with the

*The PRESIDENT and JUDGE COALTER, absent.

†**Verdict—Surplusage.**—In *Lewis v. Childers*, 13 W. Va. 10, it is said: "It is very true, if a verdict finds matter out of the issue, it is void for so much. It is also true, that if a jury give a verdict of the whole issue, and of more, that which is more is surplusage and should not stay judgment. It is also true, that on the general issue it is perfectly well settled, that the jury cannot in the case find, to any effectual purpose, any matter not within the issue, which they are charged to try. If they do, the court is bound to reject such finding as surplusage; and if the verdict be otherwise sufficient to justify a judgment, then to give such judgment, as would be proper, if there had been no such finding of matter out of the issue. This rule is founded on the best of reasons." *Garrard v. Henry*, 6 Rand. 110.

On the same subject the principal case is cited in *Brugh v. Shanks*, 5 Leigh 601.

‡**Writ of Right—Nonjoinder of Demandants—Must Be Pleaded in Abatement.**—In *Bell v. Snyder*, 10 Gratt. 365, it is said: "The nonjoinder of the omitted heir was clearly a matter in abatement, and was not therefore available on the mise joined. The cases of *Green v. Lister*, 8 Cranch R. 229; *Garrard v. Henry*, 6 Rand. 110, and *Walker v. Boaz*, 2 Rob. 486, only prove the same general doctrine that on the mise joined matter of abatement cannot be taken advantage of by the tenant; but none of them touches the question arising in this case." *Bell v. Snyder* holds that upon the mise joined every affirmative matter going to the right and title of the defendant, the want of which might have been pleaded in bar of

others, (and therefore could maintain this Writ jointly with them,) this, like the other finding, being matter of abatement, cannot be given in evidence, nor found by the jury, on the mise joined, but must be pleaded in abatement.

Pleas in Abatement.§—The rules that govern pleas in abatement.

Appeal from the Superior Court of Law of Kanawha County. The following opinions will give a full view of the matters in controversy.

James Wickham, and Leigh, for the Appellants.

Johnson, for the Appellees:

JUDGE CARR.

This is a Writ of Right. The Demandants, in the form prescribed by the Act of Assembly, count of a tract of land, to which they set out by metes and bounds, and say that they have right to have the said tenement with the appurtenances, and offer proof that such is their right. The Tenants come and defend the right, &c.; and after describing the tenement in the words of the count, they put themselves on the Assize, and pray that recognition be made, whether they have greater right to hold the tenement aforesaid with the appurtenances, as they now hold it, or the said W. Garrard, and Frances his wife, W. Barnes and Sarah his wife, James Bream, Thomas Bullitt and Alexander Bullitt, to have as they now demand it. And the Demandants, in like manner, put themselves upon the Assize, and pray recognition to be made, whether they have greater right to hold the

111 tenement aforesaid, *as they demand, or the said Tenants, as they hold it. The mise being thus joined, a Jury were sworn, the truth to say, whether the Defendants have more right to hold the said land and appurtenances, which the Demandants claim against them, by the said Writ of Right, or the Demandants to have it, as they demand.

I have stated the pleadings thus specially, to show in the clearest light, the single point in issue, upon which the parties have staked their rights; to which the evidence and the Jury are tied down; to which, and to which alone, the verdict must respond. That point is simply an enquiry into the mere right; a comparison of the title, whether the Tenants have more right to

the action, is necessarily put in issue and he is put to proof of same.

In *Howard v. Rawson*, 2 Leigh 784, it is said: "Pleas in abatement are regarded with great strictness; and no example is found of the reception of such plea after a plea in bar (except for matter arising *purs darrain continuance*) although it must frequently happen, that matter in abatement arising before suit brought, is discovered after issue joined. In *Garrard v. Henry*, 6 Rand. 112, 113, it is said by JUDGE CARR, that the death of the demandant pending the action, abates the writ, and the court will *ex officio* abate the suit, at whatever stage the fact may come to its knowledge; but that the death of a party before the commencement of the suit, is a fact which does not itself abate the writ, but only falsifies and renders it abateable by plea; and that, if the tenant passes by the fact of such death, and joins the mise on the mere right, he thereby acknowledges the demandant is in life, and forever precludes himself from taking advantage of his death, in any manner or form. This is conclusive upon the first point."

The principal case is also cited with approval in *Walker v. Boaz*, 2 Rob. 490; *Warren v. Saunders*, 27 Gratt. 268.

§**Pleas in Abatement.**—See generally, monographic note on "Abatement, Pleas in" appended to *Warren v. Saunders*, 27 Gratt. 269.

hold, or the Demandants to have, the land in controversy.

How have the Jury answered this enquiry? They find, "that the Demandants have more right to have the tenement which they demand against the Defendants, by their Writ of Right, than the Defendants have to hold the same." If they had stopped here, there could not have been the shadow of a doubt. They had fully discharged themselves of the issue in the very terms of their oath. But they go on, and find two other facts, the influence of which on the cause, they submit to the Court: 1. That Alexander Bullitt, one of the Demandants, was dead before the institution of the suit, leaving children; 2. That Bream, who claims a part of the land in controversy, under a Deed from Mrs. Huie, was not in possession by authority of any of the representatives of C. Bullit, previous to the execution of that Deed; and also that Mrs. Huie was not in actual possession, when she executed that deed, but was in legal possession of the title to her distributable part of the said land.

Upon this verdict, the Court below rendered Judgment for the defendants; and this Judgment, if it stands, will be an eternal bar to the claims of all and each of the demandants; for, the Books all tell us, that when once the mise is joined on the mere right, the Judgment must be final. Thus *Co. Litt. 295, b. "Seeing the mise is joined on the mere right, albeit, the verdict of the Grand Assize be given upon another point, yet Judgment final shall be given. And so it is, if the Tenant, after the mise joined, make default, or confess the action, or the Demandant be non suit; and yet, in none of these cases, they of the Grand Assize gave their verdict upon the mere right." Does it not seem a strange anomaly, that where the whole and sole enquiry, the Jury could, under their oaths, make, was, whether the Tenants or Demandants held the better right to the land, and where they have explicitly answered, that the Demandants had the better right, a Judgment should be entered, the effect of which is, that the Tenants have the right, and that this Judgment should be final and conclusive upon the right? Let us examine the nature of the two facts, which have wrought this startling effect.

Matter of defence is either in abatement, or in bar. Where it goes to destroy the cause of action, it is in bar. Where it merely defeats the present proceeding, and does not show that the Plaintiff is forever concluded, it is in abatement. This definition shows at once, that the facts added by the Jury to their verdict, present matter in abatement, for, that one of the Demandants was dead at the issuing of the Writ, or that Bream held in common with others, could never destroy the cause of action, though if properly pleaded, either might defeat the present proceeding. Matter in abatement is either intrinsic, appearing in the Writ, Declaration, Replication, or some pleading of the Plaintiff; or it is extrinsic. For intrinsic matter, the Court will, ex officio, abate the suit. Extrinsic matter is such as either de facto

abates the suit, or such as renders it abateable. Of the first sort, is the death of the Demandant, or one of the several Demandants in a Writ of Right, pending the action; and at whatever stage of the suit, this fact comes to the knowledge of the Court, they will abate the suit. Carr v. Carter, and Drago v. Stead, in our books are cases of this kind. But, the death of a party *before the commencement of a suit, is a fact which does not, of itself, abate the Writ, but only falsifies and renders it abateable by plea, put in, in due time, and proper form. If the Defendant, passing by the fact of such death, pleads generally, or as here, joins the mise on the mere right, he thereby acknowledges that the party is in life, and forever precludes himself from taking advantage of his death, in any manner or form. So of the second fact found, that Bream was not in possession previous to the Deed of Mrs. Huie, and that she had only a legal possession, it is evident that by this finding, the Jury meant to present the question, whether, under such circumstances, the Deed conveyed the title of Mrs. Huie; and it is equally clear, (and indeed was conceded at the bar,) that any conveyance, whether at Common Law or Statutory, would, under such circumstances, carry the title.

But, it was relied on, that this finding was important in another point of view; that it showed, that Bream held as tenant in common with the other Demandants, and could not, therefore, properly join with them in the action. However true this may be, it is most clear, that it is extrinsic matter, purely in abatement, and not abating the Writ, but rendering it abateable only: that as such, it should have been pleaded before the mise joined, and could never be touched afterwards. Suppose, that after the mise joined, the tenants had made formal application to the Court, to be permitted to plead both these matters in abatement. Would it not have been gross and palpable error in the Court to have received such plea? The Books all tell us so. But, if it could not have been pleaded, is it not most strange to suppose, that it might on the trial of the mise have been given in evidence, when the issue was wholly different, and the opposite party having no notice, could not be prepared to rebut it, though he might have known of twenty witnesses who could directly disprove it? On this point, I refer to the case of Bolling v. The Mayor of Petersburg,

3 Rand. 563, and the cases there cited. *But, these facts have been found; they form a part of the verdict; and the question is, what shall we do with them? I answer without hesitation, reject them as surplusage. The verdict, without them, is a perfect answer to the issue. These facts are wholly out of it, and ought not to prevent a Judgment for the Demandants. It is settled Law, founded on the soundest and clearest reason, that the verdict is void so far as it goes out of the issue. Thus, in Foster v. Jackson, Hobart, 53, it is said, "First lay this for a ground, that if the Jury find any thing that is merely out of the issue, that such

verdict, for so much, is utterly void and of no force though it conclude in general for or against the Plaintiff or Defendant; whereof the reason is plain, which is, that the Juror are triers of matter of fact put in issue between the parties, and their oath, which contains their commission, is, that they shall truly try the issue between party and party. So that whatsoever they do try besides the issue is *per non juratos*: as a cause judged by the Court that hath no jurisdiction of the cause, is *coram non iudice*, and utterly void; for, a verdict must not be to the action that might have been pleaded, but to the issue which is pleaded, and in their charge. And if that other point had been pleaded, it might have had another answer and evidence. And so upon the matter, if that extravagant part of the verdict be false, it is no perjury, neither doth an attain lie upon it." The reason here seems to me most conclusive. Again, 1 Lev. 66, cited Com. Dig. tit. "Pleader," S. 18, it is said, "If a verdict finds matter out of the issue, it is void for so much, though the matter out of the issue destroys the Plaintiff's title." Again, Co. Litt. 227, a. "But, if the Jury give a verdict of the whole issue, and of more, &c., that which is more is surplusage, and shall not stay Judgment; for, *utile per inutile non vitiatur*. But, necessary incidents required by Law, the Jury may find." 21 Vin. Abr. D. 9, 2, Pl. 8. "If the Jury find the issue and more, the surplusage is void."

Pl. 9. "Where surplusage is found by
115 *verdict in Assize, as jointenancy, &c., which abates the Writ, yet this is only surplusage when it is not pleaded, and shall not prejudice the Plaintiff." These authorities put the point beyond question. I refer also, as well on this, as the other legal positions taken before, to the many Authorities collected by my brother Green, which I have examined, and know to be correctly stated.

Upon the whole, I am clearly of opinion, that the Judgment of the Court below be reversed, and final Judgment entered for the Demandants.

JUDGE GREEN.

The pleadings having been made up, and the mise joined in the usual form, as prescribed by the Act of Assembly, the Jury found that the Demandants have more right to have the tenement as they demand it, than the Tenants have to hold it; unless the right of the Demandants to recover, is affected by two facts; 1st, that one of the Demandants was dead before the emanation of the original Writ, leaving children, his heirs; and 2dly, that one of the Demandants received a conveyance for H. G. Huie for her distributable share of the land in controversy, when he was not in possession, under, or by authority of any of the legal representatives of C. Bullitt; and when the said Huie was not in actual possession of the land, but was in legal possession of her title to her distributive share.

The obvious purpose of finding the last of these facts was to submit to the Court the question, whether H. G. Huie, being entitled to a distributable part of the land in question, and having conveyed her

interest therein to one of the Demandants, when she was not in actual possession, and when he was not in possession under the legal owners, her Deed passed her title. If not, it is clear that all the Demandants were not entitled as they claimed to be, and the question would have arisen, whether, in that case, even those who were

entitled could have had any judgment? *The question, however, on that point does not arise, since it is clear that H. G. Huie's Deed passed her title, whether it was by feoffment with livery of seisin, (as could hardly be the case; for, in that case, she would have been in actual possession at the time of the conveyance,) or by Deed of bargain and sale, or lease and release, or covenant to stand seised to uses, or otherwise; for, no adverse possession being found, she had a legal seisin, which might be transferred to another by any Common Law or Statutory conveyance; and the seisin, so transferred, was sufficient, under our Act of Assembly, to maintain a Writ of Right. But this finding shows, that whether she was seised in parcenary with the other Demandants, (as is implied by the finding) or jointly, or in common, her grantee must have been a Tenant in common with the other Demandants; all of whom are found to have better right than the Tenants. And it is equally clear, that Tenants in common cannot properly join in a Writ of Right; and a joint Writ, alleging a joint right in them, is false. So the other finding, that one of the Demandants, who, if alive, would have had title, was dead before the emanation of the Writ, leaving children who were his heirs, also falsified the Writ. Either of these facts might have been pleaded in abatement of the Writ, and if they can now be taken notice of, a Judgment of abatement, or a final Judgment upon the right, in favor of the Tenants, must be the consequence.

To determine whether these facts, brought in this form to the notice of the Court, can be properly assumed as the foundation of their Judgment, an attention to some of the settled doctrines of the Law in respect to abatements, is necessary.

Matter of abatement is either intrinsic, appearing on the face of the Writ, or shown by the pleadings on the part of the Plaintiff; in which case, the Court will, *ex officio*, abate the Writ or suit, as the nature of the matter of abatement, so appearing, may require, and at any stage of the suit at which it is brought

to the attention of the Court in
117 *any way, even after verdict on the general issue, unless cured by the pleadings or verdict; or it is extrinsic, which can only be shown by plea in abatement, or suggestion, to the Court either by one of the parties or an *amicus curiæ*; and the party making such a suggestion, makes it, not as a party, but as *amicus curiæ*. Of these extrinsic matters of abatement, some only make the suit abateable; and they must be pleaded in due time or they cannot be afterwards available to him in any possible way. In all such cases, extrinsic matter of abatement, existing before the suing out of the

Writ, and before the proper time for pleading in abatement, must be then pleaded, or they can never after be pleaded or insisted on; and such matter thereafter arising, must be promptly pleaded *puis darrien continuance*, or the party loses the benefit of the plea forever. Other extrinsic matters of abatement are such as *abate the suit de facto*, and these after the Defendant has lost the right of pleading them, being made known to the Court at any stage of the cause, and in any way, *abate the suit*; and if not made known to the Court, and Judgment be given either for Plaintiff or Defendant, such matter may be assigned upon a Writ of Error, as error in fact, for which the Judgment would be reversed. And finally, the same matter may, in some cases, be pleaded in abatement or in bar, at the election of the Defendant.

Considering the death of one of the Demandants before the suing out of the Writ, and the several tenancy of the Demandants, found by the Jury in this case, for the present, as matters going only in abatement of the suit, which is their effect as they are presented to the Court? They are extrinsic matters, and such as do not, (as the death of a party pending the suit does,) *de facto abate it*. Nothing existing before the suing out of the Writ can *de facto abate the suit*, since it only falsifies the Writ, and makes it *abateable*, and that only by a timely plea in abatement. After pleading in bar, no plea in abatement is admissible, unless it be of something which has happened since the last
118 continuance, *and which makes the suit *abateable* only, and does not *ipso facto abate it*. The tenants, therefore, could not, after joining the mise, avail themselves of these facts by plea, although they might have done so, upon their first appearance; and a Judgment for the Demandants generally, although one of them was dead at the institution of the suit, could never be impeached upon the allegation of those facts, since nothing can be assigned as error upon a Writ of Error, which might have been pleaded in the original action.

Does the finding of these facts, by the Jury, vary the case, and make it the duty of the Court to consider them as properly upon the record? I think not. Although a Jury may find, upon the trial of the general issue, or any other, against an estoppel operating in respect to a matter involved in the issue, yet it is perfectly well settled, that they can in no case find, to any effectual purpose, any matter not within the issue which they are charged to try. If they do, the Court is bound to reject such finding as surplusage; and if the verdict be otherwise sufficient to justify a Judgment, then to give such Judgment, as would be proper, if there had been no such finding of matter out of the issue. This rule is founded on the best reasons. The parties cannot be supposed to come to trial, prepared to give evidence as to any matter, except that put in issue; and no evidence, not tending to prove the very matter in issue, can be properly allowed to go to the Jury. The finding of such collateral matter, must, therefore, be upon *ex parte* and

illegal testimony, and is entitled to no respect whatever. It has been held here, and in the Supreme Court of the U. States, upon the fullest consideration, that no matter of abatement can be given in evidence, upon the trial of the mise joined upon the mere right; and if we could, after the mise joined, give a Judgment of abatement, or any other than a final Judgment on the right, in any case except where the suit *abates by matter which abates it de facto*, or is pleaded in abatement *puis*
119 *darrein* *continuance, I should clearly think that we could not in this case.

I refer to a few cases in a summary way relating to these various points.

Death of a Plaintiff before suit, pleaded in abatement. 1 Chitt. P., 441, and the cases there cited.

Several tenancy of one of the Demandants in *mort d'ancestor*, pleaded in abatement of the Writ, and admitted. 1 Vin. Abr. Z. a. Pl. 1.

If matter of abatement be extrinsic, the Defendant must plead it; if intrinsic, the Court will take notice of it themselves. *Dockminique v. Davenant*, 1 Salk. 220, and 1 Vin. Abr. "Abatement," K. b. Pl. 8. If it appear, from the Writ itself, that it ought to abate, the Court will abate it *ex officio*, and that, even after verdict, as where, in *Assize*, no disceisor was named in the Writ, and this noticed in the verdict. 21 Vin. Abr. "Trial," P. f. Pl. 12.

Where Plaintiff or Defendant shows, by his pleading, that the Writ ought to abate, the Court will abate it *ex officio*. 1 Vin. Abr. "Abatement," A. *passim*.

All matters of abatement, in and before the Writ, should be pleaded. *Ibid.* F. b. Pl. 19.

A man shall not take advantage of a plea of abatement of the Writ, after a plea in bar, where it does not appear to the Court that it ought to abate. But, if that appear, the Court ought to abate it *ex officio*; although the Defendant admits the Writ by pleading in bar. *Roll's Rep.* 176. *Anon.*

Where a man pleads death pending the Writ, he shall not plead it after the last continuance; because this Writ is abated in fact. 1 Vin. Abr. "Abatement," R. a. Pl. 4.

Præcipe quod reddat against two who were essoined at the summons, and made default at the day, by which grand cape issued; and at the day one appeared, and said that after the day of their default the other died. Judgment of the Writ. He shall have the plea without saving the default, because it proves that the Writ
120 abated in fact. **Contra* of entry (by the Plaintiff) after the last continuance or such like; for by this, the Writ is only *abateable*. *Ibid.* Pl. 5.

Court cannot abate an *abateable* Writ, without plea. *Ld. Raym. Rep.* 476, cited in Vin. Abr. "Error," with approbation.

Where a Writ is *abateable*, as by jointenancy, several tenancy, misnomer, or by taking baron by the Plaintiff pending the Writ, and the like: and the party pleads and admits it, (by not taking advantage of it by plea in abatement,) he shall not have Writ of Error after. But, when the Writ is abated, (*de facto*,) as by death pending

the Writ, and the party admits it, (as aforesaid,) yet, then he shall have Writ of Error after. 1 Vin. Abr. "Abatement," U. a. Pl. 16.

Error in fact, (upon a Writ of Error,) was assigned, viz: that the Plaintiff was a feme covert at the time of the action brought. Sed non allocatur; because it might have been pleaded in abatement, and it is a general rule not to suffer that to be assigned for error in fact, which might have been taken advantage of by being pleaded in abatement. 10 Mod. 166, cited 9 Vin. Abr. "Error," E. a. Pl. 10.

A verdict against the admissions of the parties express or implied in their pleadings, or out of the issue, is void as to so much; and the Court, disregarding such matter, will give such Judgment as, upon the pleadings, and so much of the verdict as is within the issue, may be proper. 21 Vin. Abr. "Trial," P. f. Pl. 14. A verdict finding matter of a abatement not in issue, held void for so much.

When the Jury find the issue and more, the surplage is void, Ibid. D. g. 2, Pl. 8; as where jointenancy, &c. which abates the Writ, is found by verdict in Assize, this is only surplage when it is not pleaded, and shall not prejudice the Plaintiff. Ibid. Pl. 9.

In waste, the Plaintiff declared that the Defendant made feoffment to the use of himself for life, remainder to the 121 Plaintiff in fee. The Defendant pleaded that he was seised in fee, absque hoc that he made a feoffment. The Jury found, that he made feoffment to his use for life without impeachment of waste, remainder to the Plaintiff; and Judgment for the Plaintiff, because the finding of the provision of the feoffment without impeachment of waste, was out of the issue. Ibid. Pl. 12; see too, Ibid. E. g. 4, Pl. 3, where in maintenance against two, the Plaintiff, in his replication, admitted that the maintenance was several. Held, that this abated his suit, though the finding of the Jury to the same effect would not.

It was argued, however, that if the Tenants were precluded from availing themselves of the fact, that one of the persons named as a Demandant was dead, before the emanation of the Writ in abatement, the fact that he was dead, leaving children and heirs entitled to one twentieth undivided part of the land, was admissible in bar of the action; because the remaining Demandants, exclusive of him who was dead, had not right to the whole of the land, as they demand it. They do not allege that they had; but that they, and the other named as a Demandant, had right to the whole; and this allegation is true. The plea in bar was an admission on the record, that he was alive and competent to sue; which could not afterwards be controverted by the Tenants, in any form. This was an estoppel, against which they could not make any allegation, nor the Jury find with any effect. When, therefore, it was proved, that a right to one-twentieth part of the land had devolved upon, or in any way been acquired by, Alexander Bullitt, although it was competent to the Tenants to show, that he had

transferred to some other his right, by his own act, in bar of the demand asserted in his name, in this scit; they could not show in evidence, that his right had devolved by his death on his children, since they had admitted on the record, that he was alive and capable of suing. Although a Jury may find the truth upon an estoppel in pais, as by Deed, if it be not pleaded; 122 yet they cannot find "against an estoppel or admission in the same record in which the issue is joined," Goddard's Case, 2 Co. 4; nor in any subsequent suit between the same parties or their privies, can the Jury find against such an estoppel, whether it be by express admission, or by an omission to deny an allegation in the pleadings in the former suit, "nient dedire." Dicken v. Molland, Palm. 509; Sir H. Wallop's Case, Ibid. 19, cited 21 Vin. Abr. "Trial," R. f. Pl. 1, n; see also, Vin. Abr. same title, C. q. Pl. 29, 30, 31. And to prevent this estoppel in any subsequent suit, is the only purpose of a protestation in pleading, which admits the fact protested against, for all the purposes of the suit in which the protest is made. This case is therefore to be considered, as if Alexander Bullitt was alive, both at the emanation of the Writ, and the trial of the issue, notwithstanding the finding of the Jury to the contrary; and the objection made on this ground, does not exist.

The remaining objection founded on this finding is, that it appears upon the evidence necessarily offered by themselves, that the Demandants, who demand as jointly seised or entitled, were in fact Tenants in common seised severally of the undivided proportions of the land in question, to which they respectively had right; and that as Tenants in common cannot join in a Writ of Right, the Demandants have not more right to have as they demand, than the Tenants to hold as they hold, according to the terms of the mise; the Tenants having a perfect right to hold as they do, by virtue of their actual possession, against all who have not a right to have the land against them, as they demand it. This objection would have much plausibility, if this cause were to be decided upon the Common Law, independent of our Statute; according to which, the Demandants, when there were several, were obliged to allege a joint or entire and actual seisin in themselves, such as parceners and jointenants had. For, if they alleged a several seisin, they thereby abated their suit; or, they must allege an actual seisin in their common ancestor, and show 123 *that they were entitled to claim as his heirs. If they showed in their count, that any one of the Demandants claimed otherwise than as a parcener with the others, they would thereby also abate their suit. Being obliged to make such allegations, if upon the trial it appeared, upon their own evidence, that they were not true, and that some one of the Demandants was a Tenant in common with the others, it might be said, with some plausibility, that they failed in the proof that they were entitled to have the subject claimed, as they demanded it. Yet, no question upon a case of this sort has ever

occurred in England, as far as I can discover, as it surely must have done, if evidence upon the trial of the mise, that one of the Demandants was a Tenant in common with the others, would have defeated the action, and entitled the Tenants to a final Judgment upon the right. For if so, it would have been extreme folly to plead several tenancy of the Demandants in abatement, which would have subjected the Tenant to new actions, founded on the same rights. Nor can I suppose it possible, that the Common Law could have permitted such a monstrous consequence, as that parties clearly entitled should lose their rights forever, in consequence of a misconception of the form of their action.

We are, I think, relieved from any difficulty on this question, by the terms of our Act of Assembly prescribing the form of the count in the Writ of Right. This alleges no seisin either joint or several by the Demandants or their ancestor; but, only that they have right to have the tenement in question; an allegation fully supported by proof, that the Demandants, in exclusion of all others, have a right to the whole of the tenement demanded, no matter in what proportions or by what title, whether as Jointtenants, Parceners, or Tenants in Common; the manner in which they were entitled not affecting the question of their mere right.

I do not mean to insinuate, that our Statute has altered the Writ of Right in any of its fundamental principles. It
124 *is still appropriate only to a claimant of an estate in fee simple, by the very terms of our Statute, and is a possessory action, founded on the actual or legal seisin of the Demandant or his ancestor only; as appears from our Statute of Limitations. These essential matters, although not alleged in the count, are necessarily to be given in evidence, or the Demandant must fail. The principles of the Common Law, also, requiring that Tenants in common shall sue severally and not jointly, and jointtenants, jointly and not severally, and parceners, in some cases jointly, and in some severally, and that jointtenants and parceners shall be sued jointly, and several tenants severally, are all in force. But these being matters of abatement, are only available by plea in abatement, and if not so pleaded, cannot be insisted on after the mise joined on the mere right, in any form whatever, since they do not affect the question of mere right.

The Judgment should be reversed, and final Judgment be given for the Demandants.

JUDGE CABELL, concurred, and the Judgment was reversed.*

125 *Faulkner's Administratrix v. Harwood.

February, 1828.

Equitable Relief—Judgment at Law—What Must Be Shown.*—After a trial at Law, a Court of Equity

*THE PRESIDENT, and JUDGE CALTER, absent.
Equitable Relief—Judgment at Law—What Must Be Shown.—A party who had a defense at law, but failed to make it, and seeks relief in equity against a judgment, whether confessed or rendered on a

will not grant a new trial, merely because injustice has been done; but, the party applying for the new trial, must show that he has done every thing that could be reasonably expected from him, to obtain relief at Law.

Bill of Discovery—When It Must Be Filed.—A Bill of Discovery, to obtain evidence which might have been useful in a trial at Law, must be filed pending the suit at Law, unless some sufficient excuse is shown, why it was not filed at that time.

This was an appeal from the Richmond Chancery Court, where the Administratrix of Thomas Faulkner filed her bill against

contest, should allege and prove facts that constitute a fraud perpetrated by the adverse party in procuring the judgment or preventing the defense; or facts that indicate that though the complainant used proper diligence, or such diligence would not have availed, he was, by accident, mistake or surprise, prevented from discovering important facts, or from adducing material evidence and making adequate defense. *Morehead v. DeFord*, 6 W. Va. 320, citing principal case. And in *Knapp v. Snyder*, 15 W. Va. 441, it is said: "It is well settled, that a court of chancery will not entertain a party seeking relief against a judgment which has been rendered against him in a court of law, in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party be shown why the defense at law was not made. This wise rule springs out of the positive necessity that there must be some period at which litigation shall cease. A court of equity will not grant relief merely because injustice has been done. The party seeking the relief must show that he has been guilty of no laches, but that he has done everything that could have been reasonably required of him under the circumstances of the case. But courts of equity have always granted relief in such cases when it is shown that the reason why the defense was not made at law, was founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party. *Mosby v. Haskins*, 4 Hen. & M. 427; *Degraffenreid v. Donald*, 3 Hen. & M. 10; *Herd v. Dishman*, 5 Call 379; *Faulkner v. Harwood*, 6 Rand. 125; *Mason v. Nelson*, 11 Leigh 227; *Holland v. Trotter*, 23 Gratt. 139; *Polindexter v. Waddy*, 6 Munf. 418; *Smith v. McLain*, 11 W. Va. 655; *Shields v. McClung*, 6 W. Va. 79, and cases cited."

To the same effect the principal case is cited in *Norris v. Hume*, 2 Leigh 338; *foot-note* to *Donally v. Ginatt*, 5 Leigh 359; *Tapp v. Rankin*, 9 Leigh 490; *Slack v. Wood*, 9 Gratt. 43; *Green v. Massie*, 21 Gratt. 359; *Goolsby v. St. John*, 25 Gratt. 153; *Perkins v. Clements*, 1 Pat. & H. 153; *Shields v. McClung*, 6 W. Va. 89, 94; *Graham v. Citizen's Nat. Bank*, 45 W. Va. 705, 32 S. E. Rep. 247; *Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. Rep. 786.

In *Hudson v. Kline*, 9 Gratt. 884, it is said: "It has been a favorite policy in this state, especially of late, not to afford relief in a court of equity to a party who has a plain remedy at law, except in cases of concurrent jurisdiction. In all other cases, he must avail himself of his legal remedy. If without his default, he be deprived of all remedy at law, equity may relieve him; but if any legal remedy remain to him, though he may have lost by his misfortune, and without the fault of his adversary, other concurrent legal remedies, he must resort to his remaining legal remedy. This policy is illustrated by the cases cited by the counsel for the appellee, especially *Cabell v. Roberts*, 6 Rand. 580; *Collins v. Jones*, 6 Leigh 530; *Faulkner v. Harwood*, 6 Rand. 125; *Haden v. Garden*, 7 Leigh 157; *Allen v. Hamilton*, 9 Gratt. 256, to which may be added *Slack v. Wood*, 9 Gratt. 40."

And in *Smith v. McLain*, 11 W. Va. 668, it is said: "In a bill brought to obtain relief in the nature of a new trial, the bill should allege, not only the discovery of new evidence, but also what that evidence is, that the court may see that it is material in its object and not merely cumulative, corroborative or collateral; and also that it is such that it ought to produce an opposite result on the merits. And the bill must do more than this: it must show that the evidence is such that reasonable diligence on the part of the defendant could not have secured it at the former trial. See *Griffith v. Thompson*, 4 Gratt. 147; *Slack v. Wood*, 9 Gratt. 40; *Brown v. Speyers*, 20 Gratt. 296; *Floyd v. Jayne*, 6 Johns Ch. 479; *Hendrickson v. Hinkley*, 17 How. 446; *Faulkner v. Harwood*, 6 Leigh 137; *Meem v. Rucker*, 10 Gratt. 506; *Waltou v. Hamilton*, 9 Gratt. 256; *George v. Strange*, 10 Gratt. 499."

‡**Bill of Discovery—When It Must Be Filed.**—To the point that a bill of discovery to obtain evidence

John M. Harwood, to injoin a Judgment recovered by the Defendant against the Plaintiff. All the facts of the cause are sufficiently detailed in the opinions which follow.

Leigh, for the Appellant.
Johnson, for the Appellee.

February 11. JUDGE CARR.

Harwood having a claim to several slaves then in litigation, sold this claim to Royston, for 187l. 10s., for which sum Royston executed his bond to him. Royston sold his bargain to Faulkner; and Faulkner, by a contract with Harwood, gave him several notes or orders, &c. in exchange for Royston's bond. Among these, was the order of Mrs. Stepoe for \$210 58 cents, which had been given to Gaines an Attorney, to sue on, and which was transferred to Harwood by an assignment on the receipt of Gaines. Faulkner afterwards contesting the right of Harwood to the money due on this order, received the amount of it himself, and having died, Harwood sued his Administratrix in assumpsit for the amount, and recovered Judgment.

126 *The bill was filed to injoin this Judgment, on the ground that Harwood sold, not his right and interest to the slaves merely, but such a share of the slaves themselves, and warranted that share: that this order was given in part satisfaction of that share: that the share has turned out to be nought, the suit having been decided against Harwood's title; and therefore, Harwood has no claim upon the order: that this would have been proved to the Jury on the trial at Law, if the exhibits B. and D. had been in the knowledge or power of the Plaintiff, at the time of trial; but, that these papers had been put by Faulkner into the hands of Hoomes, an Attorney, who died before the suit was tried; and that these documents had been but lately found among his papers. The bill asks an Injunction, but does not designate the further and final relief expected.

If the Court ought to interfere at all, I presume it must be to grant a new trial, as it is a matter wholly at Law. But, the first question is, as to the jurisdiction.

It is a fundamental principle in Equity, that if a party will suffer a Judgment to pass against him, through neglect, he cannot have relief in Equity, for a matter of which he might have availed himself at Law. *Lee & ux. v. Boles*, 1 Ch. Cas. 95; *Williams v. Lee*, 3 Atk. 233. In this last case, Lord Hardwicke lays it down, that it must appear that the Defendant was ignorant, at the time of trial, of the fact which renders the verdict contrary to Equity.

In *Bateman v. Willoe*, 1 Sch. & Lefr. 201, Lord Redesdale says, "The inattention of parties in a Court of Law, can scarcely be made the subject for interference in a Court of Equity. There may be cases cognizable at Law, and also in Equity, and of

which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown why it was not filed at that time, the principal case was cited in *George v. Strange*, 10 Gratt. 506; *Hazeltine v. Brickey*, 16 Gratt. 180; *Green v. Massie*, 21 Gratt. 860; *Zoll v. Campbell*, 8 W. Va. 227.

See further, monographic note on "Bills of Discovery" appended to *Lyons v. Miller*, 6 Gratt. 497.

which, cognizance cannot be effectually taken at Law, and therefore Equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at Law. So, where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an "unconscientious advantage at Law, which Equity will either put out of the way or restrain him from using. But, without circumstances of that kind, I do not know that Equity ever does interfere to grant a new trial of a matter, which has already been discussed in a Court of Law, and over which the Court of Law had full jurisdiction." He adds, "A bill for a new trial, is watched by Equity with extreme jealousy. It must see that injustice has been done, not merely through the inattention of the parties; but some such reasons as those I have mentioned, must exist."

Cases might be multiplied beyond number, to show that this is the settled doctrine. This question has been often decided also in this Court; and though sometimes with a little more latitude than may seem to accord with the true practice, yet generally, and particularly in the later cases, in conformity with the decisions I have quoted. I would particularly refer to the case of *Oswald, Denniston & Co. v. Tyler*, 4 Rand. 19, where the subject is ably discussed and placed by the majority of the Court, on the true ground. That is not a binding authority, but it has my entire approbation; and I trust we shall not depart from the course there laid down. There is nothing more difficult than to keep this encroaching jurisdiction within due limits. When a case seems to address itself strongly to our justice, we are too apt to yield to the particular call, without considering its effect upon the general rule. Now, let us apply this rule to the facts in this case. Does it appear that the documents B. and D. were out of the knowledge and power of the Plaintiff at the trial at Law? She states, that they were found but lately among the papers of Hoomes, who died before the trial. The answer puts her on the proof of this, by the allegation, "that it was extremely improbable, that a defence at Law was prevented by any such cause," and that "a small degree of industry and attention would easily have removed all difficulties on that head." Surely after this, she ought to have proved the fact. It was said, that she was an

128 Administratrix, and "might well be supposed ignorant of the facts and papers necessary for her defence at law. This may be admitted; but surely, it does not dispense with some proof before us, to justify the setting aside a verdict and Judgment at Law. If the papers were placed in the possession of Hoomes, the person who found them after his death, might have given evidence of that fact. As it stands, there is certainly no such fact in the cause; no evidence that the papers were not perfectly within the power of the Administratrix. It will not be said, that her statement in the bill is evidence.

If so, the rule would be a nullity. Every one would state enough to give Equity jurisdiction. But here, the answer puts her on the proof. If it ought not to be produced in this case, it would be difficult to state one where it would be necessary. Though an Administratrix, as she has stated the fact in her bill, she might prove it, if the proof existed. The absence of such proof takes away all ground of jurisdiction.

But, another ground to support the jurisdiction is taken. It is said, that this is a Bill of Discovery; and that this is founded on that part of the bill, where the Plaintiff charges, that the consideration of the assignment of the order, was the price of the slaves sold by Harwood to Royston, and by him to Faulkner; which she was unable to prove in a Court of Law, and still may be unable to adduce positive evidence of it, without a discovery from the Defendant; and in the close of her bill, she calls upon him to answer as to this charge.

If there is any thing in authority, this position is wholly untenable. The objection to it rests on the same ground with that just discussed, that if a party suffers a Judgment to pass against him, through neglect, he will not get relief in Equity for a matter, of which, with due diligence, he might have availed himself at Law. Now, the Administratrix nowhere states, that she did not, before the trial, discover, that the assignment of the order, and the purchase of the slaves, were con-

129 nected. It is clear, indeed *from her bill, that she was aware of that fact, while the case was pending at Law: and the exhibit C. forming a part of the Law Record, shows that the fact was attempted to be used at the trial. If, then, her evidence to establish it was defective, she ought, at once, while the action was pending, to have filed her Bill of Discovery, to enable her to defend herself at Law. This is the settled practice. Speaking of a Bill of Discovery, Lord Redesdale says, Mitf. 52, "This bill is commonly used in aid of the jurisdiction of some other Court; as to enable the Plaintiff to prosecute or defend an action at Law," &c. And the bill must be filed as soon as the party discovers the necessity of appealing to the conscience of the adversary. Equity will not suffer him to spin out litigation, take the chance of a Jury, and failing there, file his bill for a discovery. *Leicester v. Parry*, 1 Bro. Ch. Cas. 305. A plea that a Writ of Right had been tried and determined against the Plaintiff, was held a good plea to a bill for discovery of matter relative to the title. See also *Duncan v. Lyon*, 3 Johns. Ch. Rep. 351; *Ibid.* 395; *Thompson v. Berry*, 6 Johns. Ch. Rep. 479, where the subject is very well treated.

In the case before us, then, it is a full and decisive answer to the Bill of Discovery, that it is after verdict, and no reason shown why an earlier application was not made. There is no hardship in this rule. It is only saying, that a party shall use ordinary diligence, shall seek a discovery as soon as he ascertains that he wants it. But, the contrary practice would be fraught with much mischief. Where the application

is in due time, the effect is only a suspension of the proceeding at Law till the discovery is had; and then, the case proceeds to Judgment in the proper forum, and the facts are tried by a Jury. But, if you depart from the rule, you encourage negligence, protract litigation, harass and exhaust the parties, and draw within the jurisdiction of Equity, the general review of trials at Law. Upon both grounds,

then, respecting jurisdiction, I am 130 *strongly opposed to the bill; and as jurisdiction precedes discretion, it would seem unnecessary to go further. But, as the question was much discussed, I will briefly state what would be my view of the contracts, if the exhibits B. and D. are considered in connection with exhibit C.

B. is the first contract, made 10th of January, 1811. It is drawn very obscurely. The commencement looks like a mortgage; but, the latter part shows distinctly, that it was a sale; whether of the interest, or the share of Harwood, is by no means clear. There are expressions which look each way. But, as I deem this point very immaterial, I shall not further consider it.

Take it that it was a sale of the share; it will be denied by nobody, that parties may modify or abrogate their contracts; and that a subsequent agreement about the same subject, does change the former, so far as it differs from it. In other words, that the last is the agreement, and the only agreement. On the 4th of March, 1811, not two months after the first contract, the parties made a second so clearly expressed, that it seems to me beyond the reach of doubt. By it, Harwood sells to Royston all his right, title, claim, and interest, to seven negroes, (who are named) and stated that he claimed under the Wills of his father and a Mr. Orrell; which right, title, claim, and interest, he goes on to warrant. Now, if there can be a contract so drawn as to express a sale of the right and interest of the party to a subject, without a sale of the subject itself, it seems to me, that this contract is so expressed; and this, I thought, was acknowledged in the argument, but for the warranty. It was asked however, "how will you reconcile the warranty, to a sale of the interest only." I reply, the clause of warranty can never be resorted to, to ascertain the thing or the interest sold. That is by no means its function. These must be gathered from the premises, the words expressing what is bought and sold. These govern the warranty; for, a man never warrants more than he has sold.

When, then, it is expressly stated, 131 that Harwood sells his "right, title and interest, how could he warrant more? But, the warranty is as express as the sale. He warrants his right, title and interest. If you ask me, to what such a warranty amounts? I answer, to very little that I can see; certainly (I think) to no more than this, that he has done nothing, and will do nothing, to affect his right, title and interest, such as existed under the Wills. It seems to me still more strange, to resort, for explanation of this contract, to the former one; especially when this has no reference at all to that. It often

happens, that parties, by a subsequent writing, explain a former contract. This is the natural flow of the stream. But to resort to a former contract, and by it, to change the clear meaning of a later one, would be to turn the current back upon its source. That Royston understood the contract as a sale of Harwood's interest only, is further evidenced by his endorsement on exhibit C. With respect to the slave Daniel, who is stated by the contract to be in Ball's possession, he says in October, 1811, "I have this day conveyed to George Ball, and to him relinquished all my interest in said slave," &c. Here we see a conveyance of his interest only. Then his assignment to Faulkner, "I do hereby assign all my right, title and interest in and to the within mentioned slaves, to Thomas Faulkner and his heirs," &c. Now, it would hardly be contended, that Faulkner could have recourse to Royston, in case the claim turned out bad; and yet Royston meant (no doubt) to sell as he bought, to sell his bargain. If Faulkner could have no recourse to Royston, it would seem strange to say he could have an Equity against Harwood, to stop the money on the order he had assigned him, when this assignment took place, not in a trade about the slaves at all, but in the purchase of the bond of Royston to Harwood. This fact is stated in the answer, and proved by two witnesses, Thrift and Newcomb; who further say, that Faulkner told them he had bought of Royston, Harwood's claim or right in the slaves.

132 "But it is said, that exhibit D. shows the meaning of the parties in these contracts. This bears date November, 1811, after the contract by which Faulkner had gotten of Harwood, Royston's bond, in exchange for various orders, &c. "I do hereby relinquish all my right, title and interest, in certain negroes conveyed and sold by me to C. Royston, who sold and conveyed the same to Thomas Faulkner. I sold to Royston my right to only one half that property," &c. stating, that he after discovered that he had a right to two thirds, and had that day received satisfaction of Faulkner for the two thirds. This paper was intended, it seems to me, merely to sell the additional claim, and acknowledge satisfaction; and not, in the slightest degree, to change the nature of the former contract. Where it refers to that contract, it is mere recital; "negroes conveyed and sold by me to Royston, who sold and conveyed to Faulkner." But, how sold and conveyed? Why, as by the contract is declared. But we see, that when he relinquishes, it is still his right, title and interest; and when he speaks of his sale to Royston, he says, "I sold my right to one-half;" always clearly evincing, that it was his claim, his right, his interest, whatever that might be, that he meant to sell. All this, it seems to me, would be the natural course of such a trade. All the parties knew, that the slaves were in litigation. They were, of necessity, a subject for speculation. They might be something or nothing, as the suit should eventuate. Any one who wished to speculate, would enquire into the title, and regulate his bids accord-

ingly. In all such cases, the party weighs the chance of gain, against the hazard of loss. He makes his bargain with his eyes open, and he has no shadow of Equity to be relieved from loss, when it falls on him.

My opinion, therefore, clearly is, that 1st, the party has no right to be heard in Equity, and it is on this ground distinctly, that I choose to place my opinion; 133 but 2ndly, *if the party were received, I think he shows no case for relief; and therefore, that the Decree of the Chancellor be affirmed.

JUDGE COALTER.

I would have been strongly inclined to grant relief in this case, had the Appellant proved the two important matters stated in her bill, to wit: the discovery of the papers amongst those of Hoomes, after the trial, and the failure of the consideration of the assignments on which the suit at Law was founded. The answer, by doubting the truth of the first, and stating that it was extremely improbable, put the Appellant on the proof of it, which she has failed to adduce. The bill does not state, in what manner the consideration failed; whether because the Appellee never had any just claim to the slaves, and that so the suit was decided against him; or, because he had sold them previous to the sale under which the Appellant's intestate claimed them.

The Appellee admits, that the suit was decided against his title; but says, that an appeal was taken, which was dismissed for want of prosecution; which, being the fault of the Appellant's intestate, for whose benefit it was taken, he ought not to be responsible; and he examines a witness to prove his title to them, as the dower slaves of his father's widow. The record of the suit concerning these slaves, is not before us; nor is it even stated, what has become of it, except in the answer as aforesaid. It is not material, therefore, what my opinion might be, as to the true meaning of the contract of sale, inasmuch as, for these reasons, I am obliged to affirm the Decree of the Chancellor.

The PRESIDENT.

After a trial at Law, new trials should not be granted by a Court of Equity, merely because injustice may have 134 *been done at Law. A party, to entitle himself to a new trial, must show that he has been guilty of no laches: that he has done every thing that could be reasonably required of him, to obtain relief at Law. Without such excuse, which is to be judged of according to the circumstances of the case, he cannot get relief in a Court of Equity. It does not appear, that the documents B. and D. were out of the power of the Defendant, at the time of the trial of the suit at Law; and being put on the truth of that fact by the answer, some evidence of a matter so susceptible of proof ought to have been adduced, to entitle him to relief in Equity. Indeed, it is not probable, that as the document C. which belonged to the same transaction, was before the Jury, the documents B. and D. were not also

in the power of the Plaintiff in Equity, if due diligence had been used to procure them.

As to the other ground of relief, a discovery from the Defendant, if at all expected by the Plaintiff, it was more necessary in the absence of the documents B. and D., which are all now in the record, than since the trial at Law; and although I would not, in every case, limit the right of a party to a Bill of Discovery, to the pendency of the suit at Law, I think, in this case, there has been evident negligence in the Plaintiff, in not filing her bill, pending the suit at Law, if any discovery was expected from the answer of the Defendant.

In addition to this, I see nothing in the answer, which ought to change the verdict of the Jury. On neither ground, do I think that there is any error in the Decree, and I am therefore for affirming it.

Decree affirmed.*

135 *Durham and Wife v. Dunkly.

February, 1828.

Gift of Personality—Retention by Donor—Effect.—A slave is given to an infant, by Deed, with a reservation expressed in the Deed, that the donor is to keep the slave and raise it for the donee, until she arrives at the age of thirteen. The slave is delivered to the donee on the day of the execution of the Deed, and on the same day, taken back by the donor. The Deed is never recorded, and the donee never lived with the donor. This gift is void under the Act of Assembly, 1 Rev. Code, 432, sec. 51.

Same—How Evidenced.—A gift of slaves can only be evidenced by Deed or Will duly proved and recorded or by possession passing from the donor to the donee, and remaining with him, or one claiming under him.

Same—Same—Nature of Possession.—The possession here meant, is an actual, abiding, permanent possession.

Appeal from the Superior Court of Law for Halifax County.

Micajah Durham and Nancy his wife, brought an action of detinue against Moses Dunkly, for a slave named Jenny. The whole case is so fully unfolded in the following opinion, that it is unnecessary to give it here.

Leigh, for the Appellant.
Johnson, for the Appellee.

February 16. JUDGE CARR.

This is an action of detinue. The facts are these: On the 4th of January, 1804, the Defendant Dunkly executed a Deed of Gift, conveying Jenny, a slave, to the female Plaintiff, then an infant of tender years. The Deed has this clause: "I have delivered the above named negro to the said N. W. Sawyers, which I am to keep the said negro, and raise it for the above named N. W. Sawyers, until the said Nancy is thirteen years old." There were two

subscribing witnesses to the Deed; by one of whom it was proved in the County Court of Halifax in June, 1804; but, no further proof being made, it was never recorded.

The execution of the Deed was proved 136 at the trial by a subscribing witness.

Before the execution of the Deed, but on the same day, the slave was delivered to N. W. Sawyers; and immediately after the Deed was executed, she was taken back into the possession of the Defendant, upon the terms mentioned in the Deed; the said slave and the said Nancy being both at that time under one year old. The Defendant had (excepting the aforesaid delivery and taking back) remained in possession of the slave, from her birth; nor had the donee ever lived with him. On this state of facts, the Court (on the motion of the Defendant) instructed the Jury, "that the said Deed did not pass such an estate, as to enable the Plaintiffs to recover in this action: that to make the gift of a slave valid, such gift must be evidenced by Will or Deed, proved by two witnesses, or acknowledged and recorded within eight months, or the slave must be delivered to, and remain in, the possession of, the donee, or some third person claiming under such donee, so that the possession of the donor must be entirely broken up." Upon this instruction, the Jury found a verdict for the Defendant; and this Court awarded a Supersedeas. We are to enquire whether the instruction of the Court be correct. That question depends on the construction given to the 51st section of our Act concerning slaves, &c., 1 Rev. Code, 432: "No gift of any slave shall be good, or sufficient to pass any estate in such slave, &c. unless the same be made by a Will duly proved and recorded, or by Deed in writing, to be proved by two witnesses at the least, or acknowledged by the donor, and recorded according to Law. This section shall be construed to extend only to gifts of slaves, whereof the donors have, notwithstanding such gifts, remained in the possession, and not to gifts of such slaves, as have at any time come into the actual possession of, and have remained with, the donee, or some person claiming under such donee."

It was contended for the Plaintiffs, that this was a gift in futuro; and that to such gifts, the Act does not apply.

137 *The Deed says, however, that "I, Moses Dunkly, for the consideration of love, &c., have given and granted, and by these presents do freely give and grant, unto Nancy Sawyers and her lawful heirs, &c., one negro girl named Jenny," &c. These seem clearly to me, to be the words of a present, and not of a future gift; and if this Deed had been proved, or acknowledged, and recorded according to Law, there would have been an end of the question. No future act of Dunkly could have affected the title of the female Plaintiff. The Deed adds, "I am to keep the said negro and raise it for the said Nancy, till she is thirteen." But, these words relate to the possession merely, and do not postpone the vesting of the right. This, then, being a gift in presenti, it is not material to consider whether a gift in futuro be within the operation of the Act.

*JUDGES GREEN and CARELL absent.

Gift of Personality.—In Virginia for more than a hundred years there have been statutes prescribing what is necessary to make a valid gift of slaves. *Dickeschied v. Bank*, 28 W. Va. 367, citing the principal case.

On the subject of gifts of personality, the principal case is also cited in *Hansbrough v. Thom*, 3 Leigh 160; *Slaughter v. Tutt*, 12 Leigh 159; *Thomas v. Lewis*, 89 Va. 66, 15 S. E. Rep. 389.

See further, monographic note on "Gifts" appended to *Barker v. Barker*, 2 Gratt. 344.

It was contended, in the second place, that taking this as a gift in præsent, still it was good, because the possession of the slave being delivered to the donee, and resumed by the donor, for the purposes, and upon the terms, of the Deed, the subsequent possession of the donor was the possession of one claiming under the donee; and so, that the Act was substantially complied with, which requires, that the slave, "shall have come into the actual possession of, and have remained with, the donee, or some person claiming under such donee."

I confess that my first impressions were strongly in favor of this conclusion; but, subsequent reflection and investigation have compelled me to change them. There are but two classes of gifts of slaves which the Law tolerates. 1. A gift evidenced by Will or Deed, properly proved and recorded. 2. A gift evidenced by possession passing from the donor to the donee, and remaining with him, or one claiming under him. To place this matter in the clearest light, we must look back to the old Laws on this subject. The Act of 1757, 7 Hen. Stat. at Large, 118, entitled "An Act for preventing fraudulent gifts of slaves," after stating in the Preamble, "Whereas many
138 *frauds have been committed, by means of secret gifts made of slaves, by parents and others, whereby creditors and purchasers have been frequently involved in expensive Law suits, and often deprived of their just debts and purchases," enacts, that no gift of slaves shall pass any estate, unless by Will or Deed, duly recorded.

In 1758, 7 Hen. Stat. at Large, 237, there is a Law with exactly the same title, and with enactments almost exactly like the last. The only material difference respects the continued possession of the donor. Thus, "whereas many frauds have been committed by means of secret gifts, made, or pretended to have been made, by parents and others, (who have notwithstanding remained in possession of such slaves, as visible owners thereof,) whereby creditors," &c. just as in the former. Here, we see what was meant by possession remaining with the donor.

These Acts remained in force unaltered, till October, 1787, 12 Hen. Stat. at Large, 505, when an Act passed to "explain and amend the Acts for preventing fraudulent gifts of slaves." The Preamble is uncommonly long and particular in its recitals. It first recites substantially the whole of the Acts of 1757-8; and then states, that "whereas, in the general construction of these Acts, it has been understood, that they were not intended to interfere between donor and donee, further than to prevent deceptions and frauds, and that the enacting parts of the said Acts extended only to secret gifts of slaves, and whereof the donor retained possession; and not to gifts where the possession had been in the donee; and many parents and others have, since the said recited Acts, made gifts of slaves to their children and others, without Deed in writing, and such donees have continued in possession of the slaves so given, under a delivery at the time of

making, or after such gifts, by which the donees have been considered as the owners of such slaves, and have obtained credit thereby; and whereas, from a late adjudication, in a question arising on the said recited Acts, it was determined that
139 all *gifts of slaves, since the said Acts, are void, unless made in writing, or confirmed by Will, as in the said Act is directed; which late adjudication, by disquieting and disturbing possessions, will tend to produce infinite disputes and litigation, and contrary to the intent of the donors, to deprive children of the provisions made for them by their deceased parents, injure husbands who have married women, possessed of slaves under such gifts, defraud creditors and purchasers under such donees, and multiply the mischiefs the said Acts were intended to remedy; for prevention whereof, Be It Enacted, that the said recited Acts for preventing fraudulent gifts of slaves, shall, from and after the passing of this Act, be construed to extend only to gifts of slaves, whereof the donors have, notwithstanding such gifts, remained in possession; and not to gifts of such slaves, as have at any time come into the actual possession of, and remained with, the donee, or some person claiming under such donee."

I have quoted the Preamble and enacting clause of this Act, thus specially, because they seem to me to show more clearly than any argument, what the Legislature meant. 1. We have stated the mischief intended to be remedied. "Gifts, made or pretended, of slaves, by parents, &c. who have, notwithstanding, remained in possession of such slaves, as visible owners." To remedy this evil the Acts of 1757-8 were passed. When the Courts came to act upon these Laws, they pronounced all gifts of slaves void, unless by Deed or Will, although possession had been delivered at the time of the gift, and remained ever after with the donee. The Preamble declares, this construction wrong: that the Laws only intended to avoid gifts of slaves, where there was no Deed or Will, and the donor had retained possession; and did not extend to gifts, where the possession had been in the donee. The Preamble then points out the mischiefs which the adjudication tended to produce; and every case it puts, shows that the possession of the donee was meant to be an actual,
140 abiding, permanent *possession; one wholly incompatible with a continuing possession of the donor. This, then, is my conclusion. A gift of slaves may be by Will or Deed, properly proved and recorded. In this case, no matter where the possession is, the solemnity of the instrument, and the record, give notice to the World. A gift of slaves may also be without Will or Deed. But then there must be something to give fair notice to the World, of the change of ownership: and for this, nothing less will answer than that possession (the indicium of title) shall pass from the donor to the donee, and remain with the donee, or some person claiming under him.

Does the gift before us, belong to either of those classes? It is by Deed properly executed and attested, but never recorded;

and the Act declares, that no gift of a slave shall pass any estate in such slave, unless by Will or Deed in writing, to be proved by two witnesses at least, or acknowledged and recorded, according to Law. This gift, then, by Deed never recorded, passes no estate in the slave. The Deed at least is wholly inoperative; and, if the gift be valid, it must be on the only other ground known to the Law; possession.

On the day of executing the Deed, the donor delivered to the donee (not then one year old) the slave Jenny; and upon the execution of the Deed, immediately resumed possession, to hold for the donee; and has held the slave ever since. Is this such an actual and abiding possession in the donee, or one claiming under her, as will satisfy the Law? I am obliged to say, that I think not. The very mischief which the law intended to prevent, was "the donor's remaining in possession of the slave as the visible owner," notwithstanding the gift. Is not this case within that mischief? A man, at his own house, makes a mere formal delivery of the slave, for a moment, to an infant of a few months old; then resumes it, and holds it ever after.

But, it is said, he resumes and holds it for the child; and that his possession is hers. What is the evidence of this?

141 *A witness proves it, and the sealed paper declares it. But, is this the evidence required by the Law, to give notice to the World, that though the possession remains with the donor, its character is changed? No! Such evidence can only be furnished by a Deed, to be proved by two witnesses at least, or acknowledged by the donor, and recorded according to Law.

It was said in the argument, suppose, when a gift of a slave is made to an infant, possession is delivered by the donor, to a third person, (the father, for instance,) to hold for the infant; will not this be a valid gift? I answer, yes, undoubtedly; for, in such case, the reason and policy of the Law are satisfied. The possession of the donor is broke up. He is no longer the visible owner; no longer retains that indicium of title, calculated to deceive the World: the possession passes substantially to the donee, and remains with the father as a trustee for him. The object of this Act being to prevent fraudulent gifts of slaves, and thereby to protect creditors and purchasers, it would seem reasonable to have placed unrecorded Deeds of gift of slaves, on the same ground, on which the Statute of Frauds places those Deeds which it declares fraudulent and void, as to creditors and purchasers; but which it still pronounces valid between the parties. This, however, was matter of Legislative discretion. The Law is not so written; for, it declares that the Deed shall pass no estate in slaves, unless executed and recorded according to Law.

I think the instruction of the Court was right, and that the Judgment must be affirmed.

The other Judges concurred, and the Judgment was affirmed.*

*JUDGES CABELL, and GREEN, absent.

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*Arthur v. Chavis.

February, 1822.

Chancery Practice—Judgment—New Trial—Newly-Discovered Evidence.—After a verdict and Judgment at Law, Equity will not grant a new trial on the ground of newly discovered evidence, unless the applicant has used proper diligence to procure such evidence before the trial at Law, or the case is involved in great doubt and obscurity.

This was an appeal from the Chancery Court of Lynchburg. The case is fully reported in the opinions of the Judges.

Stanard, for the Appellant.

Johnson, for the Appellee.

February 19. JUDGE CARR.

In January, 1821, Milly Chavis exhibited her petition to the County Court of Pittsylvania, praying to be permitted to sue Jas. Arthur for her freedom, and stated the facts of her case. The Court proceeded in the regular way to grant the petition. The case progressed; and after two continuances, came on for trial at the March Term, 1822. Both parties seem to have considered themselves ready, and to have gone willingly to trial; as the record discloses no motion for a continuance. The Jury found a verdict for the Plaintiff, on which the Court rendered Judgment. (The Chancellor states in his opinion, that a motion for a new trial was made to the Law Court, and overruled; but, the Law record attached to the copy of the Chancery record in my possession, shows no such motion. It may, however, have been omitted, as I see that the Declaration itself is left out. It is clear, that there was no motion made, or that it was overruled.) The Defendant at Law then offered to the Chancellor a bill for an Injunction and a new trial, on the allegation of additional evidence discovered since the trial. The Chancellor refused

the Injunction, and that refusal was 143 approved by a Judge *of this Court.

A second bill was offered to the Chancellor, alleging a further discovery of new evidence. It was refused, and the refusal acquiesced in. A third bill was offered, refused by the Chancellor, and granted by a Judge of this Court. The Defendant answered. A vast volume of evidence was taken, and on hearing, the Injunction was dissolved, and the bill dismissed; from which Decree, the appeal is taken.

The ground on which the pauper claimed her freedom, was, that she was the daughter of one Winny Chavis, a free woman; that between forty and fifty years before,

+New Trial—After-Discovered Evidence.—In *Zickfoose v. Kuykendall*, 12 W. Va. 39, it is said: "It is admitted that after-discovered evidence, to afford a proper ground to awarding a new trial, whether the application be made to a common-law court, or to a court of equity, must (1st) have been discovered since the former trial; (2d) be such as reasonable diligence on the part of the party seeking the new trial could not have secured at a former trial; (3d) be material in its object and not merely cumulative, corroborative or collateral; (4th) must be such as ought to produce an opposite result on the merits. *Read's Case*, 22 Gratt. 946; *Adams v. Hubbard*, 26 Gratt. 129; *Slack v. Wood*, 9 Gratt. 43; *Brown v. Speyers*, 20 Gratt. 306; *Gillillau v. Ludington*, 6 W. Va. 128; *Arthur v. Chavis*, 6 Rand. 142."

Equitable Relief—Judgment.—On this subject, see *foot-note* to *Faulkner v. Harwood*, 6 Rand. 125. The principal case is cited on the subject in *Tapp v. Rankin*, 9 Leigh 480; *Slack v. Wood*, 9 Gratt. 43.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 423.

when she was a girl of six or seven years old, living with her mother in Brunswick County, she was stolen from her, carried to Pittsylvania by one Davis, and sold by him to Bennett, who gave her to Arthur, his son-in-law. She is claimed by Arthur as a slave, born in Goochland County, the property of Humphrey Parish, who bequeathed her to his son Moses, who sold her when a girl of three or four years old to Davis, who sold her shortly after to Bennet, who gave her to Arthur. This is the chain of title on each side.

There seems no doubt, that there was a girl name Milly kidnapped from her mother Winny Chavis, and never after recovered by her. It is also pretty strongly proved, that there was a girl named Milly sold by Moses Parish to Davis, and also that Davis sold a girl of that name to Bennet. It was, therefore, a question of identity. As grounds for a new trial, the bill states, that since the trial and the adjournment of the Law Court, the Plaintiff has discovered evidence to prove, that Polly M'Kinney, the principal witness of the Defendant, is unworthy of credit; also to prove the manner in which the Defendant received a scar on her thigh, which at the trial was relied on strongly, as identifying her with the stolen child: that he has also, since the trial, discovered the Will of Humphrey Parish, bequeathing to his son Moses a girl named Milly; the inventory of Hum-

phrey Parish's estate, in which Milly is named; a Bill of Sale from Moses Parish to Davis; and the widow of Moses, who gives evidence to the fact of her husband's owning such a girl, and selling her to Davis. The bill does not give us any information as to the time or manner, how and when all these discoveries were made.

The answer contests every inch of ground; puts the Plaintiff on the proof of his whole case; insists that from the nature of the case and the evidence, much of it must, and all of it might, with ordinary diligence, have been known to him before the trial at Law; and that the allegation of these after-discoveries, ought not to be received by the Court, as no particulars of time, place, or manner, are stated, so as to put it in the power of the Defendant to disprove them.

In ancient times, when the Courts of Law were strict and technical, and narrow in their proceedings, and new trials rarely granted by them, Courts of Equity were in the habit of exercising jurisdiction over trials at Law, and compelling the successful party to submit to a new trial, or be perpetually enjoined from proceeding on his verdict. But, even then, they never interfered, unless a clear case of fraud or injustice were made out, or upon newly discovered evidence, which could not, with due diligence, have been used at the trial. As the Law Courts have become more liberal in granting new trials, Equity has, very properly, receded from the jurisdiction. I will not quote cases on this subject. The English Books are full of them; and our own Court has often acknowledged their correctness. There is one Authority to which I will refer; it is the case of Bate-

man v. Willoe, 1 Sch. & Lefr. 201. Lord Redesdale, after laying it down as settled Law, that the inattention of parties in a Court of Law, cannot be made a ground for the interference of a Court of Equity, and that unless where a verdict has been obtained by fraud, or a party has possessed himself improperly of something, by means

of which he has an unconscientious advantage at Law, Equity does not interfere, adds, "But, without circumstances of that kind, I do not know that Equity ever does interfere to grant a new trial of a matter, which has already been discussed in a Court of Law, a matter capable of being discussed there, and over which the Court of Law had full jurisdiction. A bill for a new trial at Law, is watched by Equity with extreme jealousy. It must see that injustice has been done, not merely through the inattention of the parties, but some such reasons as those I have mentioned, must exist." Let us apply these principles to the case before us.

The first defect in the Plaintiff's case which strikes me, is, that he states not one fact or circumstance, as to the means by which, or the manner in which, he came to the knowledge of the new evidence; nor does this vast mass of testimony contain one atom of evidence on this subject. The cases all state, that, "it must appear to the Court;" that "the Court must see," &c. that the evidence has been discovered since the trial, and could not have been produced at it. Appear, how? How must the Court see it? By the bare statement of the Plaintiff, unsupported by proof, though it is called for in the answer? Surely no! It must appear by evidence. The Court must see it by the proofs. If you hold the Plaintiff to state in his bill, how and when he came at the new evidence, and to support his statement by proof, you enable the Defendant to meet this proof; you give him something tangible, something that he can grapple with. But, leave it on the general statement, that the evidence has been discovered since the trial, without specification, without proof; and you not only relieve the Plaintiff from the burthen of proof, but put him beyond the power of disproof. Where is the hardship of requiring him to state and to prove the means by which he acquired the new evidence? They must be within his knowledge, and susceptible of proof. Upon this general ground, then, I think the Plaintiff's case wholly defective. *But, I will go further, and show (I think) from the nature of the new evidence, either that it must, or that with ordinary diligence that it might, have been known before the trial.

The first ground for a new trial, is, to enable the Plaintiff to impeach the credit of Polly M'Kinney. In the first place, it is a settled rule, that a new trial will not be granted to enable a party to impeach the credit of a witness, examined at a former trial. *Huish v. Sheldon*, Sayer 27; *Ford v. Tilly*, 2 Salk. 653; *Bunn v. Hoyt*, 3 Johns. 256; *Duryee v. Deulson*, 5 Johns. 249. But, passing that by, let us see whether, with due diligence, all the evidence since adduced to impeach the credit

of Polly M'Kinney, might not have been had at the trial. Although the affidavits accompanying the petition of the pauper do not appear, it is most probable, that Polly M'Kinney's was one of them; because the petition, referring to the evidence, relies on the scar, as one of the grounds to establish the pauper's freedom; and Polly M'Kinney is the only witness who proves that the stolen child had such a scar. But, if this were not so, Polly M'Kinney's deposition was taken in March, 1821, only two months after the suit brought, and twelve months before the trial. From the first it was known, that Polly M'Kinney was an important witness. She had always lived in Brunswick, had moved in a low and narrow sphere; her first deposition was taken in Brunswick, in the presence of an Agent of Arthur. All the evidence to impeach her (and this evidence could only consist of general reputation as to her credibility, not particular facts) must of course be looked for in her neighbourhood; and it cannot be conceived, that, with tolerable diligence, the Plaintiff could not have examined every witness, who knew any thing about her, before the trial. The answer, indeed, states that her character was assailed by evidence before the Jury; and this allegation is responsive to the bill.

147 *The next allegation is, that he has, since the trial, discovered evidence of the cause of the scar, shewing that it was received while Milly was in the service of Bennett, and after she was a woman. The principal witness as to this, is Sally Wallace. She lived within a mile or so of the Plaintiff. Two or three others of the County are also examined, who speak of seeing her lame, of seeing blood, of hearing it said that Milly had fallen into a potatoe hole and hurt her thigh; and Bennett, the father-in-law of Arthur, and former owner of Milly, is one of them. Now, is it conceivable, that this evidence should not have been known (if true) before the trial? What was there in the trial itself, to open these new floods of light upon the Plaintiff? It was known from the first, that the scar being on the kidnapped child, and on Milly, was relied on as a strong proof of identity. It must have been, (and the answer says, was) the subject of much conversation in the neighbourhood; among the parties especially, it must have been frequently talked of. How can we imagine, that Arthur and his father-in-law did not canvass the matter, and that the latter did not tell of the fall and wound which Milly had received while in his service. With me the conclusion is strong, either that Bennett told Arthur of this before the trial, or that it is all a fabrication, and made up since; and this, by the way, is one of the strong objections to granting these new trials for after discovered evidence, especially when that evidence does not consist of written documents, but of vive voce testimony. On a trial at Law, all the strength and the weakness of the case is disclosed. To suffer the loser, after this, to hunt up evidence, and get a new trial, on the bare statement that he did not know of it before, would be to hold out a strong

and dangerous temptation to subornation of perjury; and the mischief of such a practice could not be more strongly exemplified than in the present case. The party went freely to trial. As soon as the Judgment went against him, he, by various agents, scours the Country, and the adjoining States of Tennessee *and Kentucky; and a first, a second, and a third bill is filed for a new trial; each successive attempt fortified by additional evidence, as the stock on hand was found insufficient; and the result is such as might have been expected. For, no one can look into this record, without sickening at the mass of pollution which it presents. With respect now to the documents, which are supposed to show that Milly was a slave, and came from Goochland; could not the Plaintiff, with reasonable diligence, have discovered this evidence before the trial? From the moment the claim to freedom was set up, his mind must have been turned to tracing the title of those under whom he held the pauper. It is acknowledged on the record, that before the trial at Law, the Plaintiff had the depositions of the Parishes of Goochland, stating, that on the division of their father's estate, a small mulatto girl, named Milly, was allotted to their brother Moses, and that he told them he had sold her to one Davis, of Pittsylvania. This proves, that the Plaintiff knew where to look for evidence. Nothing was more natural than for him to look in the Clerk's Office of Goochland for the Will and Inventory of H. Parrish, if he thought them material; though I cannot see that they were, as the facts of which they speak, were equally proved by the Parishes. Are we not bound, also, in reason, to conclude that when the Parishes gave evidence of the possession by their brother of the girl, and his sale of her to Davis, they would also tell the Plaintiff that Moses had removed to Kentucky, and that his widow still lived there. We see that soon after the trial he sent to Kentucky, and took her evidence. There was nothing in the fact of the trial to give him this information; though that fact might quicken his diligence. Several witnesses, too, state, that before the trial, they heard the Plaintiff speak of getting the evidence of Mrs. Parish of Kentucky. I rely, however, much more on the circumstances, to show, that with diligence, her evidence might have been had, than on their testimony; for, their credit is strongly impeached.

149 *The only remaining evidence, on which the new trial is asked, is, the Bill of Sale from Parish to Davis. It is equally clear to me, that this also might have been had at the trial, with proper diligence. It was known from the first, that Bennett got Milly from John Davis. The Bill of Sale from Davis to Bennett (in possession of the Plaintiff) showed that fact. Davis had lived in Pittsylvania. It is well known in that County, that about twenty-one or twenty-two years before, he had removed to East Tennessee, Green County, and settled on Lick Creek, near Jonesborough. This is proved by Kirby. Parker and Walker also prove his removal

to Tennessee. These witnesses are examined by the Plaintiff. Why, then, could not the Plaintiff, as well before as after the trial, have sent to Tennessee? Ought he not, in common prudence, to have made enquiry concerning this link in his chain of title, and must he not naturally have gone to make enquiry, to the neighborhood from which Davis had moved?

I have thus gone through the grounds stated for a new trial. I have shown (I think) that they ought not to be considered, because they are so defectively stated, as to disable the Defendant from meeting and disproving them; but if considered, that they are utterly insufficient to support the motion for a new trial.

I ought, perhaps, to have noticed a fact, which, though not stated in the bill as a cause for a new trial, the Plaintiff or his Agents seem to have been at great pains to prove; that is, that the Plaintiff is a man of very weak mind, incapable of attending to business, and that by interrogation he may be made to say almost any thing. If this be so, how is it that we have before us three long bills, stating, in the person of the Plaintiff, with great minuteness of detail, a variety of complicated facts, and sworn to by him? No man can examine these bills, without coming to one of two conclusions; either that the Plaintiff is not the man this evidence would make him, or that there has been foul play in this business. But, if the Plaintiff was weak,

150 it would *furnish no ground for a new trial. He had sons, we see, who acted for him. He had other agents also. In addition to this, it seems, that the children of Milly were owned by several persons; and every owner would of course feel an interest, and take a part in the matter. Surely, all this array must be considered fully equal to bringing out all the Plaintiff's evidence at the trial, and more than a match for the pauper, a woman of colour, who had been held from her childhood in slavery; and who had to take the burthen of proof, and establish her claim to freedom. Let no one take alarm at this remark, as if I were placing the question of freedom on different grounds from any question of property. I mean no such thing. But surely, it ought to stand on equal ground. When the imbecility of the master, who claims property, is urged as a cause of new trial, the imbecility of the pauper, who is claiming freedom, should also be considered, especially as every application for a new trial is to the sound discretion of the Court.

The case of *Swinerton v. The Marquis of Stafford*, 3 Taunt. 91. was cited in the argument, to show that a Court will sometimes grant a new trial, although conflicting evidence has been submitted to the Jury, and they do not think the verdict wrong. It must surely be admitted, that this is in direct opposition to the general rule. That rule, as drawn from the latest cases, especially the case of *Cairstairs v. Steene*, 4 Mau. & Selw. 192, is thus clearly laid down by *Starke on Evidence*, vol. 1, p. 437: "The Courts do not interfere for the purpose of granting new trials, but in order to remedy some manifest

abuse, or to correct some manifest error in Law or fact. Where there is a contrariety of evidence, the Court will not grant a new trial, unless it clearly appear that the Jury have drawn an erroneous conclusion, even although there are circumstances in the case, pregnant with suspicion, and which lead to a contrary conclusion; or, although the verdict be contrary to the opinion

151 and direction of the Judge who *tried the cause;" that is, his opinion upon the weight of evidence. This is unquestionably the general rule. If, then, the case in *Taunton* be good Law, it must be because the special circumstances of that case make it an exception; and this is the ground, on which the Court who decided it, seem careful to place it; and every case which leans on that as Authority, must bring itself clearly within it; as these exceptions to general rules are taken strictly, particularly where latitude would trench seriously upon the province of a Jury. The case from *Taunton* was an issue under an Inclosure Act, to try whether the Defendant, who was seised in fee of a tenement in the occupation of a Tenant named Knight, had a right of common in respect of that tenement, over *Mothersall Common*, the waste directed to be inclosed. It was a question, which carries the parties back into remote antiquity. The trial was in 1810. An old grant to the priority of *Stone*, brought from the *Cottonian M. S.* was offered in evidence; also another grant made to the same priority in 1342. There was much conflicting parol testimony also, on both sides, as to the question whether the Tenants had been accustomed to turn out their cattle on the locus in quo, or on one of the two adjoining commons; the three commons being of great extent, running for miles, all uninclosed, and cattle passing from one to another. There were only seven months from the decision of the commissioners, to the trial of the issue. Under these circumstances, the Court decided, that where there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the Jury, and the Court does not think their verdict wrong; yet, if the inheritance is to be bound forever by the verdict, the Court will grant a new trial, on payment of costs. This is the abstract of the Reporter. Now, I ask, is our case within this exception to the general rule? That was a question involving real property;

152 this, personal only. From their very nature, *such questions about the realty, go back far into the past; and here, the Chief Justice says, "The point that weighs most in this case, on the part of the application for a new trial, is, that it is a question involved in great doubt, great obscurity, and of great value; and the verdict in this case binds the right forever." In our case, a woman upwards of fifty years old, had in the first place, to show her right to freedom. Then the Plaintiff had only to show, that *Bennett* had bought her of *Davis*, who had bought her of *Moses Parish*, whose father had held her as a slave, from her birth; and I have

shown, that before the trial of the cause at Law, the Plaintiff was in possession of the clue, which led to the whole claim of title, and might, with ordinary diligence, have produced it. Again; in the case cited, the whole time given to investigate a most intricate and obscure land title, depending upon old customs, old grants, and parol evidence, was seven months; here, there were fourteen months from January to the March twelve months after. The value involved here, can, strictly speaking, be taken to be only the remnant of this old woman's life. We hear, indeed, that she has children; but, this is not assigned by the bill as a ground of new trial. We see from the record, that suits for the freedom of some of those children were depending, when this cause was tried. They are probably all decided before this; but, we know not how. The bill asks for no new trial in those cases. In all the material features of the two cases, therefore, there is so radical a difference, that the one cannot govern the other; and a further reason against granting a new trial for this cause, is, that the bill does not place it on this ground at all, but exclusively on the ground of new evidence.

The Counsel for the Appellant also cited in favor of a new trial, the case of Jackson on the demise of Walcot v. Crosby, 12 Johns. 354. That was a case, in which both parties claimed under a soldier, to whom the patent had issued for the land in contest. The Court considered the new evidence as important: that the party
153 had not been guilty of gross neglect: that this was a peculiar class of cases, not governed by the rules adopted in ordinary cases, and upon the whole, thought it best to grant a new trial. They cite no authority in support of their decision, while they acknowledge that it is a departure from the general course. I have shown (I think) that in this case, there is nothing peculiar, nothing to withdraw it from the general rule; that with ordinary diligence, all the evidence might have been procured before the trial; and that to grant the new trial, would be to encourage negligence, and set a precedent most mischievous in its consequences.

Although I have examined carefully, and taken a note of every material deposition in this case, and could easily give my view as to the weight of evidence on the question of freedom, I shall not do so, because I do not think that question before us. It was exclusively for the Jury. If there was any evidence, of which due diligence would have informed the Plaintiff, he must be taken to have known it. If he was not prepared to bring his case fully before the Jury, he should have moved for a continuance, and showed that the evidence was material, and that he had used due means to obtain it. To have refused him a continuance in such a case, would have been error. But here, there was no motion for a continuance. The parties went freely to trial. The Plaintiff, in his bill, does not complain of fraud or unfairness in the trial. He puts his case simply on the ground of new evidence. If he has shown that he has discovered this evidence since the

trial, and that he could not, with due diligence, have discovered it before, he should have a new trial. But, if he has utterly failed, (as I think he has,) he ought not to have a new trial, however strongly the evidence now produced may bear upon the question of freedom.

I am for affirming the Decree.

154 *JUDGE COALTER.

The Writ in the action at Law was issued on the 20th of February, 1821, returnable to the third Monday in March. Neither the Declaration, nor the proceedings in the Office, are copied into the record, nor the affidavits, on which the petition to be permitted to sue, was founded. In August, 1821, the suit was continued at the Defendant's costs, and in November, at the Plaintiff's. The trial took place on the 20th of March, 1822. The body of the deposition of Polly M'Kinney, the principal witness for the Plaintiff, was taken on the 8th of March, 1821, before the return day of the Writ; and a supplement to it, on the 20th of June, 1821, the day on which the issue was made up. The depositions of Humphrey Parish, Booker Parish and Aaron Parish, filed also in this same cause, were taken on the 12th of March, 1821, and are said to be taken in a suit of Milly Chavis against William Bennett. They are said to be taken in pursuance of a commission and notice annexed. So that, probably, she had first sued Bennett, her former master. How this matter is, it is not material to enquire into. Those depositions, either for this reason, or because they were hearsay principally, were not read. These matters are merely stated to show, that the suit was prosecuted with great celerity, and little delay on either side, so as to give but little time to search for distant witnesses.

The first witness proves, that in 1772, on a division of their father's estate, Milly, a mulatto girl, then aged about two years old, fell to Moses Parish their brother, and that he told him in 1773, or 1774, that he had sold her to John Davis of Pittsylvania. The others prove similar declarations by their brother Moses, and that the girl in 1774, was about three or four years old. It is in proof, that the Appellant is an aged and infirm man, entirely incapable of attending to the defence of such a suit. He states in his bill, that he did not know
155 of the existence of the widow of

*Moses Parish, who, it appears, lived in Kentucky at the time of the trial; and that he was also ignorant of the existence of the Bill of Sale made by Moses Parish to Davis, which has since been found amongst the old papers of Davis in Tennessee, he being long since dead. He proves by the deposition of Sally Davis, taken in December, 1823, that in January preceding, Samuel Barger, who appears to be the agent of the Appellant, made enquiries concerning a Bill of Sale, supposed to have been made by Moses Parish to John Davis, sen'r for a negro girl named Milly; and that her husband Jesse Davis, now deceased, told him there was a number of old papers of his father's then in a desk in the house; and on examination, they found the Bill of Sale, of an ancient date, and of a very ancient appearance, and

which Barger took away with him: that John Davis, sen'r removed to that place about nineteen years before, and died about two years after his removal. Elizabeth Davis, daughter of Jesse Davis, and Field Davis, a son, prove also the search for, and finding, the Bill of Sale. This Bill of Sale is exhibited. He also proves by the deposition of Molly Parish, the widow of Moses Parish, that her husband sold a bright mulatto girl to John Davis, about four years of age at the time, about forty-nine years ago last April, (her deposition was taken in December, 1823:) that she has heard of her since, understood that Davis has sold her, and that she had had seven children, but never saw her since. The other evidence in the record proves, that Davis immediately sold her to Bennett.

The only evidence of identification of the Plaintiff at Law, said to have been stolen, then six or seven years old, was a scar on her thigh, proved by Mrs. M'Kinney. The Appellant, in his bill, states, that at the time of the trial, he did not know of any witness, who could prove the manner in which the Plaintiff obtained the scar on her thigh. He now proves this by one witness positively, who saw the wound when dressed. Her credit, however, 156 *is assailed. But, several other witnesses saw the Appellant when lame with a wound said to have been received in her thigh by a fall into a potatoe hole.

Suppose it had been competent for the Court of Law to have heard a motion for a new trial on these grounds, after the discovery of this new evidence; ought it to have been granted? If only the poor remnant of this old woman's life, had been in controversy, probably it would not, except as a protection to the Parish; though, if she was really of any value worth contending for, it might be another matter. But, when we consider the effect that this verdict may have on her progeny, whether in the hands of the Appellant or others, there can be no question that the case is one of sufficient value and magnitude to have demanded the attention of the Court. The Appellant's age; the short time between the institution and trial of the suit; the foreign residence of the witnesses; the existence of the Bill of Sale from Parish to Davis, not even known to those in possession of it until searched for; are all facts corroborative of the statement in the bill, that he did not know of their existence at the trial. The failure to state the time and manner in which the Bill of Sale was discovered and came to his knowledge, when both are proved, ought not to deprive the Appellant, it seems to me, of the benefit of his allegation. So, too, as to the discovery of the witness Mrs. Parish. It is no where proved, that her existence was known to any one, from whom he could have gotten the information. He says he made enquiries, but could not learn.

What effect this evidence ought to have on another trial, or how far the witness who proves the wound on the thigh, corroborated by the other evidence, would be credited by the Jury on such trial, it would not be for a Court, in granting a new trial,

to say. The evidence, both written and parol, is certainly pertinent to the issue, and might have an important effect on the trial; and I think, if it could be now exhibited to the Court of Law, that Court, 157 considering *the present liberality in granting new trials in such cases, ought to grant it. But, the party is deprived of that remedy by the adjournment of the Court, before the discovery of the new evidence; and by this means, will be deprived of what he would otherwise be entitled to, unless a Court of Equity can relieve.

Under these circumstances, I think it is the province and duty of that Court to interfere, and direct an issue to be made up in the usual way, in order to re-try before the Jury and a Court of Law, the right of the Appellee to her freedom.

The PRESIDENT.

It does not appear that any negligence is imputable to the Appellant; on the contrary, his inability, from age and infirmity to attend to the defence of the suit, which is proved by the testimony in the record, would, in a less difficult case, have been some excuse for his failing to procure his testimony, in time for the trial at Law. Nor, is any fault imputable to the Appellee. Her delay in making her claim to freedom, may be attributed to her condition as a slave. But this, if she is entitled to freedom, is not imputable to the Appellant. She claims her freedom on facts, which, if true, occurred more than forty years ago; the evidence of which was to be met, by testimony to be found in another State, and a remote County; and such is the obscurity of the cases that it is not surprising, that it was not known to the Appellant, within the fifteen months that elapsed, between the Writ and the verdict. It may be hard, that the Appellee should lose the benefit of a verdict in her favor; but, it would be unjust, that the Appellant should lose his property, without having the opportunity to prove that it is his, by the evidence which is now in the record. If it had been discovered after the verdict, and before the end of the Term in which it was found, I

158 think there can be no doubt, that on motion, *the Appellant would have been entitled to a new trial. The obscurity of the case, and the effect of the verdict on the interests of others not parties to it, would, upon the facts in the record, have been a proper ground for a new trial. In the case of Swinnerton v. The Marquis of Stafford, 3 Taunt. 91, though conflicting evidence had been left to the Jury, and the Court did not think the verdict wrong, yet, as the case was involved in great doubt and obscurity, and of great value, a new trial was awarded. In the case before us, the main point turned on the identity of person; as to which, after the lapse of more than forty years, nothing can be more obscure and doubtful. The verdict, also, will materially affect property of great value to the holders of it. In the case of Jackson v. Crosby, 12 Johns. 354, the identity of a soldier or patentee of land, was the turning point in controversy; and though that was a recent case, compared with the one under con-

sideration, as the Defendants, as was said by the Court, were not chargeable with gross negligence, in not having discovered the evidence before the trial, and the identity of the soldier, entitled to the land in question, involved in much doubt and difficulty, and about which there is usually much contrariety of evidence, granted a new trial; remarking, at the same time, that these were peculiar cases, as they certainly are, and not to be governed by the rules adopted in ordinary cases. I do not cite this case as having any authority in this Court; but, as the decision of able Judges on a question quite analogous to the one before us, and in which I entirely concur.

I think that the Decree is erroneous, and ought to be reversed.

Decree reversed.*

159 *Talbert, &c. v. Jenny, &c.

February, 1828.

Chancery Practice—Suit for Freedom—When Allowed after Suit at Law.—Under what circumstances, a pauper, who has brought a suit at Law for his freedom, and failed, may afterwards go into Equity for the same object and obtain relief.

This was an appeal from the Chancery Court of Wythe, where Jenny, and her three children, obtained leave to sue in forma pauperum, for their freedom. The Chancellor decreed in favor of the Plaintiffs, and the Defendants appealed. The whole case is given in the following opinions.

Johnson, for the Appellants.

Leigh, for the Appellees.

February 27. JUDGE CARR.

The facts of this case seem to be, that B. Talbert, when he purchased the woman Jenny, made her a promise that when she should have a child for every one of his, (he then having five) he would set her free. This promise, though no way binding, the old people, (and especially Mrs. Talbert,) seem to have been anxious to comply with. In 1792, B. Talbert made a Deed to his youngest son, Charles, then, and always after, living with him, conveying to him Jenny and her son Moses. This Deed was confessedly voluntary, made, as some of the witnesses say, to cover the property from an apprehended claim, afterwards compromised. No change of possession followed the Deed. It seems, that either at the time of this Deed, or soon after, some division of the other slaves of the father was made among the other children. Things remained in this way, the father still in possession of the property, till 1803; when it was agreed among B. Talbert and his

children, that the former division should be done away, and a new division take place. For this purpose, the children were called to their father's house, and all attended but one (Thomas.) Jenny had now six children; and it was agreed, that the five children should have one each; and it was distinctly understood, that the former division was to be done away, and the Deeds (as the witness expresses it) to be forgotten and laid aside; and Jenny and her youngest son were to be set free. That the Appellant

Charles, assented to this arrangement, is fully proved; for, several witnesses state, that while the division was pending, one of the sons-in-law finding Jenny not included in the scheme, asked "what is to be done with big Jenny?" To which the Appellant answered, "Never mind big Jenny. Our mother" (who was then dead) "wished her to be free, and she shall be free." Accordingly, B. Talbert, by Deed, emancipated Jenny, the day after the division; and some time after, he, by Deed, emancipated her son Lorenzo. Both these Deeds were recorded. Jenny had two other children afterwards. From the time of her emancipation in 1803, till 1813, Jenny acted in all respects as a free person, and kept her three youngest children with her. B. Talbert died in 1809. The Appellant never objected to the Deeds of emancipation; nor, that we hear of, ever made any claim to Jenny or her children, during the life of his father; nor after his death, till the year 1813, when he took possession of the three children, leaving Jenny at large. She sued at Law for the freedom of her children, and a verdict was found for the Defendant.

Two objections were taken for the Appellant, on the argument. 1. That Equity has no jurisdiction of the cause. 2. That the Judgment at Law is a bar, so far as it relates to the children.

As to the first. Though not fond of extending Equity jurisdiction, I think this is a case which it may fairly reach; at least, concurrently with a Law Court. See *Dempsey v. Lawrence*, Gilm. 333.

161 *The more serious question is, can it take cognizance after a trial at Law? And in common cases, I should be clear that it could not, if the trial at Law was fair. But there is something peculiar in this case. I do not mean that this is a claim for freedom. That, we all agree, must stand on precisely the same ground with any question of property. Nor do I mean, that this is the case of a mother, who had herself been a slave, and was suing as next friend for infants who were held in slavery. This circumstance would prepare us to expect, that the cause of the paupers would not probably be presented to the Jury in its best shape; but that would furnish, of itself, no ground for a new trial of the question. The peculiar feature is this: The arrangement by which the five children of Jenny were divided among the children of Talbert, the former conveyance done away, and Jenny and her last child freed, was a family matter entirely. The children called together, and the business settled without writing, the only persons who could give evidence of this settlement, were the children; and they were strongly interested in keeping fair weather with their brother Charles. For, if the Deed of 1792, under which he succeeded, was good to hold the three youngest children of Jenny, it was equally so to hold the four born between 1792, and 1803, and divided among the brothers and sisters of the Appellant. They might well, therefore, be tempted to withhold their evidence, upon a compact expressed or understood, that if Charles might be per-

*JUDGES GREEN and CABELL, absent.

*The principal case is cited in *Sawney v. Carter*, 6 Rand. 174.

mitted to recover the three youngest children, he would suffer them to retain their portions; and so sensible does the Appellant seem of this, that he told a witness, he had his brothers and sisters feed; for, if they said any thing against him, he would take away their negroes. And in the last examinations we find, that one of the principal witnesses, Mrs. Elizabeth Scott, said, that as Charles had offended her, she would now let out the whole truth; from which it would seem, that it had not before been let out. These considerations satisfy me, that *the case was not fully before the Jury, nor the evidence such as it now appears; and that this proceeded, not from negligence in the paupers, but from causes beyond their control.

The case of Isaac v. Johnson, 5 Munf. 95, is much stronger than this. There, the pauper sued for his freedom at Common Law, had a verdict against him, and moved for a new trial, which was overruled, and Judgment entered. He was then sold. Afterwards, he petitioned, and had leave to institute another suit in the Corporation of Lynchburg; which was removed to the Superior Court of Law. Pending this suit, being advised by Counsel that the former Judgment might be pleaded in bar against him, he filed a bill in the Superior Court of Chancery in Richmond, setting forth sundry grounds of relief, and praying that the former Judgment might be set aside, &c. The Injunction was granted, and afterwards, on hearing of the bill, answer and exhibits, dismissed, with costs; and a non-suit was suffered in the action at Law, and afterwards another suit in Chancery brought by Isaac in the County Court of Campbell. In this suit a final Decree was pronounced by the County Court in Isaac's favor; which, on appeal, was reversed by the Court of Chancery, and the bill dismissed; and on appeal to this Court, the Chancellor's Decree was reversed, and that of the County Court affirmed. This was going vastly beyond what is asked in this case, and further, I confess, that I could have gone. I do not think, then, that under these peculiar circumstances, the Judgment at Law is a bar; and that being removed, there is no difficulty; for, on the merits, the paupers are clearly entitled to their freedom. The first gift, and the Deed, (as the Chancellor says,) were clearly, by the mutual consent of the parties, destroyed by the second division, which might well be done, without Deed; this being personal property, and possession following the new arrangement. That the Appellant assented to this new division, was proved both by positive
163 *evidence, and by his long acquiescence in the freedom of Jenny and her children for ten years. The Decree should be affirmed.

JUDGE GREEN.

The Appellant claims under a voluntary Deed, by which his father conveyed to him Jenny and one of her children in 1792. The slaves remained in the possession of the father until 1803, when Jenny had, in all, six children, one of whom was very young; and Basil Talbert had five children.

It appears, that when Basil Talbert purchased Jenny, he promised her that whenever she had a child for each of his children, she should be emancipated, and Mrs. Talbert was anxious that this promise should be redeemed. After the death of Mrs. Talbert, it was agreed, that the Appellant and Mrs. Scott, (one of the children of B. Talbert, to whom a conveyance had been made in 1792, of one of Jenny's children) should give up their claims under those Deeds; and that the five oldest children of Jenny should be assigned, one to each of B. Talbert's children; and that Jenny should be set free, with her last child, which was accordingly done; and from this time (1803) until 1809, when B. Talbert died, and until 1813, Jenny lived as a free woman in all respects, and had two other children. In 1813, the Appellant seized the three last children of Jenny as slaves; and they being infants, Jenny sued for their freedom, but not for her own, the Appellant not having seized her. Upon a trial, the Jury found a verdict for the Defendant, and Judgment was accordingly given against the Plaintiffs. This Judgment is relied on as a bar to the Plaintiffs' claim in this suit, or at least, as to the children of Jenny, and is, I think, the only impediment to their right to freedom.

The transaction, at the last division of the negroes, was, in effect, a restoration of the legal title to Jenny and her children, to B. Talbert. Such a title may pass,
164 without *Deed, when the possession accompanies the transfer of the title, as it did in this case; B. Talbert never having parted with the possession. The Plaintiffs were, therefore, entitled to recover at Law; and in an ordinary case, a Plaintiff so entitled could have no remedy in Equity, after a Judgment against him at Law. But, I do not think this Judgment ought to bar the remedy of these parties in Equity, considering their situation, infants held in slavery; and that the evidence which they now exhibit, was not then in their power; some of the witnesses, as they say, having determined to let out the truth, only since the trial at Law.

All the children of B. Talbert had a motive for not voluntarily communicating the true character of the transaction at the last division; for they apprehended that the Appellant might, as he threatened he would, claim against them the negroes, which they held under that division, by force of the original Deed to him, as he claimed Jenny and her children, if they let out the truth.

I am for affirming the Decree.

The PRESIDENT.

The Deed of gift from Basil Talbert to Charles Talbert, having been regularly recorded, and being of prior date to the two Deeds of emancipation, under which the Appellees claim their freedom, that Deed was an obstacle in the way of their title at Law, which could only be removed, upon the evidence in the record, by a Court of Equity. By that evidence. I think it sufficiently appears, that the Deed of gift was not intended to be effectual between the parties to it; but, to cover the property contained in it, from the consequences of a suit then pending against the donor, and

for his benefit only. If this was at all doubtful on the direct evidence to this point in the record, it is rendered manifest by the subsequent conduct of the parties. The full exercise of ownership of the property by the donor, in continuing to hold the possession of it, *and in two instances making a division of it among his children, with the assent of the donee, though ineffectual, prove his entire and exclusive right to it. The Chancellor, I think, was therefore correct in decreeing the Deed of gift to be cancelled, and in liberating the Appellees.

Decree affirmed.*

Culpeper Agricultural and Manufacturing Society v. Digges, &c.

Pleading and Practice—Pleading without Bail—Joinder of Issue—Effect.—Where a Defendant is permitted to appear and plead without giving special bail, and the Plaintiff joins issue, without making any objection, such objections are waived by the Plaintiff, and the appearance bail is discharged.

Corporations—Suit by—Corporate Name.—A bond executed to the "President and Managers of the Culpeper Agricultural and Manufacturing Society," may be sued upon by the "Culpeper Agricultural and Manufacturing Society," that being the legal style of the Corporation.

Same—Same—Same.—Corporations must sue in their true names; but contracts may be made by or with them, by a mistaken name if the mistake be only in syllabis et verbis, and not in sensu et reipsa.

Appeal from the Superior Court of Law for Fauquier County.

The Culpeper Agricultural & Manufacturing Society brought an action of debt against William H. Digges and Whiting Digges, who were the obligors in a note under seal, executed to the "President and Managers of the Culpeper Agricultural and Manufacturing Society." The Declaration avers that the said note was executed to the Plaintiffs, by the name and style of "The President and Managers of," &c.

The Writ was executed and appearance bail given. The Defendants appeared, 166 without having given special *bail, and pleaded, that the Plaintiffs were an unchartered Bank, and therefore an illegal company; to which plea the plaintiffs replied generally, and issue was joined. The Defendants afterwards demurred, and the Plaintiffs joined in demurrer.

On the demurrer, the Court gave judgment for the Defendants, and the Plaintiffs appealed.

Harrison, for the Appellants, objected, first, to the Defendants' being permitted to

appear and plead, without having given special bail. Secondly, that the error in the style of the Corporation in the bond, is not such an one as to debar the Plaintiffs from suing in their proper corporate name. For this, he cited 10 Co. Rep. 125; 11 Co. Rep. 19, 20, 21; 2 Bac. Abr. 5, tit. "Corporation;" College of Physicians v. Dr. Salmon, Ld. Raym. 680; Sidney College v. —, 1 Wils. 184; Dutch East India Company v. Henriquez, Ld. Raym. 612; Mayor, &c. v. Blamire, 8 East, 492.

Leigh, for the Appellees, contended, that the variance here was material. 2 Com. Dig. 298, tit. "Capacity," B. 5. The addition of a name is material. Croydon Hospital v. Farley, 6 Taunt. Rep. 467. As to the Defendants' being allowed to plead without bail, the objection was waived by the plea and issue, and the bail, both common and special, were discharged. If the Plaintiff objected to this proceeding, he ought to have objected at the time; and if his objection was overruled, he ought to have excepted.

March 4. JUDGE GREEN delivered his opinion.

The objection now taken by the Appellants, that the Appellees were improperly permitted to appear, plead and demur, without giving special bail, was waived by the Appellants' taking issue on the plea, and joining in the demurrer, 167 *without making this objection in terms; and the appearance bail was thereby discharged, as was decided in Grays v. Hines, 4 Munf. 437. The appearance of the Defendants, and pleading without giving special bail, superceded the issue joined upon the plea put in by the bail for their appearance, and rendered it null. In strictness, perhaps, it ought to have been set aside; but, the omission to do so, is no error to the injury of the Appellants.

The Declaration alleges, that the Plaintiffs were incorporated by the name of "The Culpeper Agricultural and Manufacturing Society;" and avers that the Defendants executed their obligation to them, by the name of "The President and Managers of the Culpeper Agricultural and Manufacturing Society;" and upon a demurrer to this Declaration, the question is, whether such an averment can be made, against the terms of the obligation as described in the Declaration? If it can, then, instead of demurring, the Defendants should have pleaded, that certain persons by name, were: "The President and Managers of the Society," and that the bond was made and delivered to those persons individually, and traversed this averment in the Declaration. For, by demurring, they admit the averment to be true, if it is competent to the Plaintiffs to make it. This averment might, I think, be well made. Although a Corporation cannot sue but in its true name, contracts may be made by and with it, by a mistaken name, if the mistake be only in syllabis et verbis, and not in sensu et reipsa, as is said by the Court in the case of The Mayor and Burgesses of Lynn Regis, 10 Co. 125; and such a mistake may be averred in pleading, or shown in evidence, upon the general issue. Ibid. and Gilb. Hist. C. B. 179, Cap. 17, cited 6 Vin.

*JUDGES CABELL and COALTER, absent.

†Corporations—Suits by.—In First National Bank v. Huntington Distilling Co., 41 W. Va. 534, 23 S. E. Rep. 794, it is said: "It is true that corporations are mere legal creatures, and must sue and be sued in their true names. Porter v. Nekervis (1826), 4 Rand. 359; Society v. Digges (1828), 6 Rand. 165. Yet if some words are added to or omitted in the true name of a corporation, this is not a fatal variance. If there be enough to distinguish the corporation from all others, and to show that the corporation suing or being sued was intended. 6 Rand. 165, 167. It is enough if it be *idem re et sensu*. It need not be *idem syllabis seu verbis*. Mayor, etc., of Lynne Regis (1613), 10 Coke, 123 a; Dr. Ayray's Case, 11 Coke, 18b. If a corporation be misnamed in a suit against it, it may be pleaded, but only in abatement. 6 Com. Dig. 300; 1 Thomp. Corp. §§ 284, 291."

See further monographic note on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

Abr. 320. If some words are added to or omitted in, the true name of a Corporation, this is not a fatal variance, if there be enough to distinguish the Corporation from all others and to show, that the Corporation claiming, or against which a claim is asserted, was intended; of which many examples are given in the case cited from Coke's Reports.

168 "If, in this case, the bond had been given to 'A. B., President, and C. D., Managers of the Culpeper Agricultural and Manufacturing Bank Society,' or to the 'President and Managers of the Culpeper Agricultural and Manufacturing Bank,' I should have thought that it could not have been averred or shown by proofs, that it was in truth given to the 'Culpeper Agricultural and Manufacturing Society;' for, this would be an opposition to the legal import of the Deed itself. In the first case, the legal effect of the Deed would be, to create an obligation to the individuals named, and the addition of 'President and Managers' would be only a superfluous description of the particular individuals meant, or at most an indication that the obligation was made to them, for the benefit of the Corporation; and in the other, the name of the Corporation in the bond, would be different in sense, from the true name of the Corporation claiming it as made to them. But in this case, the naming of the 'President and Managers, without using their proper names, does not, in any degree, contradict the averment that the bond was made to the Corporation; but, is entirely consistent with it, since it clearly indicates that the bond was given to them and the other Corporators, not in their individual, but in their corporate characters.

I think the Judgment should be reversed, the demurrer overruled, and the cause remanded for a trial of the issue in fact joined between the parties.

The other Judges concurred, and the judgment reversed, &c.

169 *Tomlinson's Administrator v. Mason, &c.
March, 1828.

Debt on Bond—Plea of Fraud—Immaterial Allegation.—In debt on a bond, a plea, that the bond was obtained by fraud, covin, &c. without saying whether the fraud was in the consideration of the bond, or in its execution, is immaterial.

Bond—Suit on—Partial Failure of Consideration.*—Where property is sold, a bond taken, suit brought, and the Defendant pleads that the prop-

*Bond—Suit on—Partial Failure of Consideration.—In *Fisher v. Burdett*, 21 W. Va. 629. it is said: "Before the adoption of said act of 1881, the courts of Virginia held, that the defendant could not vacate a bond at law because he was imposed upon in a settlement of accounts which preceded its execution, or because the bond was founded on a false or fraudulent statement of facts. *Taylor v. King*, 6 Munf. 368, or because the bond had been obtained by fraudulent misrepresentations made by the plaintiff. *Wyche v. Macklin*, 2 Rand. 426, or when the action was on a contract either by deed or by parol the defendant could not at law show, that the consideration had failed in part. *Tomlinson v. Mason*, 6 Rand. 169; *Webster v. Couch*, 6 Rand. 519. 1 Rob. Pr. (old) 227-8; *Christian v. Miller*, 3 Leigh 78." And in *Sterling Organ Co. v. House*, 25 W. Va. 88. it is said: "It has been decided in a number of cases in the court of appeals of Virginia, that prior to the statute of 1881 before quoted, no special plea could be filed by a defendant setting up as an abatement or satisfaction of the plaintiff's demand, that he had violated the obligation on his part

erty was of less value than it was represented to be, such defence, sounding altogether in damages, is bad; and the proper remedy would be an action of deceit.

Appeal from the Superior Court of Greensville County, where an action of debt was brought by the administrator of Tomlinson against Rives and Mason, on a bond executed by the Defendants to the Plaintiff, administrator as aforesaid. The Defendants pleaded several pleas, which, with the subsequent proceedings, are fully set forth in the following opinion. A conditional verdict was rendered, and Judgment given for the Defendants. The Plaintiff appealed.

Attorney General, for the Appellant, contended, that the verdict was insufficient, and destitute of the necessary precision. It submits to the Court a mere abstract principle of Law. It is not universally true, that the representations of an agent, without authority, are binding upon his principal. *Fenn v. Harrison*, 3 Term Rep. 757; 1 Camp. Rep. 258. A crier has less authority than an auctioneer. He is employed by the auctioneer, as a ministerial agent.

Johnson, for the Appellee, said that the bond was no bar to the evidence offered by the pleas; because, the issue being joined, the estoppel is waived. For this, he cited *Taylor v. King*, 6 Munf. 358; *Chew v. Moffatt*, 6 Munf. 120; *Wyche v. Macklin*, 2 Rand. 426. As to the finding being on an abstract point, it must be taken in connection with the pleas, which, taken together, explain the question propounded by the Jury. The case of *M'Michen v. 170 *Amos*, 4 Rand. 132, justifies a verdict of this sort. That principals are liable for their representations of their servants, made in execution of the duty assigned to them, is proved by *Paley on Agency*, 228, 229; *Grammar v. Nixon*, 1 Str. 653; *Crockford v. Winter*, 1 Camp. Rep. 124; *Herne v. Nichols*, 1 Salk. 289; 1 Com. Dig. 317, 312, (new edit.) Ib. 318; *Earl Ardglasse v. Muschamp*, 1 Vern. 239; *Whitehead v. Tuckett*, 15 East, 400.

March 3. JUDGE COALTER delivered the opinion of the Court.

This is an action of debt on a bond taken by the Appellant on the sale of his intestate's estate. There are several pleas; 1. That of payment. 2. That the bond was obtained by fraud, covin and misrepresentation, in this, that it was given for the price of a slave (Judith) exposed to public sale: that she was, at the time of the sale unsound and of no value; and that the plaintiff, at the time of the sale, knew that she was unsound and of no value, but by

imposed on him by the contract, or that the consideration failed, or that fraud and deceit had been practiced by the plaintiff in making the contract sued upon, on which his suit was based: in other words that he could not set up the defense of recoupment by plea. *Taylor v. King*, 6 Munf. 358; *Wyche v. Macklin*, 2 Rand. 426; *Tomlinson's Adm'r v. Mason*, 6 Rand. 169.

Pleading and Practice—Plea Raises No Defense—Effect of Statute of Jeofails.—The Virginia authorities hold that where a plea is so defective, as not to raise a substantial defense to the action, the plea is bad even under the statute of jeofails, and a repleader ought to be awarded by appellate court, though no objection was raised to the plea in the court below, and issue had been joined thereon. *State v. Seabright*, 15 W. Va. 506, citing the principal case as authority.

deceit, &c. fraudulently concealed the same. 3. That the bond was obtained by fraud, covin, and misrepresentation. 4. That it was obtained by fraud, covin, and misrepresentation, by the Plaintiff, and others in collusion with him, falsely and fraudulently representing to the Defendant, that the slave, for whose purchase the bond was executed, was then and there pregnant and healthy, in confidence of which false representation, the writing was given. This plea does not state, that she was not pregnant, and that she was not healthy, further than may be inferred from the allegation, that she was falsely represented to be so; nor does it aver a sale of the slave, either public or private, except so far as may be inferred from the allegation, that the bond was for her purchase; nor does it say, that the representation was made in the sale, but seems rather to confine it to the time of giving the bond.

171 *On issues made up on these pleas, the Jury find for the Defendant, subject, however, to the opinion of the Court on the following question: "whether the representations of a crier at a public sale, in relation to the property, under the hammer, are to be considered, in Law, as the representations of the principal, no authority being given by the principal to the crier to make such representation?"

The first two pleas go to the entire action. The first avers payment of the whole debt. The second avers a fraudulent concealment of unsoundness, which rendered the slave of no value. The third does not state whether the fraud and misrepresentation affected the consideration of the bond, or the manner of its execution; and therefore, presents no point on which an issue could be taken, or judgments rendered. The fourth is the one on which the verdict of the Jury shows that the cause turned. Independent of the above remarks as to this plea, it is not a plea to the whole action. It does not aver that the slave was of no value. She might have been sound, though not pregnant; or she may have been neither and still of considerable value. There is no averment that the Defendant offered to rescind the contract and return her, if that would have altered the case. The facts stated in the plea, giving them their utmost latitude could only entitle the Defendant to compensation for the difference in the value of the slave, if pregnant and sound, and her real value. This, sounding altogether in damages, was the proper subject of an action of deceit, and could not be adjusted on the issues joined in this cause. It was not enough to avoid the bond in toto, so as to produce the great injustice of leaving the Defendant in possession of the Plaintiff's property, without paying for it what it was really worth. In the case of *Chew, ex'or of Wormeley v. Moffatt*, 6 Munf. 120, the plea of fraud went to the whole consideration, and was an answer to the whole action.

This case presents a striking instance of the effects of the extremely loose practice, to say no more of it, which prevails

172 *in our Inferior Courts, continually presenting new and unheard of ques-

tions for the decision of this Court. A general demurrer to the three last pleas would have been decisive of the case. The Statute of Jeofails cannot aid the party in such a case as this. Admitting all he says to be true, the Court cannot give Judgment according to the right of the case. He can have no right to hold the slave, though unsound, without paying her real value. Had the verdict of the Jury been for the Plaintiff, if the Law on the point reserved should be for him, otherwise for the Defendant, this would have shown that there was nothing in the case except what grew out of the fourth plea; and in that case, the Court might have rendered Judgment for the Plaintiff, non obstante veredicto.

Independently, therefore, of the objection, that the verdict presents an abstract question, and the strong views which might be taken on that and various other grounds taken in the argument against the Judgment of the Court below, those taken above preclude the necessity of going into them.

The Judgment of the Superior Court must be reversed, and the third and fourth pleas, and the issues thereon, set aside as immaterial, and a venire de novo awarded, to try the issues on the first and second pleas.

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*Sawney v. Carter.

March, 1828.

Equity Jurisdiction—Enforcement of Promise of Emancipation.—A Court of Equity cannot enforce a promise by a master that he will emancipate his slave, after a certain condition is performed which condition has been complied with. The jurisdiction of Equity only extends to cases where the pauper has a legal right to freedom, but there is some impediment to the assertion of that right in a Court of Law.

This was an appeal from the Chancery Court of Fredericksburg, where Sawney, a coloured man, filed his bill against Robert C. Carter, to recover his freedom. The facts of the case are sufficiently set forth in the following opinion.

Harrison, for the Appellant.

Stanard and Briggs, for the Appellee.

March 8. JUDGE COALTER delivered the opinion of the Court.

The pauper, in this case, claims his freedom on an alleged contract between his master and him, at the time he was purchased at an executor's sale, that on paying his purchase money, he should be free. He alleges that he has paid accordingly; but, that his master would not emancipate him. The proof of the contract is by no means clear; although, if that was proved, and such a contract could be enforced in Equity, there is perhaps proof enough in the record, of his master having received some property, to wit, a waggon and three horses, which the pauper claimed as his own, and the proceeds of his

***Equity Jurisdiction—Enforcement of Contract for Future Emancipation.**—A contract between a master and his slave for the future emancipation of the slave is utterly void and cannot be enforced against the master, although the slave may have fully complied with his part of the agreement. To this effect, the principal case is cited with approval in *Stevenson v. Singleton*, 1 Leigh 73; *Bailey v. Poindexter*, 14 Gratt. 198; *Williamson v. Coalter*, 14 Gratt. 207; *Shue v. Turk*, 15 Gratt. 265, 275.

earnings by waggoning, to send the case to an account.

There is no case in this Court, that I can find, justifying the idea that a Court of Equity can enforce such a contract; but, the reverse has been decided, as will be seen hereafter. There is no doubt that a Court of Equity may entertain a bill, where

the party has been detained in 174 "slavery and has a legal title to his freedom, but there is some impediment to the assertion of that right at Law which would, in any other case, justify the interposition of a Court of Equity; as, if the Will, by which he was emancipated, was fraudulently suppressed, or destroyed; or a Deed, prior to that of emancipation, and which had been abandoned, was fraudulently set up as a bar to the recovery at Law; as was lately decided in the case of Talbert v. Jenny, ante, 159.

In the case of Dempsey v. Lawrence, Gilm. 333, the pauper was not so before the Court, as that the merits could be decided, either by the Court below, or by this Court. The bill was dismissed; and this Court only sent the case back, to be placed in a situation in which it could be tried on the merits. How this Court would have decided, could the merits have been gone into, cannot therefore be known; and consequently, that case can give no rule in this.

The case of John Rose, a pauper, v. Haxall, adm'r of Duncan Rose, junr. was decided in this Court against the pauper. That was a very strong case for the pauper, as I find by my note of it, though I was not present when it was decided. According to these notes, it appears, that this man belonged to the estate of the late Col. Bainster, near Petersburg: that he was the son of Duncan Rose the elder, who, on his death bed, recommended him to the care of his nephew, the intestate of the Appellee. On the sale of Banister's estate, he was purchased by Dr. Wilson for 90l. who sold him to the intestate for the same sum. The intestate then put him apprentice to a carpenter. After his apprenticeship, he worked as a journeyman, and, down to the death of the intestate, worked for himself, and was treated as a free man by his employer, who paid him his earnings. The intestate frequently admitted that he was free, and said that he had paid him his purchase money, and more; and never interfered with him as a slave. His administrator always considered him as free; but finding that he had not been emancipated by Deeds, and not know-

175 ing *but that he would be necessary to pay debts, considered it his duty to take him as a slave. He says he is not hostile to his claim to freedom; but suggests, for the consideration of the Court, whether a contract for freedom can be set up in a Court of Equity, and whether any other mode of emancipation than that prescribed by Law can be sustained.

By the Act of May, 1723, 4 Stat. at Large, 132, it is enacted, that no negro, mulatto, or Indian slave, shall be set free on any pretence whatever, except for some meritorious service to be adjudged and allowed by the Governor and Council, and license therefor

first had and obtained; and if they shall be otherwise set free, it shall be lawful for the Church-wardens, and they are required, to take them up and sell them as slaves, &c. This is re-enacted by the Act of October, 1748, 6 Stat. at Lar. 112.

By the Act of May, 1782, 11 Stat. at Large, 39, reciting, that application had been made to empower persons disposed to emancipate their slaves, to do so, it is enacted, that it shall hereafter be lawful for any person, by his last Will and Testament, or by any other instrument in writing under his or her hand and seal, attested and proved in the County Court by two witnesses, &c. to emancipate his slaves or any of them, &c. This act is brought into the revision of 1794, ch. 103, sec. 36, by the 26th section of which, 1 Rev. Code, 433, it is made unlawful to permit slaves to go at large, and hire themselves out, under penalty of being apprehended and sold; and is also brought into that of 1819, sec. 53, p. 433.

It has also been decided by this Court, that a Deed of emancipation, not recorded in the proper Court, but in some other, gives no title to freedom, until properly recorded. Givens v. Mann, 6 Munf. 191; Lewis v. Fullerton, 1 Rand. 15.

On the whole, the Decree must be affirmed.

176 *Kelly, &c. v. Kelly's Executors.

March, 1828.

Parent and Child.—Conveyance to Child.—Presumption.—Where a father, being indebted to his children, afterwards conveys property to them, which is more than equal to the amount of the debt, this conveyance shall be presumed to be in satisfaction of the debt, if there are no circumstances to prove a contrary intention.

Same.—Same.—Same.—Although the property conveyed, and the debt are not ejusdem generis, the one may be a satisfaction of the other, if the intention of the testator be apparent, that such should be the effect.

This was an appeal from the Fredericksburg Chancery Court, where James W. Kelly and others, filed their bill against William Stone and George Kemper, executors of John Kelly, deceased. The whole subject of controversy is fully explained in the following opinion.

Briggs and Leigh, for the Appellants.

Harrison and Stanard, for the Appellees.

March 8. JUDGE CARR, delivered his opinion.

John Kelly married a lady of the name of Paine, and received by her (it is said) twelve slaves. She died, leaving five children. In 1797, John Kelly, being about to marry a second wife, executed a Deed of gift conveying to his children, in different proportions, all the slaves he had received by their mother, which were to be delivered to them "at lawful age, or marriage." This Deed was duly recorded; and the slaves were, at different periods, delivered to the children. The second marriage took effect, and eight children were the fruit of it. In 1809, one Yates, by Will, bequeathed to the children of Kelly by his first wife \$1000, to be equally divided among them. In 1810, Kelly was appointed guardian of his children as to this legacy, and not long

*See monographic note on "Parent and Child" appended to Armstrong v. Stone, 9 Gratt. 102.

after received the money. On the 31st of March, 1814, J. Kelly and his wife executed five Deeds, conveying to each of his 177 children by his first wife, one hundred acres of land, which it is agreed on all hands were worth more than their shares of the legacy. All these children were then of age, except one. The consideration expressed in the Deeds, is natural love and affection, and one dollar. The Deeds were accepted, recorded, and the children took possession of the land. In 1815, J. Kelly made his Will, in which he gives again to the children by his first wife, the slaves and land before conveyed. He gives the rest of his land and slaves to his wife, for life; and at her death, the land to be divided among his children by the last wife, and slaves, among all his children by both wives. In 1820, J. Kelly died; and in 1822, the children by the first wife filed their bill against their father's executors, to recover their legacy of \$1000, left them by Yates. The Chancellor dismissed their bill, and they appealed to this Court.

The only question in the cause, is, whether this legacy must not be taken as satisfied by the land conveyed to the Plaintiffs in 1814? This, it will be observed, is not a question whether a debt is extinguished by legacy; nor, whether a provision secured to children by settlement, is satisfied by portions given them by the Will of a parent; nor yet, whether a legacy be deemed by an advancement made in the life of the testator; but simply, whether a parent, owing to his children a debt, and making them a Deed for property of greater value than the debt, shall be considered as having given them this property (leaving the debt still unpaid,) or as having discharged the debt by the conveyance of the property.

We will consider this question, first, on the presumption arising from the acts of the parties; secondly, on the evidence.

On the first head, I will cite some cases, which seem to me very strongly in point.

Wood v. Bryant, 2 Atk. 521: The Plaintiff's wife was entitled to the residue of her grandmother's estate under her Will, and likewise was left executrix, and 178 durante *minore etate her father was administrator. At the time of her marriage with the Plaintiff, he was, by agreement, to have 800l. from the father; which, in the settlement, is mentioned to be a portion, and in consideration of natural love and affection. The father being dead, this bill was filed against his representative, for a settlement of the grandmother's estate; and it was insisted, that the 800l. paid by her father on her marriage, was not in satisfaction of this residue, especially as it was expressed to be given for natural love and affection, and as the father, at the time of the marriage, was worth 8,000l. and had but this daughter and a son; and Chidley v. Lee, Prec. in Ch. 228, was cited, where a portion given in this way had been decided to be no satisfaction. There was evidence given of parol declarations made by the Plaintiff and his wife shortly after the marriage, that

the 800l. were intended as a satisfaction of the residue, as well as a portion; and on the other side, declarations of the father, that the residue amounted to 500l. and that he intended to give the Plaintiff 1000l. more; and that six weeks before his death, he told the Plaintiff, "Thou knowest I owe thee a great deal of money, and thou shalt not be wronged of a farthing." Lord Hardwicke says, "The first question is, whether there is a presumptive satisfaction of the legacy to the Plaintiff's wife, under the grandmother's Will, by the 800l. being advanced to her by the father on her marriage. I do not think any rule can be laid down, but the cases must depend upon their particular circumstances. There are very few cases where a father will not be presumed to have paid the debt he owed to a daughter, when, in his life-time, he gives her in marriage a greater sum than he owed her; for, it is very unnatural to suppose, that he would choose to leave himself a debtor to her, and subject to an account. As to the case of Chidley v. Lee, the ground Sir John Trevor went upon was, that the husband knew nothing of the legacy to the wife from a collateral ancestor, and therefore held it was not 179 satisfied by *the portion. But, I must own, that I think that an extreme hard case; and I believe I should have been inclined to have decided it otherwise. If the present case, therefore, rested on the presumption only, I should be of opinion that the 800l. was a satisfaction of the residue, under the grandmother's Will." The parol evidence he considered as making the case still stronger for the defendant, and refused the account (as to the residue) prayed for.

Seed v. Bradford, 1 Ves. sen. 501: B. was indebted to his daughter 104l. being one-fifth of a legacy left her and her four sisters, by their grandfather. Upon the marriage of the Plaintiff with the daughter, B. agreed to give his daughter 400l. On the wedding day, B. brought forward the money, and one witness stated that he said, "There is the money I give my daughter, but that is not all." The marriage took place in 1740. The wife died in 1742; the father in 1746. No demand was made of the legacy during the father's life. The husband, as administrator of his wife, filed this bill to recover the legacy. The case of Wood v. Bryant, (quoted above,) was relied on for the Defendant. Sir John Strange dismissed the bill. He said, the demand should have been made in the life of the father, who was a party to the transaction, and could have given some account of it: that there was no occasion for an express stipulation, that the 400l. were paid in full satisfaction of the legacy, and not out of his own pocket; but, every case must be taken with the circumstances upon which the Court goes, to see whether, from the nature of the transaction and demand, it is not implied that the money thus given in the lump, included what the father gave by bounty, and also, what came to his hands, as belonging to his child. That is the natural transaction; and otherwise, the Court must suppose he meant to give the 400l. out of his own pocket, and suffer

himself still to remain liable to that demand and interest.

The only other case I shall cite, is *Chave v. Farrant*, 18 Ves. 8: B. gave by Will to his grand daughters, Mary, 180 *Sarah and Betty Farrant, 150l.

each. These legacies came to the hands of their father. His daughters all married during his life, and he gave to, or in trust for, each, a marriage portion of 1,000l. No demand of the legacies was made in his life time; but, the three daughters and their husbands filed the bill for their legacies of 150l. with interest. Sir William Grant says, "Upon looking into the settlements, I find nothing from which any inference can be drawn as to the intention of the parties. In *Mrs. Chavis's*, her father covenants to pay 1,000l. for the portions of his daughters. It does not appear, that the husbands knew of the debts. My opinion is, that the father giving the portion, must be taken as meaning to satisfy the debt he owed as executor of the grandfather. That is established, in opposition to *Chidley v. Lee*, by the more recent cases of *Wood v. Bryant*, and *Seed v. Bradford*;" (the two before cited.) He then repeats the words of Lord Hardwicke, in *Wood v. Bryant*.

These cases, it will be observed, clearly establish this point; that in the absence of all explanatory evidence, a father advancing his child, to whom he is at the same time in debt, shall be presumed to do so, with a view to the discharge of the debt, if the sum advanced be sufficient; and that, even though it is a portion given in marriage. The case before us is much stronger than those cited, to raise the presumption of payment; for, the advancement here, was not made on the marriage of the children, nor when there was any other reason for it, than the wish of the father to discharge his debt. It was made by five Deeds, bearing the same date, conveying to each child the same quantity of land, one of them being still an infant, and giving them, exclusive of this, an equal, and some witnesses say, a better portion of his estate, than his younger children.

If it be objected that the legacy was a money debt, and the property conveyed, land, and that therefore, upon the doctrine of *ejusdem generis*, the latter cannot 181 be considered "as a satisfaction of the former; I answer that this conclusion is by no means sound. A careful examination of the cases on his subject will show, that all depends upon intention. This intention you must ascertain in the best manner you can, from all the circumstances attending the act. When a child is entitled to a portion of 500l., or the father has left him 500l. by Will, and afterwards, in his life, advances him 500l.; this sum being the same in amount and the same in kind, these are taken as circumstances tending to show, that the advancement was made in satisfaction of the portion or legacy. On the contrary, if the advancement was land, it is taken as *prima facie* going to show, that it was not intended as a satisfaction of the 500l., they being different things. But yet, these are mere presumptions, liable to be rebutted

and overthrown. For, if it be made to appear, that the father did not intend the 500l. advanced, to go in satisfaction of the portion or legacy, it will be no satisfaction, though *ejusdem generis*; and if we be convinced, that he did mean the land as a satisfaction, it will be so taken, though not *ejusdem generis*. For the cases showing this to be the Law, I refer to *Jones v. Mason, ex'r &c.*, 5 Rand. 577. Now, I have stated the strong facts in this case, which show so clearly the intention of the father to discharge his debt by the conveyance of the land.

But if, leaving the ground of presumption, we come to the evidence, the case is put beyond doubt; for, it is proved, that the father, in the first place, offered to sell to his children, this same land at \$8 per acre; thus clearly proving, that he did not intend to give it. They refused to give that price, but said, that they would take the land for their legacies, and on no other terms; and soon after the Deeds were executed and sent to them, and they received them upon the understanding, as every one must see, and as two or three of the Plaintiffs declared, that they were made to discharge the debts. But, they were a payment and a bounty too; for, they overpaid the legacies double and

182 *treble. In addition to this, the Deeds were made in 1814, and the father lived till 1820, and during all that time we hear not a word from the Plaintiffs about the legacy; no demand. Why? Because they were conscious that they were paid.

I am clear, therefore, on every ground, to affirm the Decree.

The other Judges concurred, and the Decree was affirmed.

Roane's Administrator v. Drummond's Administrators.

March, 1828.

Joint Judgment—Death of One Defendant—Effect.—Where a joint Judgment is obtained against two Defendants, and one dies, an action of debt on the Judgment lies against the representative of the deceased Defendant; the Law respecting partitions, joint rights and obligations. 1 Rev. Code, 369, being applicable to joint Judgments.

Special Demurrer.—After issue joined on any plea, it is too late to file a special demurrer.

Demurrer—Effect of.—Where pleadings terminate in a demurrer on either side, any error in the previous pleadings, on either side, may be taken advantage of.

Judgment—Debt on—Declaration—Wrong Sum Demanded—Statute of Jeoffails.—In an action of debt on a Judgment for a certain sum to be discharged by a lesser, if the Declaration demands a wrong sum, and no special demurrer is filed, the error is cured by the Statute of Jeoffails there being

***Joint Judgment—Death of One Defendant—Effect.**—By statute, a joint judgment may be revived against the representatives of a deceased defendant. *Hairston v. Woods*, 9 Leigh 812, citing the principal case as authority. The principal case is also cited in *Galt v. Calland*, 7 Leigh 600.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Judgment—Interest.—In this state, interest is generally recoverable on a judgment, both at law and in equity. *Tazewell v. Saunders*, 18 Gratt. 367, 368, citing the principal case as authority.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425: monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541.

Demurrer—Effect of.—See generally, monographic note on "Demurrers" appended to *Com. v. Jackson*, 2 Va. Cas. 601.

enough in the Declaration to show the true amount of the Judgment. A verdict which finds an erroneous sum, "that being the debt in the Declaration mentioned," is substantially good, the sum being surplusage, and the conclusion of the verdict being, of itself, sufficient to show the real sum demanded.

This was an appeal from the Superior Court of Law for Stafford County.

The administrators of William Drummond, deceased, brought an action of debt against the administrator of Alexander Roane, deceased, on a Judgment which had been obtained against Roane and Alcock for the sum of 50l. 19s. 10d., and one penny damages; which Judgment 183 was to be discharged by the payment of 25l. 7s. 4¼, and the damages and costs, to wit, \$8 1 cent. The Declaration alleges, that this Judgment still remains in full force and effect, and in no wise satisfied, recovered and annulled. It further states, that the Judgment, with the damages and costs, are of the value of 60l.; whereby an action hath accrued to the Plaintiff "to demand and have of the Defendant," the sum of money last mentioned, the amount of the Judgment aforesaid.

The Defendant pleaded payment and no such record, payment by Roane, and payment by Alcock; to which pleas, the Plaintiffs replied generally, and issues were joined.

At a subsequent Term, the Defendant asked leave to demur generally to the Declaration; which the Court refused to grant.

The Defendant then filed a plea of the Act of Limitations, to which the Plaintiffs replied, that a Writ had been issued within one year and a day, &c.

The Defendant filed another plea, that Alcock survived Roane; to which plea, the Plaintiffs demurred generally.

The Court sustained the demurrer, and overruled the plea. They also decided the plea of no such record in favor of the Plaintiffs.

On the trial of the issues, the jury found for the Plaintiffs the sum of 50l., "that being the debt in the Declaration mentioned," and \$60 in damages. The Court gave Judgment accordingly, and the Defendant appealed.

Harrison, for Appellant.

Briggs and Stanard, for Appellees.

March 14. The PRESIDENT delivered the opinion of the Court.*

This was an action of debt upon a joint Judgment, obtained by Drummond, in his life-time, against one Alcock and 184 *Alexander Roane, upon their obligation. Among other errors alleged in the record, the most material one relied on was, that the demurrer to the plea by Roane's administrator, that Alcock survived his intestate, was sustained by the Court. Whether this decision was correct or not, involves the question, whether joint Judgments are within the provision of the Act concerning partitions and joint rights and obligations, 1 Revised Code, 359; and this depends on a sound construction of the provisions of that Act.

At the common Law, joint obligations and joint Judgments could only be enforced

against the surviving obligors or Defendants. The death of any of such obligors, or Defendants, absolved their personal representatives from all responsibility. In the case of a joint Judgment, though it bound the lands of the deceased Defendant, it did not bind the personality, or affect his personal representative. A Scire Facias only lay against the survivor and the heir of the deceased Defendant as terretenant, and the other terretenants, if there were such, to charge the lands of the survivor, and those which descended to the heirs of the deceased Defendant. But, in the case of a joint and several recognizance, a Scire Facias lay against the survivor and the heir of the deceased Defendant, in respect to the lien of the Judgment on the land; or, it lay severally against the survivor and the personal representative of the deceased Defendant, with or without the heir; such a recognizance having the effect of a joint and several Judgment, the Judgment on the Scire Facias not being a new Judgment, but that the Plaintiff should have execution of the original Judgment, according to its terms; 20 Vin. Abr. 149; the Common Law, in this respect, accommodating itself to the nature of the obligation of the parties. See also, 10 Vin. Abr. title "Executors," N. p. 4, note p. 8, 27.

Applying these principles to the construction of the 3d section of the Act concerning partitions, joint rights and 185 *obligations, it seems to me that joint Judgments, if not within its letter, are clearly within its spirit. The reason of the Legislature for abrogating so much of the Common Law, as changed the condition and responsibility of the parties, on the death of either, was, to make obligations and responsibilities more certain, and to leave nothing to a contingency which made no part of such obligation or responsibility; and it applies with as much force to a joint Judgment, as to any other joint obligation or responsibility. The words of the 3d section are, "The representative of one jointly bound with another, for the payment of a debt, or for the performance or forbearance of any act or thing, or for any other thing, and dying in the life-time of the latter, may be charged, by virtue of such obligation, in the same manner as such representative might have been charged, if the obligors had been bound severally as well as jointly." If Roane, in the case before us, had died before the suit on his and Alcock's obligation, though joint and not several, the case would have been within the literal provision of the section. His personal representative would have been responsible, as if he were severally bound, in the obligation; and there can be no good reason why the Judgment should vary his responsibility under the Act. But, it is not necessary to lay any stress on this, except for the purpose of showing, that upon a literal construction of the Act, if a joint Judgment is to be excluded in some cases, as in the one before us, the Judgment would defeat the plain intention of the Law. But, it is impossible, I think, that any words more comprehensive in their meaning could have been used; "bound jointly with another for the

*JUDGE COALTER, absent.

payment of a debt, or for performance," &c. These words describe accurately the condition and responsibility of parties, bound by a joint Judgment, for the payment of a debt; nor are the words "obligation" and "obligors" in the section, so exclusive as to forbid a construction of it, which would include joint Judgments. It is true, these imply contract; but, even Judgments are sometimes confessed
186 *by contract. Though they have their force by Law, parties are in no less degree jointly bound by them, than by written contracts or obligations. The change of responsibility by the death of one of them, is as much within the mischief to be obviated by the Act, as in the case of one of two or more joint obligors by contract. Upon a sound construction of a Statute, persons and things, not embraced in its terms, are often included, as being within its principle, though not within its specifications. The general rule of construction, applicable to his subject, is laid down in Co. Litt. 24, 26. It is said, that Equity is a construction made by the Judges, that cases out of the letter of a Statute, yet being within the same mischief or cause of making the same, shall be within the same remedy. As, when a Statute mentions executors, it shall extend to administrators. 19 Vin. Abr. 55. The case of a joint Judgment is, in like degree, within the same mischief as joint obligations, which are literally provided for by the Act, and is, by Equity, within the same remedy. The demurrer to the plea was, therefore, properly sustained by the Court.

The next objection to the Judgment, is, that the Court refused to permit the Defendant to demur generally, and afterwards specially, to the Declaration of the Plaintiffs. As to the latter, the special demurrer, it certainly came too late after issue joined on some of the pleas, and the Court had sustained the demurrer of the Plaintiffs to one of the pleas of the Defendant; and, therefore, as to the former, the general demurrer, it does not appear that it was calculated to produce any delay, and went to the merits. Yet, the refusal to receive it, by the Court, did not prejudice the Defendant, as he had the full benefit of it by his demurrer to one of the Plaintiff's replications to another of his pleas; it being a settled rule of pleading, that when pleadings terminate in a demurrer, (on either side,) it mounts up to the first error in the pleadings of either side. Nor is there any thing in the 103d section of the Act of Jeofails, 1 Rev. Code, 511, which prohibits a Judgment
187 *after verdict to be stayed or reversed, for any defect which might have been taken advantage of by demurrer, and which shall not have been so taken advantage of, that can affect the rule stated. It certainly does not include verdicts, in a case in which there is a demurrer to the pleadings by either party. It has been often decided by this Court, that when there is an issue in Law and in fact in any case, the issue in Law should be first decided; in which case, there might be no verdict. But, if the suggestion be

correct, that a verdict in such case would cure the errors not taken advantage of by demurrer coming from the Defendant, the issue in fact ought in all cases first to be tried. But in truth, that question does not arise in this case, as there is a demurrer to the pleadings, both by the Plaintiffs and the Defendant; and he is, therefore, entitled to his objections to the Declaration, if there is any force in them.

The Declaration is very inartificially drawn; but I think, would be held to be substantially good on a general demurrer. The complaint is of a plea of debt, &c. It sets out the Judgment on which it is founded, and alleges, that it was in full force and unsatisfied, and of the value of 60l.; it being really a Judgment for 50l. 9s. 10d., and one penny damages, and \$8 1 cent cost, to be discharged by the payment of 25l. 7s. 4 1-2, and the damages and costs aforesaid; whereby an action accrued to the Plaintiffs to demand and have of the Defendant the sum of money last mentioned, the amount of the Judgment aforesaid. It then proceeds to allege the demand and refusal to pay, &c., in the usual form; to which there is no objection; and I think enables the Court to give Judgment according to the very right of the case, not noticing errors in matters of form; which could only be noticed on special demurrer according to the Act of Jeofails.

The objection to the verdict, I think, is equally unavailing. It finds the sum of 50l., that being the debt in the Declaration mentioned, and \$60 in damages, for
188 *which the Judgment is rendered; when in fact, the debt in the Declaration mentioned is 50l. 19s. 10d. and \$8 1 cent. In substance, it finds, that the debt in the Declaration has not been paid, as alleged by the pleas; and the only incongruity is in stating it to be 50l., which is surplusage; as the finding of the debt in the Declaration mentioned, was sufficient to have justified a Judgment for that sum, and the \$60 damages; which latter, in an action on a Judgment for a penal sum, the Jury were at liberty to give for the detention of the debt. The error, therefore, complained of, is in favor of the Defendant, and not to be complained of by him.

The Judgment is to be affirmed.

Rhodes v. Cousins.

March, 1828.

Creditors at Large—Right to Interfere with Disposition of Debtor's Property.—A creditor cannot have the aid of a Court of Equity to prevent, or interfere with, in any way, the disposition which his debtor may make of his property, unless the creditor has first proceeded as far as he can at Law. To subject real estate, he must have ob-

***Creditors at Large—Right to Interfere with Disposition of Debtor's Property.**—Previous to the enactment of § 2, ch. 179, Code of 1860, it was the settled rule of the courts, that a creditor at large could not resort to a court of equity, to impeach any conveyance made by his debtor, on the ground of fraud. If real estate was the subject of the conveyance, a judgment was regarded as sufficient. If goods and chattels or any equitable interest therein although incapable of being levied on, were embraced in the conveyance, the creditor was required to take out execution and have it levied or returned, so as to show that his remedy at law had failed. Wallace v. Treake, 27 Gratt. 486, citing the principal case, to sustain the proposition. And in Zell Guano Co. v. Heatherly, 88 W. Va. 415, 18 S. E. Rep. 612, it is

tained a Judgment at Law; and to subject personal estate, he must have a Judgment and execution.

Ne Exeat—When Granted.—A Writ of Ne Exeat cannot be granted, unless 1. There is a precise amount of debt positively due; 2. It must be an Equitable demand, on which the Plaintiff cannot sue at Law, except in cases of account, and a few others of concurrent jurisdiction; 3. The Defendant must be about to quit the Country, proved by affidavits as positive as those required to hold to bail at Law.

This was an appeal from the Chancery Court of Richmond, where Cousins filed his bill against Grymes, Rhodes and Moore, praying for an Injunction to prohibit a sale of certain goods which had been conveyed (fraudulently, as he alleged) by Deed of Trust from Grymes to Rhodes; or, that the goods might be returned by Moore the auctioneer, to the other Defendants; or, to stay \$1,500 in the hands of Moore, if a sale should be thought proper; or to grant a Ne Exeat. The whole ground of complaint is fully set forth in the following opinion.

Wickham, for the Appellant.

May and Spooner, for the Appellee.

March 15. JUDGE CARR delivered his opinion.

The bill presents this case: that in the winter of 1820-21, Cousins endorsed for Grymes (a grocer) an accommodation note, to be discounted at the Bank, for \$1,500: that the note had been renewed from time to time, and the one last given would become due in about four weeks: that the Plaintiff will, no doubt, have to take up the note when it falls due: that the said money was borrowed to pay debts, which Grymes contracted in supplying his store with groceries: that a few days before, he had been surprised to discover in a Petersburg paper (where the parties live,) an advertisement of the stock of goods belonging to Grymes, to be sold on the 11th of September, by a certain Jer. Rhodes, an Englishman, having no fixed residence here, and who had avowed his intention of returning in a short time to England: that, on enquiry of Grymes, he told him, that being a secret partner, Rhodes had obtained a Deed of Trust from him by deception and fraud; and under it, was about to sell the goods. He charges, that Rhodes has been a sleeping partner since the last fall: that he has reason to believe that he will leave this Country with all his effects, if not prevented, before the note becomes due, previous to which time, the Plaintiff can have no redress at Law: that Grymes is insolvent: that the goods are in possession of Moore an auctioneer. The prayer of

the bill is, that an Injunction issue to prohibit a sale, or a return of the goods by Moore to the other Defendants; or to stay \$1,500 in the hands of Moore, if a sale be thought proper; or to grant a Ne Exeat.

Taking this matter up simply upon the case made by the bill, it is clear to me, that the Plaintiff had no right to the aid of Equity, either by way of Injunction or Ne Exeat.

1. As to the Injunction. It is well settled Law, that none but a Judgment-creditor can have the assistance of Equity to control, prevent, or interfere with, in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by Injunction. A creditor must have proceeded as far as he can at Law. If he means to affect the land, he must have a Judgment, and take his elegit. If the personalty, there must be Judgment and execution issued; and he must show in his bill that he has done this, or it may be demurred to. See Mitf. Pl. 114-15; Angel v. Draper, 1 Vern. 399; Shirley v. Watts, 3 Atk. 200; Bennett v. Musgrave, 2 Ves. sen. 51; Balch v. Wastall, 1 P. Wms. 451; Cooper's Equ. Pl. 149; see also Wiggins v. Armstrong, 2 Johns. Ch. Rep. 144. That case was thus: Plaintiff had two notes on D. to a large amount, on which D. confessed a Judgment to a greater amount to another person. The bill charged a fraudulent collusion: that the Judgment was voluntary and without consideration, and with intent, to defraud the Plaintiff; and he prayed an Injunction against proceeding on the Judgment by execution. An Injunction was granted. No answer was put in; but a motion was made to dissolve, on the ground that the Plaintiff, not being a Judgment-creditor, had no lien on the property of the debtor, and no right to question the Judgments. The Chancellor reviews the cases with his usual care, and comes to the conclusion, that a creditor at large, and before Judgment and execution, cannot be entitled to the interference of Equity. He remarks, very sensibly, "The reason of the

191 rule seems to be, that until the creditor has established his title, he has no right to interfere; and it would lead to an unnecessary, and perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds."

The same doctrine is again discussed and considered as settled in 2 Johns. Ch. Rep. 284, 4 Do. 671, 682. This Court, also, in the case of Chamberlayne v. Temple, 2 Rand. 384, lays down the doctrine in the same way, and strongly and forcibly illustrates the mischiefs and inconveniences of a contrary proceeding.

In the case before us, the Plaintiff not only had no Judgment, but he was not even a creditor. True, he had endorsed a note for Grymes; but, he might never be called on to pay it; or called on, he might not be able to pay it; and in either case, he could have no demand on Grymes. What

said: "In *Rhodes v. Cousins* (1828), 6 Rand. (Va.) 188, 190. CARR, J. says: 'It is well-settled law that none but a judgment creditor can have the assistance of equity to control, prevent or interfere with, in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by injunction.' There must be some specific right of the creditor against the property sought to be subjected, and, having no certain claim upon the property of the debtor, he has no concern with his frauds. To same effect, see *Tate v. Liggat* (1830), 2 Leigh 84; *Kelso v. Blackburn* (1831), 8 Leigh 299; *McCullough v. Sommerville* (1830), 8 Leigh 415. These cases lead in this state (Virginia) to the enactment of the statute in question."

Ne Exeat—When Granted.—See principal case cited with approval in *Parks v. Rucker*, 5 Leigh 152.

right, then, had he to claim the interference of Equity, to disturb the arrangement made between Grymes and Rhodes; to forbid the sale of the goods; and to take them wholly, from the possession of the owners, for an indefinite space of time?

2. Just as unfounded seems to be the attempt of the Plaintiff to obtain a Writ of Ne Exeat against the Defendant Rhodes, and his effects. As no such Writ was issued, I shall pursue that subject no further than just to remark, that our Act of Assembly does not regulate the proceeding on the Ne Exeat further than to say, (1 Rev. Code, 217, sec. 110,) that Writs of Ne Exeat shall not be granted, but upon bill filed, and affidavits made to the truth of its allegations: that if granted, the Court or Judge shall direct to be endorsed thereon in what penalty bond and security shall be required of the Defendant; and that if the Defendant shall, by answer, satisfy the Court or Judge, that there is no reason for his restraint, or give sufficient security to perform the Decree, the Writ may be discharged. What the allegations in the

bill shall be to justify the Writ, 192 "the Law has left to the Court, who must be guided by the rules settled in such cases. The Ne Exeat, as now understood and practised upon, is a proceeding in Equity to obtain bail, in a case where there is a debt due in Equity, though not at Law; for, if it be a legal debt, then you may take bail at Law, and Equity will not entertain you, except in cases of account, and perhaps a few other cases of concurrent jurisdiction. The general rule is, that where you can get bail at Law, Equity will not grant the Writ. In the exercise of this power, Courts of Equity are very cautious, as it is a strong step, tending to abridge the liberty of the citizen. To induce that Court to issue a Ne Exeat, it must appear, 1st, that there is a precise amount of debt positively due: 2d, that it is an equitable demand, upon which the Plaintiff cannot sue at Law, except as before, in account, and some other cases of concurrent jurisdiction: 3d, that the Defendant is about quitting the Country, to avoid the payment. As to the first, in *Jackson v. Petrie*, 10 Ves. 163, Lord Eldon says, "The affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail; nor do I recollect, that this Court has granted the Writ upon an affidavit stating merely information and belief as to the amount of the debt, except where it is matter of pure account." In *Haffey v. Haffey*, 14 Ves. 261, Lord Eldon mentions a very hard case, to show that under circumstances, which would not entitle you to bail if your demand was a legal one, you shall not have it in Equity. It was decided by Lord Thurlow. A bond was payable on the 1st of January. The obligor, by agreement, obtained indulgence till the 1st of July. In the last week of June, he declared his intention of leaving the Kingdom, to evade payment. There was the agreement and the bond; yet it was held, that as under that agreement which prevented the obligee from getting bail at Law, the money was not

due in Equity, he could not have the Writ. To obtain the Writ, it is also necessary that the affidavit must be positive 193 as "to the Defendant's intention to go abroad, as to his threats or declarations to that effect, or to facts evincing it. In *Odham v. Odham*, 7 Ves. 210, the Court said, in relation to this, "It is not sufficient to show that another person said so."

In the case before us, there is no debt due. If due, it would be a legal debt, on which bail at Law might be demanded. There is no sufficient affidavit of intention to leave the Country. The Courts in England have thought these guards necessary to protect the personal liberty of the subject; and we, surely, cannot think them less so here.

On every ground, then, this bill, taking it as true, is insufficient, and should never have been received. I have put the case on the strongest ground for the Plaintiff; for, he could not do more than prove his case; and in truth, he has fallen far short of it. I am clear that the Decree be reversed, and the bill dismissed.

Upon the subject of the Writ of Ne Exeat, I refer to the following cases: 2 Ves. senr. 489; 3 P. Wms. 312; 3 Bro. Ch. Cas. 218; 2 Atk. 210; 1 Ves. junr. 94; 5 Ves. 91; 6 Ves. 163, 283; 7 Ves. 171-2, 8 Ves. 593; 9 Ves. 464; 16 Ves. 163; 11 Ves. 54; 14 Ves. 261; 15 Ves. 444; 16 Ves. 470; 18 Ves. 352; 1 Ves. & Beam. 372; Jac. & Walk. Rep. 405; 1 Johns. Ch. Rep. 1; 2 Do. 169. See also Beame's Brief View of the Writ of Ne Exeat, passim.

The other Judges concurred, and the Decree was reversed, and the bill dismissed.

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*Randolph v. Randolph.

March, 1828.

Equitable Relief—Execution.—It is a general rule, that where slaves are improperly taken in execution, the owner may claim the aid of a Court of Equity to prevent their sale.

Same—Same.—But, if it can be shown, that such slaves have no peculiar value in the eyes of their owner, but are merely regarded by him as any other property, Equity ought not to interfere, but leave him to his redress at Law.

Injunction—Dissolution.—It is an irregular proceeding in a Chancellor, to dissolve an Injunction in Court, with a direction that the order of dissolution should not go out; and then, in vacation, to direct that the order should go out.

Same—Same—Appeal.—From such an order an appeal lies to the Court of Appeals.

Same—Same—Matters Alleged in Bill.—Where an Injunction is granted, and a material fact is alleged in the bill, and not denied in the answer,

***Equitable Relief—Executions.**—In *Snoddy v. Hawkins*, 13 Gratt. 366, it is said: "At one time it was held in this court that an injunction to a sale of slaves could not be sustained, unless it was averred and proved that such slaves were of some peculiar value, for which money would not be an adequate compensation." *Allen v. Freeland*, 3 Rand 170; *Randolph v. Randolph*, 6 Rand. 194. More recent decisions, however, have settled the law otherwise. *Harrison v. Sims*, 6 Rand. 506; *Sims v. Harrison*, 4 Leigh 346; *Kelly v. Scott*, 5 Gratt. 479."

On this subject, the principal case is also cited in *Harrison v. Sims*, 6 Rand. 607; *Summers v. Bean*, 13 Gratt. 416, 417, 418; *Walker v. Hunt*, 2 W. Va. 494; *Baker v. Blachard*, 11 W. Va. 241, 242.

See further *foot-note* to *Bowyer v. Creig*, 3 Rand. 26; monographic note on "Executions" appended to *Paine v. Tatwiler*, 27 Gratt. 440; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 18 Gratt. 518.

Injunction—Dissolution.—See principal case cited and quoted from in *Monroe v. Bartlett*, 6 W. Va. 443.

such fact must be taken as true on a motion to dissolve; and no other proof will be required on such motion.

Administrator—Judgment against—Levy on Property Distributed.—Where personal property of a testator or intestate has been distributed to legatees or distributees of the decedent, with the assent of his executor or administrator, it is not competent to a creditor of the decedent to levy his execution on such property, under a Judgment obtained against the personal representative.

This was an appeal from the Richmond Chancery Court. The following opinions will give a full view of the case. It was submitted without argument.

March 19. JUDGE CARR.

Henry Randolph, at the sale of the estate of Archibald Cary, became a purchaser of property to the amount of 166l. for which he gave his bond with Brett Randolph as surety. Henry Randolph died; his widow administered on his estate. After some years, Cary's executor sued Brett Randolph on the bond, and obtained Judgment. Brett Randolph paid the money, and moved against the administratrix for it. He recovered a Judgment. She appealed to this Court, and the Judgment was affirmed. Brett Randolph then levied his execution on four slaves; when Catharine and Georgiana Randolph, daughters of Henry Randolph, filed a Bill of Injunction to stay the sale; stating, that some years before, a division of their father's estate had taken place, with the assent of 195 *the administratrix, on which the slaves taken in execution had been allotted to them, and had been held by them ever since, as their separate property; and therefore, were not liable to an execution against their father's estate. The Chancellor refused the Injunction. This Court granted it.

The Defendant answered, stating, among other things, that as to the division spoken of, if any such had taken place, (which he did not admit) it ought not to obstruct his execution, as the property was liable for his debt; but, whether liable or not, Equity ought not to interfere, as the Plaintiffs had a complete remedy at Law.

A replication was taken to this answer; but, no evidence was adduced to establish the division of the estate. On motion, the Chancellor, on the 27th of June, 1826, dissolved the Injunction, but directed the order not to go out. Then follows this entry in the record: "Needham, 19th July, 1826: By the Chancellor. There is no ground which I am able to discover for the interference of a Court of Equity. The case, as it seems to me, was most clearly mistaken, and, regarding the order for the Injunction as improvident, the dissolution of it at the last Term was correct, and a copy of the order for it may now go out."

From this, it would seem, that the order of dissolution was given in Court, but its operation suspended by another order, till

the case should be considered in the vacation following, and the mandate received, which should give effect to the whole. Had the Chancellor the power to act upon the case thus in vacation? That he cannot dissolve an Injunction in the Country, is clear. That must be done in Court. Yet, is not this order, made at Needham, in effect the dissolution? Is it not that, which gives life and animation to the order made in Court? Without it, the Court order was wholly inefficient; the Injunction, to every practical effect, not dissolved; no execution could issue; and I presume, no appeal from the order could be taken; for it was still sub judice. Suppose, when the

Chancellor came to examine the case, 196 he had discovered *that the Court order was improvident; he had only to withhold his mandate from the Country, and every thing would remain in statu quo. I do not think the Chancellor has the power thus exercised.

Considering this last order as the one appealed from, it may be asked, has this Court the power to grant appeals from such orders? I answer, this Court may grant appeals from the dissolution of Injunctions; and this order, (however irregular) has had this effect.

But ought we, on such a proceeding, to take up the case on its merits? If by doing so, we can settle the principles of it, and thereby prevent another appeal for that purpose, perhaps it may be best.

As the division of the property, and the separate holding by the Plaintiffs, formed the sole ground on which they could stand in Equity, and this was not admitted by the answer, I incline to think, that they ought to have been prepared with proof of it, to prevent a dissolution. But, as my brethren (I understand) are against me on this point, I will pass on to the next; that is, has Equity jurisdiction of the case? This, though a question of interest and importance, I shall discuss very briefly.

The general rule is, that where the remedy is complete at Law, Equity cannot interfere. But where, from the peculiar nature of the property in contest, and circumstances of the case, no verdict of a Jury can compensate the claimant, Equity will lend its aid to preserve the property, and give it in specie to the true owner. The question is, whether slaves, when claimed as owner, (not incumbrancer,) are, from their nature merely, such property? This precise question has not been decided by the Court. The earlier cases put it on the ground of specific execution; where we know, every application is to the sound discretion of the Court; and upon the whole case made, the question is, whether the ends of justice will be better attained, by taking or declining jurisdiction. In the case of *Allen v. Freeland*, 3 Rand. 170, 197 the Plaintiff could hardly be *called the owner; he had (as he pretended) bought the slaves at public sale; had never had them in possession; had paid no money for them; set no particular value on them; and was strongly suspected of fraud. In *Bower v. Creigh*, 3 Rand. 25, the Plaintiff was an incumbrancer merely. I readily agree that "various causes may ex-

See further, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Same—Jurisdiction of Court of Appeals.—In *Fredenheim v. Rohr*, 87 Va. 769, 13 S. E. Rep. 193, it is said: "This statute (Code of Virginia, 1887, § 4438) confers no original jurisdiction upon one of the judges of this court to award an Injunction, except in the case where the application has been made, first to a judge of an inferior court, either in term or in vacation, and has been refused. *Mayo v. Haines & Coutts*, 3 Munf. 423; *Randolph v. Randolph*, 6 Rand. 315; 1 Rand. 415."

ist to give slaves a value in the eyes of the master, which no estimated damages could reach. The slave may have been raised by him, and may possess moral qualities, which, to his master, render him invaluable. He may have saved the life of the master, or some one of his family; and thus have gained a value beyond all price. When any case of this kind is addressed to a Court of Equity, it will interfere, upon the principle, that there is no complete remedy at Law," (as in the cases cited in *Bowyer v. Creigh*;) and far would I be from obstructing the course of Equity, in the humane office of preserving the slave to his master in such cases. But, to such cases, I would restrict the interference. We must all agree, that there are many cases, in which a slave has no peculiar value with his owner; some, among the large slaveholders, where he is not even personally known; or he may be vicious or worthless. To these, and other such cases, the principle of equitable interference surely would not apply. When, therefore, a party asks the aid of Equity, to take a case from the course of the Common Law, and the Jury trial, (a tribunal peculiarly fitted for such cases,) ought he not to show forth in his bill, the facts and circumstances making such change of forum proper? Is there any hardship in this? Whether the slave has a peculiar value with his master, none can so well know as the master himself. He can speak from his own feelings, his own knowledge. The simple fact of asking the aid of Equity, will hardly be taken as proof, that he sets a peculiar value on the slave, by those who witness the thousands of applications to that tribunal, in cases wholly unfit and improper.

198 *My opinion then is, that to authorise a Court of Chancery to grant an Injunction stopping the sale of a slave under execution, the Plaintiff must claim as owner, and state some fact or circumstance, whether the pretium affectionis or any other, tending to show, that the verdict of a Jury in damages would not compensate him; and that the mere claim of him as his slave, without more, does not authorise the staying such sale under execution.

JUDGE GREEN.

Upon a motion to dissolve an Injunction upon bill and answer, the facts alleged in the bill, and not denied by the answer, should be taken to be true. They stand upon the affidavit of the Plaintiff, and are entitled to as much weight on the motion to dissolve, as upon the original motion for an Injunction. A declaration by the Defendant, that he does not know or admit any particular allegation of the bill to be true, is not a denial; although it is sufficient to put the Plaintiff to the proof of the fact, upon the hearing. In this case, the Defendant does not deny the material allegation, that the slaves, upon which his execution was levied, had been distributed amongst the distributees of his debtor; and it is perfectly clear, that if that be the fact, his execution could not be legally levied upon them; they not being of the goods and chattels of the intestate in the hands of his administratrix to be administered. But, I think it equally clear, that a Court

of Equity should not interfere to prevent a creditor from seizing and selling, under his execution, any property which he may think liable to it; unless the property be of such a character, that the owner cannot be fully compensated by the verdict of a Jury, giving him what might be the fair market value of his property; and this can only be, where the property is of such a nature, that it may fairly be supposed to have a peculiar and additional value in the estimation of the owner, the pretium affectionis. The grounds of this 199 opinion have *been so often discussed in this Court, and the principle so completely settled, that it is unnecessary now to state them at large. Whether slaves are, *prima facie*, a property of this peculiar character, has never been determined; and this case, I think, presents that single question for decision. Fully apprised of the inconveniences of a decision either way, I cannot help thinking, that slaves ought, *prima facie*, to be so considered. They have moral qualities, which make them, in some instances, peculiarly valuable to their owners; but which could not be the subject of enquiry in each particular case, without great inconvenience and uncertainty. And whatever may be their qualities, we know that attachments naturally and generally grow up between master and slave, which cannot be the subject of pecuniary estimate by a Jury. This *prima facie* presumption may, however, be repelled by circumstances. As, if the slaves were necessarily to be sold, (as in the case of their being pledged for the payment of debts,) and the question is between a creditor claiming under a specific lien, and one claiming under execution; or, if they were in the hands of the owner as a subject of traffic; in such cases, the injury done to the owner by seizing and selling them, under an execution against another, would be precisely and accurately measured by their market value. He could have full and complete redress at Law; and there would be no ground for the interposition of a Court of Equity, for the purpose of preserving to the owner the property in specie.

I concur in the opinion which has been given, as to the irregularity of dissolving the Injunction in Court, with a direction that the order should not go out, and making a new order in vacation. Upon this ground, I think the order dissolving the Injunction should be reversed, and the Injunction reinstated.

200 *JUDGE COALTER.

The bill states, that the father of the Plaintiffs, who are the Appellants here, died about the year 1804, leaving a widow and several children: that in 1809, a division of the estate took place, and that several of the children have married and left the family; and that the Plaintiffs have been ever since in possession of their portion of the estate, until the execution in the bill mentioned, was levied on certain slaves belonging to them, and thus in their possession. This bill is sworn to in March, 1826.

The answer of the Appellee (who is uncle to the Plaintiffs) does not deny the allega-

tions of the bill, but says, that he does not admit them, and calls for proof; and consequently, if the Injunction was properly allowed, it ought not to have been dissolved, until reasonable time was given to produce the proof so called for. The answer was sworn to in May, 1826; but when it was filed, does not appear on this record. The Plaintiffs instantler replied to it; and on the 27th of June, 1826, the Injunction was dissolved, but the order not to go out. It seems, however, from the record, that a subsequent order was made by the Chancellor, at Needham, his Country residence on the 19th of July, 1826. It is in these words: "By the Chancellor. There is no ground which I can discover for the interference of a Court of Equity. The case, as it seems to me, was most clearly mistaken; and regarding the order for the Injunction as improvident, the dissolution of it, at the last Term, was correct, and the copy of the order for it may now go out." The Injunction had not been awarded by the Chancellor, but had been refused by him; and on an appeal from that refusal, had been granted by the Judges of this Court.

As the Decree of dissolution was suspended by that part of it which directed the order not to go out, I incline to consider it as tantamount to a dissolution and subsequent reinstating the Injunction, and of course, beyond the power
201 *of the Court, except in term time.

I presume, therefore, that that Decree could not then have been appealed from, as the direction not to send out the order rendered it inoperative; and consequently, the Decree was not then injurious. And, besides, I presume the Chancellor retained the record, and took it with him, to Needham; so that no copy could have been furnished, until the confirming Decree, and the directions to issue the order, were returned to the Clerk's office. From that time, the Decree of June became operative and injurious to the party. I am clearly of opinion, that there is no Law authorising the Chancellor to make such Decree and order in vacation, as that of the 19th of July, above mentioned; and I at first doubted, whether, considering that as the Decree appealed from, we had jurisdiction over a decree so pronounced. I understand my brethren fully to concur with me as to the want of power in the Chancellor; but, that they are also of opinion, in which I concur, that inasmuch as the Decree of June is now put into operation, however irregularly that may have been done, it is necessarily from that Decree that the appeal is taken; and that we have, therefore, jurisdiction.

The question then is, whether the Injunction was improvidently awarded by the Judges of this Court, or not? I understand it to have been the constant course of this Court for a series of years, with a few particular exceptions, that where, on an execution against A. the slaves of B. are taken, B. is entitled to an Injunction; and is not forced to permit the execution to proceed; and resort to his legal remedy for damages. The reason given by the Judge who has preceded me, is a sufficient ground for this decision; but, I think another might well

be superadded to it. The master has not only his own pecuniary interest to consult, and his own affections and predilections to gratify, in all of which he will be aided by the Courts; but, he owes a duty to the slave, as well as the slave does to the master, and which he ought to perform; the duty of protection from a violent seizure and sale, which may terminate in the
202 destruction *of his happiness, and in breaking asunder all his family ties and connexions. I have known slaves who could not be sold for \$20, and whose masters ought to consider themselves bound by ties of real gratitude to avert such a calamity from them, if able to do so, at the expense of hundreds. Surely, such considerations ought to receive the attention and countenance of the Courts.

I therefore think, that the injunction was properly awarded, and that the Decree is erroneous and must be reversed.

JUDGE CABELL.

This is thought to be a fit occasion for the Court to express an opinion on the subject of the interposition of a Court of Equity to prevent the sale of slaves taken in execution.

Slaves are rational beings, and, as such, have moral qualities, which are calculated to render them of peculiar value in the estimation of their masters. It may be laid down as a position almost universal, that the master, unless obliged to sell, would think himself poorly compensated for the loss of a slave, by the price which a Jury might fix upon him. Moreover, slaves are human beings; and therefore, I do not think that even their attachments and feelings are to be disregarded. The inhumanity of wantonly invading these attachments and feelings, forms with me an additional argument in favor of the interference of a Court of Chancery.

I am of opinion, that it should be regarded as a general rule, that the Courts of Chancery are bound to interpose, wherever the slaves of one man are about to be sold to pay the debts of another. The exceptions to this general rule, whatever they may be, are to be brought forward and established, in each particular case, by those who claim the benefit of them.

I think, therefore, that the Injunction was properly awarded; and that it was wrong to dissolve it, without
203 allowing *the Plaintiff time to prove the facts stated in the bill.

Another question presents itself, on which it is deemed expedient that this Court should express its opinion. The order dissolving the Injunction was regularly made and entered in term time; but that order was followed immediately by another, which directed that the order of dissolution should not "go out;" and as the Court rose without taking any further order on the subject, this last order was, in effect, a suspension of the order of dissolution. The removal of the suspension of a former order of the Court, is a judicial act, which can be regularly performed only in open Court, where the parties may be present, and may be heard; or, where they may at least observe what is done affecting their interests. I concur in the opinion, that

the order made by the Chancellor was irregular.

THE PRESIDENT.

I think the proceedings in this case, after the Injunction had been dissolved by the Court, cannot affect the right of the Plaintiff to appeal from the decree. I am of opinion, also, that it was premature to dissolve the Injunction, before an opportunity had been afforded to the Plaintiffs, after answer filed, to substantiate the allegation in their bill by proof, if they could, that the slaves in question were held by them as distributees, among others, of the estate of Henry Randolph, their father. As to the grounds on which relief ought to be afforded, in a case like this, I refer to my opinion in the case of Freeland v. Allen, 3 Rand. 170.

I think the Decree ought to be reversed, and the Injunction reinstated.

204 *Allison v. The President, Directors and Company of the Farmers' Bank of Virginia.

Caldwell v. The Same.

March, 1828.

Bond with Condition—Debt on—Declaration—Allegations.—In an action of debt on a bond conditioned for the faithful discharge of the duties of an office, the Declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of the Defendant in his office; nor is it necessary to state the damages occasioned by the breaches.

Banks—Accountant—Sureties—Liability.—The sureties of an Accountant of a Bank, are not liable for monies taken by him from the Teller's drawer, without his knowledge or consent, it appearing that the Accountant is not entrusted with, or put in possession of, any monies of the Bank, as Accountant.

Pleading and Practice—Declaration—Allegation of Injury.—It is not necessary for the Declaration, after the assignment of breaches, to allege that the Plaintiffs have been injured by the breaches; but, it is sufficient if it is stated that an action has accrued to the Plaintiffs to demand and have the penalty of the bond.

Bond with Penalty—Action on—Declaration—Allegations.—In an action for the penalty of a bond, it is

***Bond with Condition—Debt on—Declaration—Allegations.**—In an action on a bond with collateral conditions, when the bond provides for many things of different kinds to be done, the omission of any one of which would constitute a breach, it is usual and proper to specially assign breaches of each kind or class of such acts. But it is not necessary or even proper to set forth each single act or the several particular sums of money received constituting the breach, as such particularity would lead to too great prolixity. *Wheeling v. Black*, 25 W. Va. 274, citing the principal case to sustain the proposition. And in *Elam v. Commercial Bank*, 86 Va. 94, 9 S. E. Rep. 498, it is said: "In *Allison v. Bank*, 6 Rand. 204, the demurrer to a declaration in debt upon the bond of an accountant was overruled, although the declaration did not state in a single instance the time or place, names or sums, of the money which had been misappropriated. In cases of this character, where the evidence must of necessity be general, and an attempt to state the breaches of the condition with exactness of detail will lead to great prolixity of pleading, some generality of statement, in the interest of justice, must be permitted. 3 Rob. Pr. 593; 4 Minors' Inst. 584, 988."

To the same effect, the principal case is cited in *Guarantee Co. v. Bank*, 96 Va. 489, 23 S. E. Rep. 909; *Kern v. Ziegler*, 13 W. Va. 714; B. & O. R. Co. v. *Jameson*, 13 W. Va. 844.

See further, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

The principal case is also cited in B. & O. R. Co. v. *Bitner*, 15 W. Va. 459; *Reynolds v. Hurst*, 18 W. Va. 660; *Caldwell v. Farmers' Bank*, 6 Rand. 241.

not necessary to state that in consequence of the refusal of the Defendant to pay, the Plaintiff sustained damage.

Felony—Bar to Civil Remedy.—The felony of one is not a bar to, or a suspension of, a civil remedy for the same act. Per *GREEN*, Judge.

These were two actions of debt, brought in the Superior Court of Law held in Petersburg, by the Farmers' Bank of Virginia, one against Allison, and the other against Caldwell who were co-obligors in a bond with Frayser, conditioned for the said Frayser's faithful performance of the duties of the office of Accountant in the said Bank. The two cases are similar in their circumstances, with only two exceptions which are mentioned in the opinions which follow.

In the case of *Allison v. The Bank*, the Declaration contains an assignment of breaches, in the words of the condition. It alleges, "that the said William Frayser has not faithfully performed the duties assigned him, or trust reposed in him, as Accountant of the said Office of Discount and Deposit of the Farmers' Bank, at Petersburg, and that the said William Frayser has not been of good behaviour in his said office of Accountant, 205 during his 'continuance therein.'"

The Declaration then proceeds to specify, and particularize, several instances of breach of the condition of the bond. To this Declaration, the Defendant filed two pleas in abatement, and also special demurrers, which related to supposed defects in the form thereof. These pleas and demurrers were overruled by the Court. At a subsequent day, the Defendant tendered three pleas. To the second and third, the Plaintiffs Counsel objected. The Court permitted the second to be filed, but rejected the third. The first plea was, conditions performed, on which issue was joined by the Plaintiffs. The second plea stated in substance, that the Cashier and Teller of the Bank, were the only officers entrusted with the care of the money, that it was their duty to take care of it, and that all the monies which Frayser purloined, or fraudulently withdrew from the said Bank, was money in the custody and charge of the Teller, or Cashier, with which Frayser as Accountant had nothing to do, that he was enabled to withdraw said money by the want of care and vigilance of said Cashier and Teller, and that as the acts done by said Frayser did not relate to, or concern, his office of Accountant, the Defendant, his security, was not responsible therefor. To this plea, a special replication was filed, stating in effect, that the various acts of misconduct imputed to Frayser, as constituting the breaches of the condition of his bond, were acts done in his character of Accountant, and were violations of his duties as such. On this replication, an issue was made up. The Jury found a special verdict, which, though very long, it is deemed best to insert at large. It is as follows:

"We of the Jury find, first, that according to the Bye-Laws, Rules, Regulations, and Usages of the said Farmers' Bank at its said Office of Discount and Deposit at Petersburg, there are, and were always, at and during the time the said Wm. Frayser

was Accountant there, an officer called the Cashier, and an officer called the Teller, as well as the said officer called Accountant, to each of whom are, and were assigned, several and appropriate duties. It is, and was, the duty of the Cashier to superintend generally, the business to the said Office of Discount and Deposit, and to take care of, and safe-keep, all the monies of their said Bank, there, except that placed in the hands of the Teller, to answer the purposes of current business. It is, and was, the duty of the Teller to disburse and receive all monies paid out of, or into the said office of Discount and Deposit; for which purpose he receives originally, and retains in his care, and safe-keeping, a certain sum from the Cashier, and other sums from time to time as wanting, and if he should at any time in the course of business get more in his hands than wanting for current business, he pays such overplus to the Cashier, if required. It is, and was, the duty of the Accountant, to keep the books and accounts of the said Office of Discount and Deposit (in the manner hereinafter particularly explained,) and for that purpose, the Accountant always has access to the books pertaining to the Department, of all the other officers and clerks in the said Office of Discount and Deposit. It is, and was, usual at the said Office of Discount and Deposit, occasionally, in case of the sickness or necessary absence from the Bank, of any of the officers thereof, for another officer to perform the duties of such sick or absent officer. But, at and during all the time the said Frayser was the Accountant at the said Office of Discount and Deposit, he had always so much to do, in his own proper office, that he was never on such occasions, so substituted for other officers. It is, and was, usual, too, at the said Office of Discount and Deposit, when the Teller left the counter for a short time, and any person presented a check, for some other officer of the Bank to pay the same out of the Teller's cash-drawer, or the money on the counter. But it does not appear, that the said Frayser ever so acted for the Teller, though he may have had frequent opportunities of doing so, except in one instance, when he changed a fifty dollar note, at the Teller's counter, and from his cash-drawer.

207 "Secondly. We find, that by whatever means individuals procure money to be paid to their credit at the said office of Discount and Deposit of the said Bank, whether by loan from the Bank or deposit therein, the only mode of obtaining money, in consequence of such credit, is, and always has been, by drawing checks or orders, as creditors would on individuals for the same purposes (form only excepted;) and as to the manner in which such checks are, and always have been paid at the Bank, and the uniform course pursued in jarrying them to the debit of the drawers thereof on the books of the Bank, the manner and course are, and always have been, as follows: The Teller, or other officer acting for him, receives the checks so drawn, which checks are always considered as paid, whether they be received in payment of debts of

any kind due at the Bank, or deposited to the credit of those who present them, or money be actually drawn upon them. As soon as the Teller receives such checks, he puts them on a small spindle, by him kept there for that purpose, and at the close of each day, all the checks he has received in any way during the day, are entered by him into a book called the "Teller's Check-book" without regard to alphabetical or other order. These checks having been thus entered on the Teller's Check-book, are not, by such entry, the commencement of an original charge against the drawers thereof, being entered there principally to ascertain the amount, and being there also particularly described, in order that if any error occurred, it may be corrected, on examination, when the checks came into the Accountant's hands. The checks having been entered on the Teller's Check-book, and then distributed in alphabetical drawers, kept for that purpose, from which drawers they are taken by the Accountant, and by him entered in alphabetical order in a book kept by him, called the "Accountant's Check-book;" and this is the original entry of the charge against the respective drawers of the checks, and from them he makes the charges against the drawers thereof respectively, posting the checks to the debits of the accounts of the respective drawers upon the ledger, the checks remaining exclusively in the possession of the Accountant, as vouchers against the drawers, until such time as the accounts of the drawers are settled with them; when the checks are returned to them by the Accountant, with a peculiar mark of cancellation, and by the drawers acquiescence in such settlements of their accounts, the correctness of the charges of their respective checks to their debits is acknowledged; it being the custom at the Bank to settle the accounts of individual dealers with it, at short periods, or when by them requested. And we find that the said William Frayser, Accountant of the said Bank at its said Office of Discount and Deposit, (during the time in the Declaration mentioned,) was a very skilful Accountant, and until his delinquency, hereinafter mentioned, was discovered, possessed, in the highest degree, the confidence of all the officers of the Bank there, both in his ability and integrity; and that the said Wm. Frayser, at and during all the time he was Accountant there, was remarkably particular in keeping fast-locked the drawer containing checks received by him, from the Teller in manner aforesaid, so that no other officer of the Bank there, could have access to them, without forcing the lock; and that it is the custom of the said Office of Discount and Deposit, for the Teller's drawer containing his cash to remain open during Bank hours, part of the cash laying on the counter for immediate use, and that every day on closing the Bank, he locks the same up in some place of security; and as to the checks above mentioned, it often happens in the course of business, that checks are drawn without date, and that checks, whether dated or not, are often presented many days after they are drawn, and that the same individual draws and

presents many checks, and sometimes checks for the same amount, on the same day.

Thirdly. We find, as the manner of stating, keeping, and settling the cash account of the said Office of Discount and Deposit of the said Bank, the manner is, and always has been, as follows: The cash account is formed, by posting the items of receipts of the day, as appearing from the books pertaining to the receiving officers, collected therefrom by the Accountant, and aggregated into one sum, which is placed to the debit of cash; and thus the balance of the cash account is ascertained every day, by the Accountant, from the books, and seen to agree precisely with the amount of money, found by actual count in the possession of the Teller, positive ascertained losses or gain in receipting or disbursing (errors at the counter not connected with the books, and generally trivial,) excepted.

Fourthly. We find, that the said William Frayser, at and during the time he was the Accountant at the said Office of Discount and Deposit, availing himself of occasional and necessary absences of the Teller from his place at the counter, and of the confidence which the other officers there reposed to him, the said Frayser, did fraudulently and improperly, without the consent or knowledge of any other officer there, take from the Teller's cash-drawer, diverse sums of money, at different times, amounting to the sum of ten thousand three hundred dollars, and that he contrived to prevent any discovery or detection thereof, in the daily settlements made at the time by filing on the Teller's spindle, a check of some individual dealer in said Bank of the same amount with the sum so taken, which check had been in fact previously paid by the Teller, entered by him, and by the Accountant in their respective Check-books, debited from the latter to the individual drawer or drawers, and then fraudulently withdrawn by the said Accountant from its proper place in his own drawer, in order, by placing it a second time on the Teller's spindle as a new check, to conceal the fraudulent taking of its amount, by the said Frayser as aforesaid; and then the said Accountant omitted again to debit the individual drawer or drawers of such check or checks in the ledger, with the amount thereof, although the same were regularly entered on both the said Check-books; because, if he had so debited them, the drawers would have detected him, by showing that they were twice charged for the same check. And we do also find, that many of the entries in the Teller's Check-book were made in the handwriting of the said Frayser, and that the hole made by the Teller's spindle in a check filed thereon is very small, so that by a little pressure it could be easily concealed from view, and in the hurry of business, it would be extremely difficult for the Teller to discover the spindle hole in a check since paid and put upon the spindle, and presented to him for payment a second time.

Fifthly. We find, the said Frayser at, and during the time he was Account-

ant at the said Office of Discount and Deposit, did fraudulently and improperly, without the consent or knowledge of any other officer of the Bank there, take from the Teller's cash-drawers divers sums, at different times, amounting to another sum of eight thousand eight hundred dollars, by the like fraudulent use of checks, which had been previously paid in the regular way, and been confided to him as Accountant and which he placed on the Teller's spindle as before stated, in order to conceal from that officer the mode of taking the said sums; and that the said Frayser, without entering these last mentioned checks in the Accountant's Check-book, contrived, by forcing the addition of such checks as were properly entered therein, and by carrying a false amount into the daily settlements of the cash account, or balance book, and by making a false subtraction of the amount of checks, to prevent a discovery, in the daily settlements made at the time, of the fact of the sums last above mentioned having been taken from the Teller's drawer.

Sixthly. We find, that the said Frayser, at and during the time he was Accountant as aforesaid, finding that the Teller had erroneously added up the checks on his, the Teller's Check-books, so as to make the amount too much by the sum of \$2,200, did improperly conceal the fact of such mistake by false and fraudulent entries on the account book, and did fraudulently and improperly, without the consent or knowledge of any other officer of the Bank there, take from the Teller's cash-drawer the said sum of \$2,200.

Seventhly. We find, that the said William Frayser, at and during the time he was Accountant at the said Office of Discount and Deposit, did fraudulently and improperly, and without the consent or knowledge of any other officer of the Bank there, take from the Teller's cash-drawer the further sum of \$1,000, and that the said Frayser concealed the same by entering in the Teller's Check-book, at the bottom of the list of the day's checks, a check of one of the dealers of the Bank, for the like sum of \$1,000, when in fact no such check had been drawn or paid; and, without debiting the individual dealer with such pretended check, the said Frayser continued by other false entries in his, the Accountant's books, to conceal the said fact.

Eighthly. We find, that the said Frayser, at and during the time he was Accountant at the said Office of discount and Deposit, did fraudulently and improperly, without the consent or knowledge of any other officer of the Bank there, take from the Teller's cash-drawer, the further sum of \$200, and that he concealed the same by prefixing the figure 2 in the Teller's Check-book to a check of one of the dealers in the said Bank for \$60, so as to make the sum appear in that book as a check for \$260, instead of \$60 only; and then, while the individual dealer was debited with the said sum of 60 dollars only, the said Frayser contrived, by other false entries in his, the Accountant's books, further to conceal the said fact.

Ninthly. We find, that all the sums of money mentioned in the 4th, 5th, 6th, 7th and 8th findings, herein before contained, were wholly lost to the said Bank, by reason of the said Frayser obtaining the same from the Teller's cash-drawer, in manner stated in our said findings; and that he, the said Frayser, was enabled to obtain the *same by the fraudulent and improper use of checks in his possession as Accountant, as aforesaid, and to conceal the same by false and fraudulent entries and omissions in the books, in the manner above stated. But, we find that nothing is due to the said Office of Discount and Deposit of the said Bank from those individual dealers with the Bank, whose checks were used a second time by the said Frayser, in the manner described in our said several findings, herein before contained; nor have those individual dealers with the Bank, whose checks have been used, or whose accounts have been falsified, in the manner herein before stated, gained from the Bank in consequence thereof, any monies to which they were not justly entitled.

Tenthly. We find, that the said Frayser was not, at any time while he was the Accountant at the said Office of Discount and Deposit, nor in any wise by virtue of his said office of Accountant, or by the Regulations or Usages of the said Bank there, entrusted with or put in possession of, the monies kept in the Teller's cash-drawer, or of any other money of the Bank at its said Office, or entrusted with the safe-keeping, receipt, or disbursement of such monies; and that the said Frayser fraudulently and improperly, and without the consent or knowledge of any other officer of the Bank there, took and carried away, from the Teller's cash-drawer, and to his own use converted, the said several sums of money, in our said 4th, 5th, 6th, 7th and 8th findings, above mentioned, and also concealed such taking and carrying away, in the manner in our said finding stated, with intent, at the time and times at which he so took and carried away the said monies, so to convert them to his own use, and well knowing that he had no right to take and convert them.

Eleventhly. We find, that the said Frayser commenced committing the several malfeasances and nonfeasances hereinabove mentioned, and continued in the practice of them from the 20th day of January, 1816, till the 31st day of December, 1819, without detection; and that, 213 *on the 3d day of January, eighteen hundred and twenty, he absconded from the town of Petersburg aforesaid; and that he returned to the town of Petersburg aforesaid, on the 11th of January, 1820, after his delinquency had been discovered, and the fact of his being in Petersburg was known, yet he was not apprehended, or prosecuted, criminally or otherwise, and no attempt was made to apprehend or prosecute him.

Twelfthly. We find, it was a duty of the said Frayser, at and during the time he was Accountant at the said Office of Discount and Deposit, and a duty pertaining to his office of Accountant aforesaid, to communi-

cate to the Cashier, every instance of individual dealers with the said Bank, there, overdrawing on the Bank; and that, in two instances, dealers with the said Bank did overdraw to a considerable amount, and that the said Frayser, instead of communicating the first overdrawing to the Cashier, according to his official duty, made one of the accounts balance on the books, by bringing forward a false balance on the ledger, kept by him, and the other, by prefixing figures to sums credited, so as to make them more than they ought rightly to have been; and that one of the said accounts, in which there was such overdrawing, has been since settled by the individual dealer with the Bank, and the balance paid by him thereto, except interest, (which interest, however, the Plaintiffs now here at the bar waive any claim for, in this action;) and that, on account of the other dealer so overdrawing, there is still a balance of \$1,498 26, due to the Bank, and that that sum is lost to the Plaintiffs.

Thirteenth. We find, that at and during the time the said Frayser was Accountant at the said office of Discount and Deposit there was a loss which accrued to the Bank, in consequence of his failure to perform the duties of his office, (as is now here at the bar acknowledged by the Defendant,) to the amount of \$1,317 6.

Fourteenth. We find, that the said Frayser borrowed of a certain Watkins, Boisseau & Co. their check on the said 214 *Office of Discount and Deposit for the sum of \$300, and that he stated to them at the time of borrowing it, that he did not know whether he would use it or not; that the said Frayser in fact presented and obtained payment of the said check, which was afterwards entered on both the Teller's and Accountant's Check-books; but, the said Frayser omitted to debit on the books of the said Bank the said Watkins, Boisseau & Co. with the amount of the check so paid, and fraudulently withdrew the check, and returned the same to the said Watkins, Boisseau & Co. as a check which had not been used, whereby the sum of \$300 was lost to the Plaintiffs.

Fifteenth. We find, by consent of parties as to the form of finding in this particular, all the Acts of Assembly relating to the Farmers' Bank, and all the By-Laws, Rules and Regulations of the said Bank, to be taken as part of the record, without being spread upon it, by reference thereto. But, upon the facts above stated, we, of the Jury, doubt, and pray the advice of the Court; and, if upon the whole case, the Court is of opinion, that the Defendant is liable to the Plaintiffs to the amount of \$10,000, then we find for the Plaintiffs the debt in the Declaration mentioned; and, if the Court shall be of opinion, that the Defendant is liable for a less sum than \$10,000, then we find for the Plaintiffs the debt in the Declaration mentioned, to be discharged by the payment of such sum as the Court shall hold the Defendant liable for, upon the facts stated, with interest from the 1st day of January, in the year 1818, till paid, so as such sum, with interest, exceed not \$10,000; the parties in open Court

consenting to the form of finding in this particular."

At a subsequent day, to wit: Monday, the 28th of May, 1821, the Court having heard an argument, and thereupon, the matters of Law arising upon the special verdict in this case being considered, it seemed to the Court that the Law was for the Plaintiffs: it was therefore adjudged by the Court,

that the Plaintiffs recover against 215 the Defendant, "ten thousand dollars, the debt in the Declaration mentioned, and the costs in this behalf expended.

Subjoined to the Judgment is a note, stating, that this cause came on to be heard, together with another case, brought by same Plaintiffs, against Joseph Caldwell, on the same special verdict, and the Court, without affecting the right of the Plaintiffs to several executions on the Judgments aforesaid, doth order, that the Sergeant or other Officer, to whom such execution may issue, shall cause satisfaction to be made of the said sum of ten thousand dollars, only, on both Judgments, and the costs in both suits, which were founded upon the same writing obligatory.

From the Judgment in this cause, Allison, the Defendant, appealed to the Court of Appeals.

Leigh and Johnson, for the Appellants. Nicholas and Stanard, for the Appellees.

March 27. JUDGE CARR.

In this case, I had written a long and laboured opinion, some time ago, which, on recent discussions with my brethren, I am induced to think was wrong in the main. I have, therefore, abandoned it, and shall content myself with a few brief remarks, referring generally to the opinions of my brothers Cabell and Coalter, which, in my mind, take a correct view of the case.

The Declaration was specially demurred to, because the breaches were not set out with sufficient minuteness; and it was insisted in the argument, that the amount of each particular sum, withdrawn by the Teller at each particular time, should have been specially stated. I think the breaches were well assigned, both upon the English and American cases; and I refer to *Strum v. Farrington*, 1 Bos. & Pull. 160; *Barton v. Webb*, 8 Term Rep. 459; *Carlin v. Chalklin*, 3 Mau. & Selw. 502; *Craghill v.* 216 *Page, 2 Hen. & Munf. 446; *Winslow v. Commonwealth*, Ibid. 459.

Upon the special verdict, it is clear, (and indeed, was admitted,) that the Appellant is responsible for the sums comprised in the 12th, 13th and 14th findings of the Jury; these being direct and clear breaches of Frayser's official bond. The great controversy was upon the 4th, 5th, 6th, 7th and 8th findings; and as to these, the Counsel for the Appellant contended, that he, as surety for Frayser, bound himself only that Frayser should faithfully perform the duties assigned to, or trust reposed in him, as Accountant; not that he should commit no felony; that the takings stated in the 4th, &c. findings, were not connected with the duties of an Accountant, as expressly found by the Jury; but were pure and simple felonies, committed by Frayser, in steal-

ing the money from the Teller's drawer: that, therefore, the Appellant was not liable for these monies, first, because the takings were no breaches of the bond; secondly, because, if they were breaches, they were felonies, and the felony merged the trespass, so far at least, that no civil action could be maintained, till the felony was prosecuted to conviction or acquittal. On this last point, (though I have examined it much, and at one time though the case turned on it,) I shall say not a word, because I am now satisfied that it does not fairly arise, as the first question disposes of all these findings. After stating in the 4th, &c. findings, the manner in which Frayser took and concealed the various sums contained in those findings, the Jury, in their 10th finding, say, "We find that the said Frayser was not, at any time while he was Accountant at the said Office of Discount and Deposit, nor in any wise by his said office of Accountant, or by the regulations or usages of the said Bank there, entrusted with, or put in possession of, the monies kept in the Teller's cash drawer, or of any other money of the Bank at its said office, or entrusted with the safe keeping, receipt, or disbursement of such monies; and that the said Frayser 217 *fraudulently and improperly, and without the consent of any other officer of the Bank there, took and carried away from the Teller's cash-drawer, and to his own use converted, the said several sums of money in our 4th, &c. findings, mentioned; and also concealed such taking and carrying away, in the manner in our said findings stated, with intent, at the time and times at which he so took and carried away the said monies, to convert them to his own use, and well knowing that he had no right to take and convert them." If there be a single ingredient necessary to the composition of larceny, not found here, I confess that I have strangely mistaken the matter. It is found, too, that this larceny was wholly unconnected with the office of Accountant: that, as Accountant, Frayser had nothing to do with the money of the Bank in any way. Was stealing within the bond? Was it to guard against a felony of this kind, (or any felony,) that the bond was taken? Could Allison, when he signed the bond, intend to bind himself, that Frayser should not steal? No more, I conceive, than that he should not commit any other felony.

I am, therefore, of opinion, that so far as relates to these findings, the Judgment be reversed, and entered for the amount of the 12th, 13th, and 14th findings, with interest from the 1st of January 1818, till paid.

JUDGE GREEN.

This is an action upon a bond executed by an officer of the Bank and his sureties, with condition faithfully to perform the duties assigned to, or trust reposed in him, as Accountant, and to be of good behaviour in office, so long as he continued therein. The Declaration sets out the condition of the bond, and assigns various breaches: 1. In availing himself of his office, fraudulently to withdraw and appropriate to his own use, divers large sums of money belonging to the Bank. 2. In

fraudulently keeping the books of the Bank, and fraudulently omitting 218 proper entries *therein, whereby he himself fraudulently got and obtained, and others fraudulently got and obtained and appropriated to their own use, divers other large sums of money belonging to the Bank. 3. In permitting fraudulently, and by the fraudulent keeping of the books, divers persons to over-check, and thereby obtain other large sums of money from the Bank, to which they were not entitled. 4. In failing to post charges, and enter as debits to any person or persons, divers large sums of money paid by the Bank upon checks presented by him and many other persons; by which means, he and others fraudulently withdrew other large sums of money from the Bank. 5. In fraudulently making divers false entries and untrue credits on the books, and fraudulently entering divers large sums of money to the credit of divers persons, which were never deposited or paid by such persons; thereby making them appear to be creditors of, whilst they were debtors to, the Bank.

To this Declaration, a special demurrer was filed, assigning for causes of demurrer, that the Declaration claimed no damages, and that the assignment of breaches was too general; not stating, in any single instance, time or place, names or sums of money.

I do not think, that in an action upon a bond with collateral condition, it is necessary to state, in the conclusion of the Declaration, the amount of damages sustained; for, if it be stated, the Plaintiff, in such cases, can recover more damages than are laid in the Declaration. Yet in all cases, there ought to be an averment in the Declaration, that the Plaintiff sustained some damage, by reason of the facts upon which the action is founded. In the cases in this Court, in which it has been held that no damages need be stated in an action of debt, although the amount of damages was not stated, yet it was averred that the Plaintiff had sustained damage; and in these cases, there were verdicts. In all the Books, it is laid down, that every Declaration, (except in a *qui tam* action) must conclude with an allegation that the 219 *Plaintiff has sustained damage; though I cannot find any case, in which the failure to make that allegation, was held to be fatal upon demurrer. Indeed, there is no case reported, in which the question arose. It is probable, that no English Pleader ever omitted this averment in the Declaration. There is in this Declaration, no intimation that any acts or omissions of the Accountant, or the failure to pay the penalty of the bond, produced any damage to the Plaintiffs. But, in the place where this latter averment ought to have been made, we find an averment that the principal obligee had absconded.

The Declaration in the case of Allison v. The Bank,* is precisely the same as in this, except that after setting out the breaches, it alleges that the Plaintiffs have been greatly injured thereby, by reason

whereof, an action hath accrued to them to demand the penalty of the bond, and concludes "to the damage of the Plaintiffs \$10,000;" and to that Declaration, there is a special demurrer, as in this case. Besides the objection in Caldwell's Case that no damages are alleged as being sustained by the Plaintiff, the objections that no time when, nor place where, the several acts alleged to be breaches of the condition of the bond were done, are stated, nor any specific sum or sums of money are alleged to have been taken by Frayser, or lost by his negligence, are common to both Declarations. I think these objections are well founded. There ought, in all pleadings, to be a reasonable degree of certainty. The time when the acts complained of were done, ought, I think, to have been stated, in order to show that they were done after the execution of the bond, and before the institution of the suit, and during the continuance of the principal obligor in office; and the sums taken, ought to have been stated in detail, or in the aggregate; and it should have been alleged, that they were lost to the Plaintiffs, by reason of the

fraudulently making false, or omitting *to make true, entries, or other acts done in breach of his duty. When the particular statement of all circumstances would lead to great prolixity, as in this case, a more general mode of pleading is allowable than in ordinary cases. *Strum v. Farrington*, 1 Bos. & Pull. 640; *Barton v. Webb*, 8 Term Rep. 459. See the later case of *Deniston v. Richardson*, 14 East, 291. But, this is allowed only to avoid prolixity and voluminous pleading; but surely, this indulgence to necessity or convenience, does not dispense with that degree of certainty, of which the pleadings are susceptible without prolixity. If, in fact, the breach of the condition of the bond had consisted in one false entry, and the loss thereby, of one single sum of money taken by the Book-keeper or any other; it would not have been sufficient, upon a special demurrer, to allege in the Declaration, that a sum of money was lost, by reason of a false entry, without stating time, place, name and sum. For, in that case, the motive to avoid prolixity would not exist. And so in these cases, it would not have increased the volume of the pleadings, or produced any inconvenience, to allege that divers sums of money, to the amount of \$20,000, were taken and lost, by reason of divers false entries, &c. to the Plaintiffs, after the execution of the bond, and before the institution of the suit, and whilst the principal obligor remained in office, to wit, on the day of at the County aforesaid. I think, upon this ground, the Declarations are insufficient. My brother Judges, however, differing with me in this, I proceed to examine the cause upon its merits.

It is admitted, that the sums of money amounting to \$3,115 32 cents, mentioned in the 12th, 13th, and 14th findings of the Jury, are properly chargeable on the Book-keeper's sureties; but, as to those mentioned in the 4th, 5th, 6th, 7th and 8th findings, amounting to upwards of \$20,000, it is contended, that they are not recover-

*The foregoing remarks of JUDGE GREEN apply to the case of *Caldwell v. The Bank*.

able in this action, because the sums of money lost to the Bank, in the manner stated in those findings, were not
 221 lost in "consequence of any official misconduct of the Book-keeper; and if they were, that they cannot be recovered against his sureties, as they could not be recovered against him, since his acts, in taking those sums of money, were felonious, (as they certainly were,) and he has not been prosecuted for the felony. These several findings state, in effect, that the Book-keeper, from time to time, during several years, took clandestinely from the cash-drawer, various sums of money, not entrusted to his care or keeping, and successfully concealed the facts, by the fraudulent use of the paid checks confided to him as Book-keeper, and by making false, and omitting to make true, entries, knowingly and for that purpose, and by forcing additions in the books kept by him; and in the 9th finding, the Jury say "We find that all the said sums of money mentioned in the 4th, 5th, 6th, 7th and 8th findings, where wholly lost to the said Bank, by reason of the said Frayser obtaining the same from the Teller's cash-drawer, in the manner stated in our said findings; and, that he, the said Frayser, was enabled to obtain the same by the fraudulent and improper use of the checks in his possession as Accountant as aforesaid, and to conceal the same by false and fraudulent entries and omissions in the books in the manner aforesaid." This declaration of the Jury, that Frayser was enabled to obtain money, by the fraudulent use of the checks, and concealed the fact by false entries, applies only to the sum found to be taken, in the 4th finding. But, that sum amounts to more than the penalty of the bond; and if his sureties are liable for that, it is unnecessary to enquire as to any others. This fraudulent and improper use of the checks confided to him, and the intentionally making of false, and omitting to make true, entries, were per se breaches of the condition of the bond; and the Plaintiffs were, for that only, entitled to recover the penalty of the bond, to be discharged by nominal damages, and such other as might afterwards accrue, by reason of future breaches; and if any real damage was the
 222 consequence "of those acts done in breach of the condition, they were entitled to recover them, no matter whether these consequences were direct or indirect, so that they could be distinctly traced to that cause, and to no other. Whether the loss of the money was really a consequence of those acts, was purely a question of fact belonging to the Jury exclusively; and I think they have distinctly found, and intended to find, that the loss was the consequence of the taking and concealment, and that he was enabled to take and conceal, by means of acts in violation of the condition of the bond. If, upon the other facts specially found, the Court, if in the place of the Jury, would have made a contrary inference, that would be the proper ground for a new trial, and would not justify the Court in declaring the fact to be contrary to the verdict, and thereupon pronouncing a final Judgment. I think, not only that the Court is

bound by the verdict, but that the Jury, in finding thus, did not indulge any rash or unfounded presumption. It cannot be said, that the loss could not possibly be the consequence of those acts; or, even that it probably was not. The Jury state the manner of keeping and examining the books daily; from which it is clear, that there was a moral certainty that if the books had been truly kept, the taking would have been immediately discovered; and that might, and probably would, have led to the detection of the thief, the recovery of the money, and the prevention of any future losses by the same means. The possibility that the taking might not have been detected, or if detected, traced to Frayser, or, if traced to him, the money might not have been regained by reason of his flight, or any other imaginable cause, can hardly be considered as decisively outweighing the contrary probabilities. Suppose it to be the duty of the Book-keeper, to give immediate notice to the Cashier, if he should discover it in inspecting the books, that some one had overdrawn, and the money was lost to the Bank, would it be any defence to say, or even to prove, that the person who had got the money, might
 223 have, or did "in fact, fly the Country, or might have been, or was in fact, insolvent, before the money could have been recovered of him, if the Accountant had done his duty? I think not. One who flies, may if promptly pursued, be retaken even in a Foreign Country, and the money regained; and one who is insolvent may pay, by means of his friends, to avoid imprisonment or disgrace. Depriving the Bank of a chance, however small, of indemnifying themselves, and by an act violating his official duty, I think subjects the Accountant and his sureties to a responsibility, which can only be measured by the full amount of the money taken and lost.

Upon the question, whether the felony of the principal is a bar to, or a suspension until he is prosecuted criminally, of the action on his bond, I have no doubt. I have examined with great care the English doctrine on this subject, from its origin to the present time. But, as this case is not to turn on that point, I shall not state at large the grounds of the opinion that I have formed, but confine myself to a mere summary of the result of my enquiries and reflections upon it.

We find no trace of any thing like this doctrine in the Books of the Common Law, before the time of Hen. 6; but, on the contrary, Bracton, who wrote in the time of Hen. 3, lays it down, that a party injured by a felony, may seek redress by a civil action, or an appeal of felony, which was a criminal prosecution, at his election. Book 3, ch. 3, sec. 1. And to the same effect is Fleta, Book 1, ch. 38, sec. 1, and Book 2, ch. 2, sec. 5; a Book written in the time of Edw. 2, or Edw. 3, according to Lord Coke. Proem to 10 Rep. or of Edw. 1, according to Selden in his edition of Fleta, page 547. And in the 44th Edw. 3, Ass. 44, 13, Judgment was given for the Plaintiff in an action of trespass against several for the ravishment of his wife, and taking

away his goods; which was a felony at the Common Law, and was then also a felony by the Statute of West. 2; 2 Inst. 434; 224 20 Vin. Abr. 467, *X. 4, Pl. 1. There is not a single adjudged case reported to this day, in which a civil action founded on a wrong amounting to a felony, has been adjudged not to lie. On the contrary, Judgments have been given for the Plaintiffs in many such cases, where the felon has been prosecuted and acquitted or convicted, and even where he has not been prosecuted criminally. The whole doctrine on this subject in England, rests upon the dicta of the Judges thrown out arguendo, and assuming various grounds as the foundation of the rule. The first of these dicta is to be found in the case reported in the Year Book 31 Edw. 6, Pl. 6. That was a Writ of Conspiracy against several, for that they had indicted the Plaintiff of an assault upon B., and beating and wounding him, &c., and feloniously stealing from his purse four shillings, of which he was acquitted. An objection was taken to the action, that it did not lie for a conspiracy in indicting the Plaintiff of an assault, battery and wounding. To this it was answered, that all those matters being contained in one Indictment, an acquittal of the felony was an acquittal of the trespass "quia magis dignum trahit ad se minus dignum," and "felony is of a higher nature than trespass," and "if one come to my house to rob me, and breaks my house, and takes the goods or not, the robbery and breaking of the house are one felony; and if he be acquitted of the felony, he is acquitted of the trespass also." Brooke, in abridging this case, says, "It was agreed that if a man be indicted, arraigned, and acquitted of robbery of J. S., he shall not thereof have trespass; for, the trespass is extinct in the felony, and omne majus trahit ad se minus. Quære inde." This is the origin of the rule, founded upon the doctrine of merger, and a mere dictum; and it had, if true, the effect of barring the civil action for the tort, under all possible circumstances. Yet, this doctrine was abandoned in the first case which occurred, of an action brought after a conviction of the Defendant upon an indictment; "because (as it was said) the party had 225 thereby 'lost his remedy by appeal;' and so it has been held, that the civil action lies after an acquittal on an Indictment; thus shifting the foundation of the rule from the ground that the trespass itself was merged and lost in the felony, to the other, that the inferior remedy by a civil action was merged in the superior remedy by appeal, (which was a criminal prosecution,) and allowing that when the higher remedy was lost, the inferior remedy revived. And in modern times, the Judges, admitting the existence of the rule, have abandoned this latter ground also, and placed it upon the broad footing of public policy, and the interests of the public in encouraging and coercing individuals to engage in the prosecution of crimes. Indeed, there seems to be good reason for the doctrine of modern times upon this subject, in England. It is in conformity with the severe spirit of their

Laws, in respect to the prosecution and punishment of crimes, which has always urged individuals, by various inducements, to the prosecution of crimes; by the forfeiture of the stolen property to the King, in case of a conviction without the intervention of the party, and fresh suit on his part; or to the Lord of the manor, when the property is waived by the felon and seized as waif; enlisting the passions of private revenge, by allowing an appeal at the suit of the party, in which, if there was a conviction, the King could not pardon; by making the Hundred liable, if the party made fresh suit, and hue and cry, and the felon was not arrested; but not otherwise. In all these respects, the policy and spirit of our Laws are the reverse of those of the English Laws. We have no appeal, in which the right to a civil action can merge. We have no forfeiture to the public, of the stolen goods or even of those of the felon; no fresh suit, or active prosecution, on the part of the injured person, is required by our Laws, to entitle him to restitution. We have no Law of waifs, nor any subjecting the Hundred to make satisfaction in any case; and our Law, upon the whole rather discourages than in- 226 vites individual prosecutions. "And

I am persuaded that the object of promoting the prosecution of crimes, would be more promoted by allowing the injured individual to prosecute his civil action uninterruptedly, and thus expose all the circumstances of the transaction to the Officers of the Law, who are bound ex officio to prosecute for the public, than by holding out strong inducement to both parties, to compound the felony, by throwing impediments in the way of the civil remedy.

The rule in question has never been practically extended, or distinctly declared to extend, to any case, in which the suit was not against the felon himself, and founded on the felonious act, as the gist of the action; nor to third persons guilty of no crime, nor to any action founded on contracts.

I think, that upon the merits, the Judgments in these cases were right.

JUDGE COALTER.

The first question in these cases arises on the demurrers to the Declarations. I have some doubts on this question; but, on the whole, am inclined to support the Declarations.

This is an action of debt for the penalty of the bond, which is one with collateral condition for the faithful discharge, by the principal obligor, of his duties as Accountant in the Bank. They are several actions against each surety, for the sum in which they became jointly and severally bound with their principal.

There are two ways of declaring; one, simply in debt on the bond, in which case, if the Defendant craves oyer of the condition, and pleads performance, the Plaintiff must reply and set out the breaches; or, if it goes to a Writ of Enquiry without plea, the Plaintiff must assign his breaches, &c. The Judgment is for the debt sued for, to be discharged by the damages found on the breaches assigned; and

the Judgment will stand as security
227 for any breaches "thereafter, which
may be recovered on a Scire Facias
setting out new breaches. This is by
virtue of the Act of Assembly (1 Revised
Code, 509;) before which, only one breach
could be assigned, as the assignment of
more would be duplicity; and however
small that breach, the whole penalty was
recovered, and the party was driven into a
Court of Equity, to be relieved against the
penalty. The other mode of declaring, is,
to set out the condition in the Declaration,
and assign the breaches in it. This latter
mode has been pursued in this case.

There is no question, that an assignment
of breaches against the sureties need not be
more specific, than if assigned in a Decla-
ration against the principal, (Barton v.
Webb, 8 Term Rep. 459;) and the question is,
whether it is sufficient to say, after setting
out the particular manner in which the
principal violated his duty in each particu-
lar case of loss, that thereby divers large
sums, &c. were lost, without setting out in
detail each particular sum. It seems that
if, after the words "divers large sums,"
the Declaration had gone on to state,
"amounting to the sum of \$1,000," or any
other gross sum, it would have been suffi-
cient; though the Plaintiff would not be
bound to prove that identical sum to have
been lost. This shows that the particular
sum is not traversable, or necessary to be
known, in order to enable the party to de-
fend himself; and it would, therefore,
seem to me to be strange, that this should
be a cause of demurrer. The acts of viola-
tion of duty, it seems to me, are sufficiently
stated, to apprise the party of the grounds
on which a recovery is sought; and as the
action is for the penalty, and for a debt
which has accrued by reason of a breach of
the condition, and which must be recovered
in debt, if any breach, however small, is
proved, damages on the amount of that
breach need not be laid in the Declaration.
The damage, if any, which is to be laid in
the Declaration, is damage for the non-
payment of the debt; and although in gen-
eral, this is but nominal, yet it is the usual
form of declaring, to claim damages;

228 and as "the forms of the Law are often
proof of the Law, it is said that the
Declaration, which in one of these cases,
does not claim such damages, is bad. I am
not prepared to say, that in the general,
this would not be a good cause of demurrer;
though it would seem strange that the
omission to claim what at most would jus-
tify the verdict and Judgment for one cent
damages, and that against the demurrant
who gets clear even of that because it is
not claimed, should be insisted on by him
as a ground of demurrer. He could only
so insist upon it, on the ground that for
want of this, no cause of action is laid
in the Declaration. But the debt, which he
owes by reason of a breach of the condi-
tion, is the substantial cause of action.
But, the party will be excused for not
claiming damages for the failure to pay a
debt, I presume, wherever it would be
error to give Judgment for damages, if
claimed. There are many cases in which
it is error to give such Judgment; as, in

qui tam actions, and in actions popular on
penal Statutes, and Judgments on Scire
Facias. Frederick v. Lookup, 4 Burr.
2018; Cuming v. Sibley, Ibid. 2489. This
would seem to me to be much a case of this
kind. The sureties here are responsible no
further than for the penalty of the bond;
though their principal is responsible for
the whole loss. They are strangers to the
breach, and cannot know that such breach
has taken place until it is so adjudged;
and of course, cannot fairly be said wrong-
fully to have detained a debt, nor could
any thing, except what would, at most, be
purely nominal, be recovered against them
for damages. They would not be liable for
interest on the penalty, by way of dam-
ages, from the time of the breach. The
first breach may be small, and yet the
penalty is thereby forfeited. Besides, the
act itself would seem to exclude it. If
the breaches sued for do not cover the
whole penalty, and that can only be as-
certained by the verdict, the Judgment for
the penalty stands as a security for after
breaches. For these, however, no Judg-
ment can be had on the Scire Facias, be-
yond the penalty. No Judgment can
229 be given "for damages, for not pay-
ing the debt, when the whole shall
have become due, for these after breaches.

As to the merits. It seems to me, that
the great question in controversy in these
cases, rests on the first breach assigned,
and the verdict in relation to it. It avers,
that William Frayser, the principal obligor,
did not faithfully perform the duties as-
signed to him, or the trust reposed in him
as Accountant, and was not of good be-
haviour in his said office of Accountant,
particularly in this, that whilst acting as
Accountant, he availed himself of the said
office of Accountant, fraudulently to with-
draw, and did fraudulently withdraw from
the said office, &c. and appropriate to his
own use, divers large sums of money be-
longing to the said Bank.

It is not pretended, I presume, that the
first branch of this assignment, in the
words of the condition, had it stopped
there, would have been a good assignment
of a breach in a case like the present; and
I understand it as merely preliminary to
the specific assignments afterwards set out,
in the same manner as if repeated before
each. This specific breach, then, unless it
can be construed to mean that the fraudu-
lent taking was perpetrated in the course
of the fulfilment of the duties assigned,
and the trust reposed in him as Account-
ant, could have been supported by evidence
simply proving, that whilst acting as Ac-
countant, he availed himself of his contig-
uous stand to the Teller, or his drawer,
and had taken from the pocket of the
Teller, or from his drawer, monies belong-
ing to the Bank. This would be a simple
felony, which a dealer in the Bank, ad-
mitted behind the counter, or which a serv-
ant in the Bank, so admitted, might be
guilty of, owing to the advantage of his
situation so obtained. Had the breach been
thus broad, or if it can be so considered, it
seems to be that it would be substantially
bad, and would be reached by the demurrer.

But, it is connected with the actings of

Frayser in his office, not only by the general allegation preceding it, that
 230 *he had violated the duties of his office, but it connects the act done with his acting, at the time it was done, as Accountant, "whilst acting as Accountant;" and it lays it as a fraudulent abduction of the money, not a felonious taking, or such a taking as the preceding statement would show to be a felonious taking. It is laid to be a taking connected with his duty and trust as Accountant, and so only a breach of trust. It might have been so. It might have been a duty assigned to him, to pay and receive money in the absence of the Teller; and so he would have been entrusted with the money. Had the breach been simply, that being Accountant, and entitled to stand behind the counter, and near the Teller's drawer, he had availed himself of that position to steal the money of the Bank from the drawer, then the question would have been, whether such breach would be good, either on demurrer, or after verdict, to charge the surety?

The Defendant's second plea intended to put this matter of fact in issue; that is, to aver that the taking was not connected with his duties or trust as Accountant, and was a mere fraudulent taking, of which any other man might have been guilty, and so the surety not liable. The replication to this plea, as I understand it, denies this, and affirms, that the damage sustained was by reason of the nonfeasance, malfeasance, and misbehaviour of the said William Frayser, in his office of Accountant, as the Plaintiffs in declaring have alleged. Had the Plaintiffs demurred to this plea, thereby admitting that the loss sustained was by means of a felonious stealing by the Accountant, but that nevertheless the sureties were liable as fully as the thief himself was, that question of Law would have been thus fairly before the Court. But, the case is not rested on that. The taking is insisted on as a mere fraudulent breach of that trust and confidence reposed in him as Accountant, and for the faithful discharge of which he gave the bond sued on.

231 *The Jury, in their first finding, negative the idea that Frayser ever acted for, or performed the duties of, the Teller, in his absence from indisposition, or in any short or occasional absence; and in the 10th finding, it is stated, that he was in no wise by virtue of his office, or by the regulations or usages of the Bank, entrusted with, or put in possession of, the monies kept in the Teller's cash-drawer, or with the safe-keeping, receipt, or disbursement of monies; and that he fraudulently and improperly, and without the consent or knowledge of any other officer of the Bank, took and carried away from the Teller's cash-drawer, and to his own use converted, the said several sums of money, in the 4th, 5th, 6th, 7th and 8th findings; and also concealed such taking in the manner in said finding stated, with intent to convert them, and well knowing he had no right to take and convert them. In other words, they find a felonious stealing and carrying away, setting out all the means of concealment, &c. which accompanied

the various acts of felony. This is the substance of the finding, taking it all together.

Suppose the means of concealment had not proved quite so good, but that the Cashier had, within an hour after the first transaction, or the next day, taken the trouble to compare the books, &c.; and the Accountant, seeing he must be discovered, had absconded with the money; would his surety have been responsible? Suppose he had simply stolen the money, and resorted to any other mode of concealment which his stand in the Bank enabled him to use. As for instance; suppose the Teller, missing the money, and suspecting some one else, had consulted the Accountant, and he, under the pretence of finding the felon, had agreed with the Teller to conceal the matter for a short time, by forcing the books, &c.; but, in the mean time, finding suspicions attach to himself, he makes his escape with the money; would this artifice, and the use of his books for this purpose, although it might have shielded him from immediate detection, have been sufficient to charge his
 232 surety, "if they were not chargeable at the moment he stole the money?"

That act, if the money was never returned to the drawer, is the act which caused the injury. The means of concealment may be more or less efficacious, according to the credit and high standing of the officer committing the felony, or the influence of the other officers. The various acts of felony, and the means used, and the length of time they are concealed, it seems to me, cannot vary the Law of the case. Notwithstanding the means resorted to here, the first felony might have been discovered within two minutes after it was perpetrated. Suppose a dealer had come in, and presented his check, and the Teller had told him, "You had only \$1,000 in Bank; you checked on yesterday for \$500, and on today for \$500 more;" and he had denied the latter. In the mean time, the Accountant, knowing what is to follow, makes his escape with the money. Would the sureties have been liable? If, instead of stealing the money, he had presented the check a second time, or caused it to be presented, and has thus gotten the money, it would have been another matter. The act, by which the money is lost to the Bank, is a simple act of stealing, which any one might commit; and the question is, must the sureties in the bond answer? I think not. Suppose he had given no security, but had executed his sole bond, binding his heirs, &c., and there had been no other claim against him, except that arising out of his felonious taking: Could he have been sued on the bond for it? Suppose the truth of the case to be set out in the Declaration; would it not be debt and trespass united? It seems to me it would. Suppose he had died before suit; would this have ranked against his executor as a debt due by bond, or as for goods taken by the testator, and converted, &c.? If he had left no personal estate but had been detected a few minutes after the felony, and had cut his throat, could a suit have been maintained on the bond, against his heir

or his sureties? Or, suppose the Plaintiffs had taken and prosecuted him for 233 *the felony, and he was now in the Penitentiary, as he ought to be, according to this finding of the Jury; would the action lie for the goods so feloniously stolen, against the surety? Suppose the Declaration, instead of alleging that he had escaped, had stated that he had been taken, prosecuted, and was now in the Penitentiary, and so the Plaintiffs had a right to demand and have the penalty from the sureties; could the Declaration have been sustained on demurrer, or after verdict? I think not. There being various acts of felony, long concealed, &c., cannot vary the case. But, it was a breach of good behaviour to steal the cash of the Bank. So it would have been to assault the President or Cashier for coming to examine his books. But, it was a breach of his duty to spindle a check a second time, and take the money, which, if any one else had done, and he had known and concealed it, he would have violated his duty. Say he would be bound to discover such felony and fraud in another; no one is bound to accuse himself of a felony, nor can the condition of this bond be construed to bind him to do so, or that the bond shall be forfeited if he does not. Even if it was a bond expressly that he should not commit any felony in the Bank, he would not be bound to discover it on himself. The concealment was a mere non-discovery of the felony.

But, this question seems to me not to be presented by the breach assigned, or by the replication to the second plea. Both put it, as aforesaid, on the breach of trust, duty, confidence, &c. belonging to his actings and doings in his office of Accountant. The verdict negatives this. No loss, as to the cases in these first findings, arose to the Bank, or would have arisen, by any of them, if he had not stolen the money. Suppose, in order to pave the way for taking the money, he had made false entries, &c. had actually spindled a check, but had taken it off afterwards, on finding that he could not take the money at that time. The books being finally posted right, so that no loss was sustained, these acts, however contrary to duty and 234 good *intention, would not have been a breach of the bond, so as to subject the sureties. An intention to commit a felony, without doing it, is not indictable.

The verdict finds, that no loss was sustained, as to the matter in these first findings, except what arose from the act of taking the money from the drawer.

I think, therefore, there can be no Judgment for those sums: but, that we can enter Judgment for those in the other findings.

JUDGE CABELL.

In the case of Allison v. The Farmers' Bank, the objections to the Declaration are first to be considered. The most of these objections resolve themselves into one, viz: that the assignment of the breaches is too general. In this respect, this case bears a very strong resemblance to the

cases of Strum v. Farrington, 1 Bos. & Pull. 640, and Barton v. Webb, 8 Term Rep. 459. In the first of these cases, the bond was conditioned for an agent's accounting for, and paying to the Plaintiffs, all such sums as he should receive as their agent. The breach assigned was, that the agent "had received divers sums of money, amounting to a large sum of money, viz: 2,000l., as agent, and had not accounted for, and paid, the said sum of 2,000l., or any part thereof." There was a special demurrer, on the ground that the assignment was too general, in not stating "from whom, or in what manner, or in what proportions, the said sums of money amounting to 2,000l., were received." It was held, however, that the assignment was sufficiently special.

In the case of Barton v. Webb, the bond was conditioned for a collector's accounting for, and paying over to the Plaintiffs as Treasurers of a Charity School, such voluntary contributions as he should collect for the use of the charity. The breach assigned was, that the collector "had received divers large sums of money, 235 amounting in the *whole to a large sum of money, to wit, the sum of 100l. of and from divers persons, and as for divers voluntary contributions, &c. for the use of the Charity School," and had not accounted and paid, &c. This assignment was demurred to, because the Plaintiffs had not named, or ascertained the persons from whom the collector had received the several sums of money mentioned in the breach, so as to enable the Defendant to meet the charge; and because the breach was too vague and general. This breach, also, was held to be sufficiently special.

The objection to the breaches in the case before us, as to generality and vagueness, is not stronger than it was in the cases just referred to; so far at least, as relates to the designation of persons, and of the sums received from each. It is true, that in the cases cited, the aggregate amount of the sum is stated. But, this appears to me to be an unimportant particular; for, the Plaintiff would not be bound to prove the amount stated; nor, was the statement of the aggregate amount necessary for enabling the Defendant to meet the charge. The objection as to vagueness and generality, is, therefore, entitled to no weight.

The breaches have been objected to on another ground; that the time is not stated with sufficient precision. The Declaration, it is true, has not paid much regard to form, in this respect. But, although the precise time is not mentioned, yet the breaches have been assigned as having been committed by Frayser, whilst acting as Accountant in the said Office; which, I think, is sufficient. I am not disposed to encourage objections, which, while they tend to produce delay, are not necessary for any of the purposes of justice.

The objection, that there is no statement of any amount of damage as having been sustained by the Bank, appears to me to be frivolous. This is an action of debt on a bond, the penalty of which is forfeited by

a single breach of the condition, however small the damage occasioned by it may be.

At Common Law, the Judgment was entered accordingly, "for the whole penalty; and the Judgment is still to be thus entered. But, by the provisions of the Statute, it is to be discharged by the damages assessed by the Jury, for the breaches proved. But, the Plaintiff is not bound, even since the Statute, to do more than to state the condition of the bond, and to assign the breaches; nor is it usual for him, in assigning breaches, either in the Declaration or replication, to state the damages occasioned by the breaches. The Plaintiff's right to recover a Judgment for the whole penalty, is established by any breach of the condition; and it is the province of the Jury to assess the amount of damage sustained, and by payment of which, the Judgment for the penalty is to be discharged.

The demurrer to the Declaration was rightly overruled.

I come now to the merits of the case, as disclosed by the special verdict.

The Jury, in their 4th, 5th, 6th, 7th, 8th, 12th, 13th and 14th findings, set forth various acts of Frayser, by which the Bank, has, in fact, lost \$25,615 32 cents. But, as the Jury doubted how far the Appellants are liable therefor, they pray the advice of the Court and say, "if upon the whole case, the Court is of opinion, that the Defendant is liable to the Plaintiffs, to the amount of \$10,000, then we find for the Plaintiffs the debt in the Declaration mentioned: and if the Court shall be of opinion, that the Defendant is liable for a less sum than \$10,000, then we find for the Plaintiffs the debt in the Declaration mentioned, to be discharged by the payment of such sum as the Court shall hold the Defendant liable for, upon the facts stated, with interest from the 1st of January, in the year 1818, till paid; so as such sum, with interest, exceed not \$10,000." The Superior Court, being of opinion that the Law was for the Plaintiffs, gave Judgment for the debt in the Declaration mentioned.

It was admitted in the argument, by the Counsel for the Appellants, and indeed it could not be denied, that the acts of Frayser, producing the losses stated in the 12th, 13th and 14th findings of the Jury amounting to \$3,115 32, are violations of the conditions of the bond, for which the Appellant is liable to the Appellees.

But the great question is, whether the Appellant is liable for any part of the losses sustained by the Bank, as set forth in the 4th, 5th, 6th, 7th and 8th findings of the Jury; which losses, as stated, amount to \$22,500; or, in other words, whether the acts of Frayser, set forth in these findings, as producing the losses therein mentioned, are violations of the conditions of the bond.

The condition of the bond is, that Frayser "shall faithfully perform the duties assigned to, or trust be reposed in, him, as Accountant, and shall be of good behaviour

in office, so long as he shall continue therein." As this bond was thus entered into solely for the purpose of making Frayser and his sureties responsible for the faithful discharge of his duties as Accountant, and for his good behaviour in that office, it is obvious that even Frayser himself would not be responsible on this bond, for any act of his whatever, that did not pertain to the duties of his office as Accountant. If, therefore, he had forcibly, or fraudulently, or feloniously, taken from the Bank, and converted to his own use, money belonging to the Bank, with the possession, safe-keeping, receipt or disbursement of which, he was not entrusted as Accountant, even Frayser himself would not be liable for it, in an action on this bond; because the act complained of, not pertaining to the duties of his office, as Accountant, is entirely out of the condition of the bond.

This principle, applied to the facts in the 4th, 5th, 6th, 7th and 8th findings, will be decisive of the question as to the liability of the Appellants, for the various losses therein set forth. These findings show that Frayser took fraudulently, improperly, and without the consent or knowledge of any other officer of the Bank, from the Teller's cash-drawer, divers sums of money belonging to the Bank; and they show the means by which he contrived to conceal such taking. These means of concealment consisted partly of the improper use of checks confided to his care, as Accountant; and partly, of fraudulent entries and omissions in the books kept by him, as Accountant. But, the Jury, in their 9th finding, say expressly, that all the sums of money mentioned in the 4th, 5th, 6th, 7th and 8th findings, "were wholly lost to the said Bank, by reason of the said Frayser obtaining the same from the Teller's cash-drawer;" and in their 10th finding, they also say expressly, that Frayser "was not, at any time, while he was Accountant, nor in anywise by virtue of his said office of Accountant, entrusted with, or put in possession of, the monies kept in the Teller's cash-drawer, or of any other money of the Bank, or entrusted with the safe keeping, receipt or disbursement of such monies;" and they go on to state circumstances, which show that the taking of the money by Frayser, was a theft committed by him on the Bank. It then clearly appears, that the loss to the Bank was occasioned by acts of Frayser, not pertaining to the duties of his office, and therefore, out of the condition of his bond.

But, it is contended by the Appellees, that the Jury, in their 5th finding, say, that Frayser took from the Teller's drawer, the sums mentioned in that finding, "by the fraudulent use of checks which had been previously paid in the regular way, and been confided to him as Accountant;" and that in the 9th finding, the Jury farther say, as to all the sums of money mentioned in the 4th, 5th, 6th, 7th and 8th findings, that "the said Frayser was enabled to obtain the same, by the fraudulent and improper use of checks in his possession as

Accountant." It must be admitted, that it is difficult to say with certainty, what the Jury meant by the use of these expressions. A reference to the 4th, 5th, 6th, 7th, and 8th findings themselves, will show that all the sums of money therein mentioned, are found by the Jury to have been fraudulently and improperly taken by Frayser from the Teller's cash-drawer,

without the consent or knowledge of
239 any other officer of the Bank; and the 10th finding shows, that such taking was theft. It is most manifest from the facts stated by the Jury themselves, that the use of the checks was not necessary to accomplish the taking, the stealing, of the money from the Teller's cash-drawer; and it is very remarkable, that as to the monies stated in the 6th, 7th, and 8th findings, no use whatever was made of any check, either as the means of taking the money, or of concealing the taking. In those cases, the taking was absolute, direct stealing, without any use of checks; and it was concealed solely by false entries and omissions in the books; and it is also manifest, that the Jury in the 4th finding, do not refer to the use of checks as a means of affecting the taking, but only as a means of concealment. And even in the 5th finding, the Jury, referring to the 4th finding, speak of the "like fraudulent use of checks." The whole verdict must be taken together; and taking it in this way, I think it probable, that the Jury meant no more by the expressions quoted in the 5th and 9th findings, than that the first improper use of a check, prevented a discovery of the first theft; and that that improper use was the remote and indirect cause of his being enabled to commit subsequent thefts; since, if the first theft had been discovered, it would have led to Frayser's removal from office, and would consequently have deprived him of the opportunity of committing the others.

But, let it be, that the Jury meant what they certainly could not mean without contradicting themselves, and finding against positive facts; let it be, that the Jury meant that the fraudulent use of checks by Frayser was the means, by which he was enabled to commit the several thefts mentioned in the 4th, 5th, 6th, 7th and 8th findings. Even then, it will be found that the loss sustained by the Bank is to be referred to the acts of stealing the money, and not to the facilities or means by which he was enabled to steal it. And so the Jury have expressly declared in their 9th finding; for, they there say, that "all

240 the sums of money mentioned in the 4th, 5th, 6th, 7th and 8th findings, hereinbefore stated, were wholly lost to the said Bank, by reason of the said Frayser obtaining the same from the Teller's cash-drawer, in the manner stated in our said findings;" which manner of obtaining it amounted, as I have before observed, to theft. Nor, when the Jury have said, that the damages sustained by the Bank arose from the thefts of money by Frayser, with which money, Frayser, as Accountant, had nothing to do, such damage, cannot be recovered on a bond, whose sole object was to provide an in-

demnity for damage arising from misconduct in office.

It cannot be denied, that Frayser's fraudulent use of checks entrusted to him as Accountant, and that his fraudulent entries and omissions in the books kept by him as Accountant, were violations of the conditions of his official bond. This was admitted, even by the Counsel for the Appellant; and if the Jury had said, that the sums of money mentioned in the 4th, 5th, 6th, 7th and 8th findings, were lost to the Bank by such fraudulent use of checks, or such fraudulent entries and omissions, there would be no doubt that the Appellant would be liable for them, to the amount of the penalty of the bond. But, the Jury have not said so. On the contrary, they have said that they were lost by his theft of monies, with which, as Accountant, he had nothing to do.

If it be said, that these violations of duty, in the improper use of checks, would justify at least nominal damages, I reply, that where breaches are assigned, and real damages are given for them, there is no room for the application of the Common Law principle as to nominal damages.

I am of opinion to reverse the Judgment, and to enter it for the debt in the Declaration mentioned, to be discharged by the payment of \$3,115 32 cents, with interest thereon from the 1st of January, 1818, till paid, &c.

241 *Caldwell v. Farmers' Bank of Virginia.

March, 1828.

The Declaration in this case is the same as that in the case of Allison v. The Farmers' Bank, with two exceptions:

1. The assignment of breaches is not followed by an allegation, that the Plaintiffs are injured by the breaches, but simply, that in consequence of the breaches, an action has accrued to the Plaintiffs to demand and have the penalty of the bond. The Declaration, in stating the bond, the condition, and the breaches, states all that was necessary to entitle them to their action for the penalty. For, the Law implies damage from the breach; and it is not incumbent on a party to state what the Law necessarily implies.

2. After stating the right of the Plaintiffs to their action for the penalty of the bond, and the refusal of the Defendants to pay the penalty, it is not stated that that refusal was to the damage of the Plaintiffs, but that "therefore they bring suit," &c. I cannot think there is anything in this objection. The action of debt lies to recover a sum of money in numero. In such actions, and particularly for the penalty of a bond, the damages are, in general, nominal; and none need be stated, unless the Plaintiff goes for damages beyond the penalty.

I think the Declaration is good; and the merits being precisely the same as in the case of Allison v. The Farmers' Bank, the same Judgment should be entered as in that case.

Judgments reversed, &c.*

*The PRESIDENT, absent.

242 *Tompkins & Co. v. Wiley.

March, 1828.

Depositions*—Regularity—Presumption in Appellate Court.—If there be no objection made to the regularity of a Deposition in a Court of Law, the Court of Appeals will presume it was properly taken, although there is neither a commission nor notice in the record.

Same.—When Admissible as Evidence.†—It is improper to read a Deposition in a Court of Law: on account of the absence of the witness, unless the party offering it proves that he has used due diligence to find the witness, or that he is not within the jurisdiction of the Court, and the reach of its process.

Assumpsit by Robert Wiley against Alexander Tompkins and three others, merchants and partners trading under the firm of Alexander Tompkins & Co., charging them as bailees of certain goods shipped by Richard Ashhurst, of Philadelphia, to the Plaintiff; and which, by the carelessness and negligence of the Defendants in keeping them, were totally lost to the Plaintiff. At the trial before the Superior Court of Law for Bedford county, the Defendants excepted to an opinion of the Court. The Bill of Exceptions sets forth, that at the trial the Plaintiff offered in evidence the Deposition of Jacob Kaskaden; and for the purpose of proving that the said witness was out of the Commonwealth, he introduced a witness, who stated, that Kaskaden was a single man having no family, and had resided as a store-keeper in the town of Fincastle; that about twelve or eighteen months ago, he heard the said Jacob say that he was going to Ireland; about which time he left Fincastle, as the witness supposed, for the purpose of visiting Ireland; but, after an absence of some weeks, he returned to Fincastle, and upon being asked if he had so soon returned from Ireland, he replied that he had only been to the City of New-York. After the return of the said Jacob from New-York, he remained a short time about and in the town of Fincastle, until about twelve months past, when he left that town, and went to places unknown to the witness, nor has the witness heard that he resides any where within or without the Commonwealth; has never heard any enquiries made about him, nor had he heard

243 *any thing about his intention to leave the State as above stated. Upon being asked the question, this witness further said, that he had not only never heard that the said Jacob was out of the Commonwealth, but that he had never heard a rumor to that effect, nor any rumor about where he was, since he had gone away from Fincastle, except that some time after he had left Fincastle, the Plain-

tiff said he had received a letter from him in which letter he announced that he had gone down the river to New Orleans, but the witness did not know the hand-writing of the said Jacob. The Plaintiff also introduced another witness, who stated that the said Jacob was a single man without any family, and had lived until eight or nine months past in Fincastle, but the witness does not know where he now resides; that he has never heard that he proposed to leave the State, except that he thinks that the Plaintiff in this case showed him a letter which the Plaintiff represented as being from the said Jacob; in which letter, the said Jacob said something about going to New Orleans, but the witness is wholly unacquainted with the hand-writing of the said Jacob, and does not know that the letter aforesaid was written by him. This witness further stated, that except as to the aforesaid letter, he had not only never heard that the said Jacob was out of the Commonwealth, but that he had not even heard a rumor to that effect, having heard nothing about him respecting the place to which he was gone, and where he intended to go and reside: he only knew that he had gone away to parts unknown to the witness, leaving no business or connexions behind him: he had heard nothing said about him. This being all the evidence on this point, the Defendants objected to reading the Deposition, because it did not appear from the foregoing facts that the witness was either out of the Commonwealth, or unable to attend the Court; but, the Court overruled the objection, and admitted the Deposition to be read. Verdict and Judgment for the Plaintiff for \$349 85, and the Defendants obtained a Supersedeas to the Judgment.

244 *Johnson, for the Plaintiffs in Error.

Leigh, for the Defendant in Error.

February 12. The PRESIDENT delivered the opinion of the Court.†

There being no objection stated in the Bill of Exceptions touching the regularity of the Deposition, it must be presumed to have been properly taken, though there is neither a commission nor a notice in the record. Whether it ought to have been read is the only question.

A party, to entitle himself to read a Deposition because of the absence of the witness, must show that he has used due diligence to find him, or that he is not within the jurisdiction of the Court, and the breach of its process. *Falconer v. Hanson*, 1 Camp. 171. The evidence set out in the Bill of Exceptions falls very far short of this. Most of it is but rumor. It by no means appears that due diligence was used by the Plaintiff to find the witness, or that he was without the reach of the process of the Court. The Judgment is therefore reversed, and the cause remanded for further proceedings, in which the Deposition is not to be read, without sufficient proof of the inability of the Plaintiff to produce the witness.

†Absent JUDGES CABELL and GREEN.

*Depositions.—See monographic note on "Depositions" appended to *Feld v. Brown*, 24 Gratt. 74. See principal case cited on this subject in *Stephoe v. Read*, 19 Gratt. 8.

†Evidence—Objections to—What They Must Show.—In *Brown v. Point Pleasant*, 36 W. Va. 303, 15 S. E. Rep. 218, it is said: "It is the duty of a party objecting to evidence to specify and point out such portions as he deems objectionable, and, in the absence of any such specifications on his part, the court will overrule the motion, if any of the evidence thus objected to *en masse* should be legitimate and proper." 1 *Thomp. Trials*, § 606; *Barker v. Barker's Adm'r*, 2 Gratt. 344; *Tompkins v. Wiley*, 6 Rand. (Va.) 242."

See further, monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

245 *Asbury Crenshaw & Thomas B. Crenshaw v. The Slate River Company.

March, 1838.

Milldam*—Abatement—Equity Jurisdiction.—When a Corporation claims a right to abate a milldam as a nuisance, because it obstructs the navigation of a stream, and such abatement would produce great loss to the mill-owner, and great inconvenience to the public, a Court of Equity has jurisdiction to prevent such abatement, and to preserve to the mill-owner his establishment, until the question, whether the mill-owner has, or has not, a right to keep up his dam, be decided.

Same—Same—Same.—The inadequacy of the damages which any Jury could give to the mill-owner in a suit against a Corporation, for the loss and injury sustained by him, by the removal of his dam, is also a good ground for the interposition of equity.

Mills—Rights of Owners in Streams.—Although grants of land to individuals may include the bed and banks of streams, or rivers, yet the public have a right to the use of all such streams, or rivers, for the purpose of navigation; but the Legislature, (representing the sovereign power,) may confer on individuals, by General Laws, or particular grants, rights in opposition to, and paramount to this public right, and such paramount rights have been conferred on owners of mills, by the General Law authorising the Courts to establish mills.

Same—Grant of—Right Vested in Grantee Thereby.—Mills are considered, by our Laws, as great public conveniences and benefits: they are regulated by Law: they are never established except on the requisition of a Jury; amongst other things, the Jury are bound to enquire, whether ordinary navigation will be obstructed, and if they report that it will not, then leave is granted to erect the mill without any condition as to navigation. Such a grant, under such a precautionary proceeding, is a perfect one, and vests in the grantee all the public right to the stream, or so much thereof as is necessary to the full enjoyment of the mill erected under the order.

Same—Statute Placing Additional Burdens on Owner—Constitutionality.—After a mill has been established, and a dam erected according to Law whereby the use of the water for grinding has been granted to the mill-owner a subsequent Act of Assembly, which imposes on him the burthen of erecting locks through his dam, of keeping the locks in repair, and of giving attendance at the locks, so as to admit the passage of boats, and on

his failure, vests in a Company the power to abate the dam as a nuisance, without a full indemnification, and equivalent for the injury thus done to his vested rights, is contrary to the Constitution of the State, and void.

The Plaintiffs, Ashbury Crenshaw, and Thomas B. Crenshaw, exhibited their Bill to the Judge of the Superior Court of Chancery for the Richmond District, praying for an Injunction against the "Trustees of the Slate River Company," a Corporation of that name, created by an

Act of the General Assembly, passed 246 on the 29th January, *1819. They allege that they are the owners in fee simple of a valuable water-grist mill, in Buckingham county, built on a water-course called Slate River; that the mill is supplied with water by a dam erected across the said river pursuant to Law, at a place where they (the Plaintiffs) are the fee simple owners of the bed of the water-course, and of the lands on both sides thereof.

They trace back their title to the said land and bed of the river, to a patent issued on the 10th January, 1726, granting 1600 acres of land to James Skelton, including the land on which the mill and dam are situated, and the bed of the river. In October, 1727, Skelton sold and conveyed the said land to George Nicholas, and from him it passed to his son John Nicholas, who obtained from the County Court of Buckingham, on the 13th May, 1765, an order authorising him to build and erect a dam across the said river on the said land; and in pursuance thereof, the said John Nicholas did build a mill and erect a dam on the site now occupied by the dam of the Plaintiffs. John Nicholas, in 1795, devised the land on which the mill and dam were erected, to his son Robert Nicholas, who in 1802, petitioned the County Court for leave to erect a water-grist mill on his own land on Slate River, were John Nicholas formerly had a mill. A Writ of Ad Quod Damnum was awarded, and the Jury found among other things that ordinary navigation will not be obstructed, and on the 12th July, 1802, an unconditional order to build the mill was granted him. On the 21st September, 1802, he sold and conveyed to Charles A. Scott, who proceeded to erect the mill and dam at the site aforesaid at very great expense. Scott sold and conveyed in 1807, to John Cunningham, from whom it passed to his daughter Letitia Taylor, who, with her husband Archibald Taylor, conveyed on the 28th July, 1824, to the Plaintiffs. Thus, they allege, that the title to the land, with the bed of the water-course, and the undisturbed possession thereof has *remained with the original patentee, and those claiming under him, for a space of almost one hundred years.

They allege that Slate River, within the bounds of Skelton's patent, is a small stream, many miles above tide-water and ship navigation, and was not, at the time of the grant, used for navigation of any sort.

They allege that on the 18th December, 1794, the Legislature passed an Act, for improving the navigation of Slate River, by which Trustees are appointed to raise

*Mills and Milldams.—See monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

The principal case is cited in Stokes v. Upper Appomattox Co., 3 Leigh 324, 337, 338.

*Same—Equity Jurisdiction.—On this subject the principal case is cited with approval in Miller v. Trueheart, 4 Leigh 578; Bull v. Read, 13 Gratt. 87.

In Keystone Bridge Co. v. Summers, 18 W. Va. 485, it is said: "If the right of the public to the use of a highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity by an injunction ought to prevent such a nuisance. Green v. Oakes, 17 Ill. 240; The Mohawk Bridge Co. v. The Utica and Schenectady Railroad Co., 6 Paige 568; Jerome v. Ross, 7 Johns. Ch. 322; Crenshaw v. Slate River Co., 6 Rand. 245."

*Same—Rights of Owners in Stream.—The legislature, by giving a court power to grant a milldam right, vests property in the owner of the mill, which cannot be taken away without compensation, because the legislature may grant a right impairing public right of navigation. Dissenting opinion of BRANNON J., in Pickens v. Coal River Boom & Timber Co., 51 W. Va. 445, 41 S. E. Rep. 403, citing principal case as authority.

And in State v. Elk Island Boom Co., 41 W. Va. 799, 24 S. E. Rep. 591, it is said: "Such booms and dams are considered by our laws as public conveniences, and the legislature, representing in this regard the sovereign power, may confer on individuals and corporations by general law, as in this case, rights in opposition and paramount to this public right. Crenshaw v. Slate River Co. (1838), 6 Rand. (Va.) 245." To the same point the principal case is cited in Barre v. Flemings, 29 W. Va. 319, 1 S. E. Rep. 736; James River & Kanawha Co. v. Turner, 9 Leigh 325.

The principal case was also cited in Ex parte Hunter, 3 W. Va. 160; Carter v. Railway Co., 26 W. Va. 654.

money by subscription for that purpose; and that by the 4th section, owners of mills on the river are required to erect locks or slopes for the passage of batteaus of four tons burthen, and of fish, at their own expense, and to keep them in good repair. [See Sessions Acts of 1794, ch. 48, p. 29.] But that, as they are informed, no subscriptions were raised under that Act, and nothing was done for the improvement of the river; the scheme being found impracticable and was abandoned.

That another Act passed 29th January, 1819, entitled "An Act for improving the navigation of Slate River," whereby a Joint Stock Company was incorporated by the name and style of "The Trustees of Slate River," [See Sessions Act of 1818, ch. 37,] for improving the navigation of the river "from its junction with the James River, to the highest practicable point of improvement;" and the improvement required by Law is, that the river should be made "capable of being navigated in ordinary seasons, by vessels drawing one foot water." When the river is thus made navigable, it is declared to be a public highway, and the Company are entitled to tolls.

That by the 10th and 11th sections of the said Act, the owners of mills are required, within six months after the navigation shall have been completed to their several mills, to erect good and sufficient locks through their dams, or on canals around them, so as to procure a safe and easy passage for loaded boats; to keep them in repair, and to cause constant attendance to be given by some person who will
248 *enable the boats to have free passage through them; and on failure so to do, a fine of \$20 is imposed on the offender for every time such failure shall happen, and the offender is moreover liable to the party grieved for damages. And if the owners of the mills shall refuse or fail to erect the locks within eighteen months, the mill-dams are declared to be nuisances, and may be abated: and the Trustees are empowered to clear them away, and to charge the expense of doing so to the owners of the mills.

They allege, that their dam is situated about a mile and a quarter above the mouth of the river; that from the dam to the mouth, the stream has been used to transport the manufacture of the mill ever since its erection by Scott, long before the passage of this Act; that the dam is built at the foot of a succession of rapids, which never were navigable, and never could have been made so without great expense; that the dam is seventeen feet high, and causes the water to flow back only about three quarters of a mile; that no part of the stream above the dam has ever been used for the purpose of navigation, as they have been informed, except on one occasion, when a single boat with two hogs heads of tobacco passed down in high water many years ago; that the obstructions to navigation above their mill are such, that they believe the Company could not be induced to encounter the expense of removing them, either for the public good, or their own emolument, if they were bound to bear the

whole expense of the improvement; but, there having been constructed on the river five mills, the dams of which have been erected on the faith of the General Law in relation to mills, and their dams having made eddy water for about twelve miles, one-third of the distance over which the improvement is contemplated, the expense of improving the residue of the distance may be within the competency of the Company; that these dams together, are believed to be between sixty-three and sixty-five feet in height, and to have covered with their ponds the most difficult part of
249 the river to be improved; that if *the Company can now charge the mill-owners with the expense of locks, while they will throw an immense burthen off their own shoulders, they will tax with an unjust and grievous burthen, those very individuals who have already done so much for the improvement of the river, and whose mills are a great public benefit; that, notwithstanding these considerations, the Company are proceeding to impose on the Plaintiffs, and the other mill-owners, the whole burthen of making locks at their dams, of keeping them in repair, and causing them to be attended to in the manner prescribed by the Act of Assembly.

They state, that they had received a written notice from the Company, apprising them that the navigation has been completed for six months, from the mouth of the river up to their dam, and requiring them to proceed to the erection of the locks. They say that the navigation above is not yet improved so as to be fit for use, and cannot be for a considerable time; so that if they are bound to make them at all, there can be no utility in making them at this time; yet, if the Act aforesaid, so far as it relates to the mill-owners, be Law, and if they (the Plaintiffs) are bound by it, they are now exposed to the danger of being prosecuted and harassed by the Company, or by any vexatious individuals who may choose to prosecute for the fines, and in the course of a few months, they will be exposed to the danger of having their dam, which is valuable to them and the public, regarded as a nuisance, and abated by the Company.

They charge, that the Act, so far as it requires the mill-owners to build and repair, and superintend the locks, is without authority and void; that they are advised they are not bound to build the locks; that no fine could be lawfully imposed on them for failure to do so, and that their dam could not be lawfully abated by the Company for such failure; but, they do not desire to engage in so inconvenient, perplexing and hazardous a controversy, as that which
250 would arise at Law, in repeated efforts to fine *them, or in an attempt to abate the nuisance; that such a controversy would be alike detrimental to their interest, and that of the Company; and that while they are threatened with the penalties of the Law for not doing what they are advised they are not bound to do, they can neither enjoy their property in quiet, nor bring it to market with safety.

They therefore pray, that, as they are

without remedy at Law, the Slate River Company may be made Defendants to their Bill; that themselves may be quieted in the possession and enjoyment of their property, free from the claim of the Company to have the locks built by them; and that the Company, their agents, and all others, may be enjoined from prosecuting them for fines and from abating and disturbing their dam.

This Bill of Injunction was exhibited on the 28th March, 1825. The Patent, Deeds, Acts of Assembly, and other Documents referred to, were annexed to the Bill. The Injunction was awarded on the next day. The Trustees of the Slate River Company filed their Answer on the 5th August of the same year.

The Answer of the Defendants, the Slate River Company, is to the following effect:

They admit the emanation of a Grant to Skelton, the execution of the several Deeds, the transmission of the lands patented, and the other documents referred to, so far as matters of fact are proved by those exhibits; but, they deny that the bed or stream of Slate River was ever so disposed of, or granted to Skelton, or those claiming under him, as to preclude or impair the rights vested in the Slate River Company by Law, and the natural rights which appertain to the people of Virginia to apply the stream for the purpose of navigation.

They say, that as early as 5th November, 1788, the Legislature passed a Law appointing Commissioners to examine the natural and artificial obstructions to Slate River, and to give their opinion

251 whether it was practicable *to make the stream navigable, and to report to the next Assembly. In December, 1790, they passed another Law reviving the former, appointing additional Commissioners, requiring any three to perform the duty assigned by the former Law, and to report. That on the 18th December, 1794, (at which time neither the Plaintiffs, nor any one from whom they claim, had any mill-dam, or right to erect any mill-dam across Slate River,) the Legislature passed the Act referred to in the Bill. That by that Law it is asserted, that it had been represented to them, that the extension of the navigation of the Slate River would be of public utility, and it is probable this representation was made by the Commissioners. That before the year 1794, the mill-dam erected by John Nicholas was down, and continued down so long that neither he, nor any one claiming under him, could lawfully erect the dam anew, without a new order from the County Court. Whatever then might be the legal effect of the order of 1765, yet the rights given thereby were lost to the builder of the dam, and those claiming under him; and before the order of July, 1802, was made, the Legislature appropriated Slate River to the purposes of navigation, in exclusion of any rights which the Plaintiffs, or those under whom they claim, have, or may have had.

They say, that the dam of the Plaintiffs is not erected at the same place on which the dam of John Nicholas was built; that Slate River, at the Plaintiffs' mills, and

for many miles up, and to its junction with James River, is a stream large enough to be used, and well suited to be improved for the purposes of navigation, to the great benefit of the public; that in its natural state, and as far back as during the War of the Revolution, it has been used for transportation; that after the dam of John Nicholas was down, the stream, for some distance above the Plaintiffs' mill, and even above the lands ever owned by John Nicholas, was used for transportation.

252 *They deny that nothing was done under the Act of 1794, to improve the navigation of the river. They say, that the persons appointed by that Act, divided the river into sections, and allotted the sections to persons who did much work on it; that one section, as difficult as any other, was allotted to Francis Harris, who nearly put his section in order for navigation; that the scheme was never abandoned from the belief that it could not be carried into effect; that those concerned in the undertaking under the Act of 1794, determined that it might be made navigable at the very time when there was no dam across the stream near the present dam of the Plaintiffs. They believed, that the neighbours on the stream might make it navigable to Kidd's Falls; and from that point to some little distance below, they would have to employ a man, and spend some money to remove the rocks about the Falls, and obstructions in the stream.

They claim all the rights vested in them by the Act of 1819; and insist, that the Complainants have no right to ask an exemption from any burthens or duties imposed by that Law.

They say, that the Plaintiffs' mill is situated about one and a quarter, or two miles from the mouth of the river; that the dam is about seventeen feet high, and causes the water to flow back between three quarters of a mile and one mile and a half.

They admit, that the river between the mill of the Plaintiffs and Kidd's Falls, a distance of three or four miles, abounds with rocks and falls that would be expensive to remove; but, they deny that they would give over the undertaking in which they have engaged, if there was no mill-dam on the river. They believe the mill-dams are an hindrance and an inconvenience to the works for improving the navigation. They admit, that the water in the mill is generally confined to the banks of the stream. The ponds are deep, and much wider than other parts of the stream; and in the winter will retain

253 the ice much *longer than the other parts of the stream, and thereby obstruct navigation longer. They say, that the mill-owners can manage to stop the water in its passage down, so as to produce delay in navigation; but, if there were no dams on the river, except those belonging to the Company, placed where they might be used, as they were required, under the sole management of the Company, it would be in the power of the Company, by the use of their lock-dams and works, to obviate, in a great degree, the inconvenience arising from scarcity of

water, drought, or ice. They admit, that the eddies formed by the mill-dams are about twelve miles, and the Company contemplate carrying the navigation to Buckingham Court-house, a distance of about forty miles; but, they deny that these eddies are beneficial to the Company in their work. They say, that if they were to erect locks at their own expense in the mill-dam, they would spend more money than would be required to improve the stream from its natural state; and after they have encountered such expense, if the dams should be allowed by the mill-owners to go down, the locks of the Company would be destroyed, and they would be compelled to go to work on the bed of the stream. The locks erected in the dams of the millers, would require greater skill, and would be much more difficult to be kept in repair than the dams of the Company, erected just where the Company want them.

They say, that from the time of the passage of the Law in 1819, to December, 1823, great efforts were made to raise the stock, and form the Company, which was well known to Archibald Taylor, the then owner of the Plaintiffs' mill, who subscribed for two shares of the stock, on the agreement that he might expend it in improving the navigation below his mill; that he placed a lock-dam between his mill and the mouth of the river, for the Company, which he used in navigating the river to his mill, and the Plaintiffs also, since they purchased: that the Plaintiffs purchased from Archibald Taylor, after

254 the Company *had been formed; had spent a large sum of money in the work, and had succeeded in procuring a passage of Laws to obtain a subscription on the part of the Commonwealth, from the Fund for Internal Improvement: that the Plaintiffs have become purchasers with a full knowledge of all circumstances, and now demand to be freed from an obligation which they are bound by Law to bear: that the Defendants being apprised of the temper of the Plaintiffs, and of their disposition to impede the operations of the Company, gave them the notice of which they complain.

They admit that the river had not been made navigable to the Plaintiffs' dam, from above, but they assert that it had been from below, and that the Company had done nearly a fourth of the entire work, and but for the mill-dams, they believe the work might be completed by the Fall of 1825. They say, they believe the work practicable, and when finished, will be of great public utility.

They deny, that the County Court has any power or authority to make an order (in favor of a petitioner for leave to erect a mill,) whereby the mill-owner shall have the right to appropriate to himself the privilege of excluding the people of the Commonwealth the right of navigating the streams of the Commonwealth: that it is the duty of the County Courts to remove obstructions to navigation, but they have no right to throw impediments to navigation, in the way of those who live on the upper part of the streams.

They contend, that although ships can never navigate Slate River, yet that the streams which are susceptible of navigation, are under the control of the Legislature, and that the owners of dams across them may be subjected to such terms as to the Legislature may seem just: that before and since the Revolution, to secure the passage of fish, and to improve navigation, the Legislature have required owners of mill-dams to erect locks or slopes, in their dams: and that the privilege of navigating streams is a natural right.

255 *They do not admit the right of a Court of Equity, by any Decree, to stand in the way of a determination of a Court of Law, on any of the matters set forth in the Plaintiffs' Bill. They deny all fraud, and all disposition to oppress, or be oppressed.

To this Answer a general replication was filed, and the parties proceeded to take the Depositions of numerous witnesses. It is not deemed necessary to report any part of that evidence. So far as it was necessary to explain any point decided by the Court, the Judges have referred to the evidence.

In June, 1826, the Chancellor dissolved the Injunction, and the Plaintiffs appealed to this Court.

Leigh, and Johnson, for the Appellant.
S. Taylor and Stanard, for the Appellees.

March 27. The Judges delivered their opinions.*

JUDGE CARR.

The Plaintiffs are the owners of a mill on Slate River; the Defendants are the "Trustees of the Slate River," formed into a Corporation of the Act of 1819, for the purpose of improving the navigation of that river. The Act directs, among other things, that the owners of mills on the river shall, within six months after navigation shall have been completed to their mills, erect good and sufficient locks through their dams or on canals, proper and convenient around them, so as to furnish a safe and expeditious passage for loaded boats, &c. up and down the river; and moreover, shall keep the said locks in good repair, and cause some person to give constant attendance at the same, whose duty it shall be to work and manage

256 the locks at all *times, when thereto required by any person wishing to pass through them with craft, giving them free passage without delay; and on failure so to do, the offender, for every offence, shall forfeit \$20, and be moreover liable to the party aggrieved for damages. And it is enacted, that if any owner of a mill shall fail to build such lock within eighteen months as aforesaid; his dam is declared a nuisance, and shall be abated, thrown down and destroyed; and the Trustees are empowered and directed to clear it away at the cost of the owner. Proceeding under this Act, the Trustees have given notice to the Plaintiffs, owners of the Virginia Mills, a short distance above the mouth of Slate River, that navigation has been completed up to their mills for six months, and requiring them to proceed to the erection of

*The PRESIDENT absent.

the locks, agreeably to the requisition of the Act. Against this proceeding, the Plaintiffs protest, as oppressive and against Law, as unconstitutional and void; and as they are liable to motions for the \$20 fine, by every one who may choose to call on them for passage, and will very soon be liable to have their dam thrown down, and irreparable injury done to their large and valuable mill establishment, they pray an Injunction, and a decision of the matter in Equity. The Injunction was granted, unless the Defendants, on being served with the order, should shew cause to the contrary, by the 10th day of the next Term. The time for answer was afterwards enlarged. The Answer was filed, much evidence on both sides taken; and the Court, upon argument, discharged the order, upon a principle which, if correctly decided, puts an end to the cause.

In the argument, several questions, deep, grave and important, were raised. Some of these, I shall pass over entirely, and touch others, so far only, as seems absolutely necessary to the decision of the case. I shall do this, not from a wish to avoid trouble, but because some of the questions are too large, and open too wide a range of enquiry, for the time I have had to bestow on them.

257 *The first objection taken by the Appellees, was, to the jurisdiction of the Court of Chancery. The testimony I have borne on this subject, has been such, I believe, as to shield me from the suspicion of inclining to that loose practice, which, acting upon the particular case, without looking to any general rule, tends to destroy every thing like system, and to break down the barrier between Common Law and Equity. In her appropriate sphere, however, I would carefully support Equity; because I think the due exercise of her legitimate powers, most salutary. One instance, clearly proper for the interposition of Equity, is, where the damages of a Jury would not compensate; the owner attaching some extraordinary value to the chattel sought. Such was the case of the Pusey Horn, 1 Vern. 273; the patera of the Duke of Somerset, 3 P. Wms. 389; the silver tobacco box, Fells v. Read, 3 Ves. 70, &c. Another acknowledged, and most useful ground of equitable aid, is, to prevent irreparable mischief by the destruction of property, while the right of the parties are in litigation. The cases under this head are numerous, and may be found in any book of reference. Waste, breaking up of meadow, of a garden, &c., are among them. In the case of Nuthrown v. Thornton, 10 Ves. 159, Lord Eldon ordered the stock, &c. on a farm, seized by the landlord under a distress for rent and bill of sale, to be specifically restored, considering that under the particular agreement it was not liable to that proceeding. He says, "Upon the particular circumstances also the Court would be justified in interposing, to prevent the destruction of the property, until the rights were ascertained, upon the principle of irreparable mischief. It is said, the Plaintiff might have damages. But, how are damages to be estimated in such a case? The directions to the Jury

must be, to give, not the value of these chattels merely, but their value to this man, having this farm, enabling him to use them for cultivation," &c.

258 *In the case before us, the Plaintiffs have mills, which have cost them upwards of \$20,000; the dam itself, as Mr. Scott tells us, cost more than \$3,000. This establishment, we are told, deals largely in wheat and the other products of the country; thereby making profit to itself, and affording to the citizens the convenience of a ready market for wheat, corn, and other articles. If the dam were destroyed by the Trustees, there would be the direct loss of its cost, the damages resulting, and the inconvenience to the public from the sudden stoppage of such an establishment; and all this mischief, being actually suffered, the mill-owner would be left to sue a Corporation for damages. It is not better to let this dam stand, and the mills go on, till the matter of right be decided? I think so, clearly; and that it is a case directly within the appropriate range of the preventive, and (if I may so say) the preservative powers of a Court of Equity.

It was next objected, that the Plaintiffs stand in the place of Taylor, who had full notice of the Law, assented to it, and aided its progress; and that he was therefore bound by it, and they equally so. Every freeholder may be said in some sort to assent to the Laws passed in a Legislature where he is represented; but such assent, I apprehend, would not bind him, if a Law were passed conveying his property to another citizen. The assent, then, must be something more than merely standing by, and not protesting against the Law. Taylor's rights, whatever they were, were vested rights at the passage of the Law. He was the owner of the mills. Has he done any thing to divest those rights? If not, they still exist in the Plaintiffs, and they are legal rights, and must be so considered though brought into equity for their preservation. It is insisted, that the taking two shares of stock by Taylor, was such assent as bound him; but I cannot think that was a surrender of his legal rights. He took them on the express understanding that he was to pay for them in locks put into the river below his mill, which were necessary for him,

259 *whether the river was cleared higher up, or not; which he had determined to make for his own use; and which, when he did make, he had very little idea, as he tells us, that the scheme would ever be carried into execution. The only equity this could raise against him, would be, that he stood by and saw the work going on, without objecting. But this, it seems to me, would not be a good objection; for, till his rights were called in question, till he received notice to make the locks, it was not necessary for him to take any active step. But this objection, if applicable to Taylor, is not brought home to the Plaintiffs, by any notice. Neither do I think, that the clause in the Law, exempting Taylor, his heirs and assigns, from paying toll on property carried from his mill down the river, has the effect of binding him to

stand by this Law. There is no proof that he had any agency, or gave any assent to this clause. It may well be supposed to proceed from a sense of justice in the Legislature, prompting them to make the owners of the mill some small return for the many burthens the Law was imposing on them.

The next objection I shall notice, is, that the Virginia Mills were not legally established. I am not sure that we can take this objection first in this Court, and in this collateral way; but the objection itself seems unfounded. The application to the Court was to build a mill, and that would seem to include every thing necessary, but especially a dam; for, if no dam had been intended, no leave of Court would have been necessary; and when we look at the Inquest, we cannot doubt for a moment, that a dam was in contemplation. The Jury are directed to enquire into the damages which may accrue from overflowing the lands above and below, and whether any mansion-house, garden, &c. will be overflowed; and that they report upon all these subjects. This would all be a farce, upon any other idea, than that of a dam; especially on a site where there is so much fall, that a dam seventeen feet high does not throw the water a mile back.

260 *But it is said, that the Act of 1794, took from the County Court all power to give leave for erecting mills on Slate River, by declaring it a public highway. There certainly is no express prohibition to the County Court, to exercise the power which was vested in them by the General Law; and the clause of the Act making the highway, is in these words: "And be it further enacted, that after the said river shall be made navigable for the passage of boats, agreeably to the provisions of this Act, the same shall be deemed and taken to be a public highway." This clause, it will be seen, while it admits that the river was not then navigable, or a public highway, does not go immediately and absolutely to change its character, but only enacts, that after it shall be made navigable, under that Act, it shall be a public highway. Now, we have it in evidence, that the whole scheme contemplated by that Act, failed. No subscriptions were raised; no money paid; no labor, to speak of, bestowed. In short, the whole project was abandoned, and the Law a dead letter. The present Trustees are created under an Act passed twenty-five years after, having no reference to, or connection with, the former. I think, therefore, that no aid can be derived from this source, to impeach the power of the County Court to grant leave to build the mill.

We come now to the main question: Are the Plaintiffs bound by the provisions of the Act of 1819? Must they either erect locks, and keep due attendance at them, or have their dam destroyed as a nuisance?

The importance and delicacy of this question need not be enlarged on. It is forced upon us, and we must either meet it, or shrink from our duty.

In ascertaining the character of streams, and the power of the Sovereign over them, we must look to the Common Law, and the

operation of our own legislation. The best and most authoritative Treatise on this subject, and that indeed from which all who have written since seem to have drawn, is Lord Hale's Tract *De Jure*

261 *Maris, &c.*, published *by Hargrave in his Law Tracts. He says, pages 8, 9: "There be some streams or rivers, that are private, not only in propriety and ownership, but also in use, as little streams or rivers that are not a common passage for the King's people." Again: "There be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow, or not, are *prima facie*, *publici juris*, common highways for man or goods, or both, from one inland town to another. Thus, (he observes,) the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports, as below, and as well where they are become private property, as in what parts they are of the King's property, are public rivers, *publici juris*, and therefore all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by Indictment, and removed." Again, p. 5, he says: "Fresh rivers, of what kind soever, do of common right, belong to the owners of the soil adjacent, so that the owners of one side, have of common right the propriety of the soil, and consequently the right of fishing *usque ad filum aquæ*; and the owners of the other side, the right of soil or ownership and fishing unto the *filum aquæ*, on their side; and if a man be owner of the land on both sides, in common presumption, he is owner of the whole river, and hath the right of fishing, according to the extent of his land in length. With this (he adds,) agrees the common experience." These extracts mark with more precision than any thing I have met with in any other Common Law writer, what constitutes a public river, and the distinction between such as are public, and those which may become private property. These distinctions are supported by the cases. Lord Fitzwalter's Case, 1 Mod. 105; Carter v. Murcot, 4 Burr. 2162; The Royal Fishery in the River Banne, Dav. Rep. 152. See, also, Palmer v. Mulligan, 3 Caines' Rep. 307; Shaw v. Crawford, &c., 10 Johns. Rep. 236; The People v. Platt, 17 Johns. Rep. 195.

262 *At the Common Law, then, we see that some rivers were public, some private; and of those considered private, that some were subject to the servitude of the public interest, and in that sense common highways by water. The mark of distinction between those which are entirely private property, and those which are subject to the public use and enjoyment, consists in the fact, whether or not they can be used as a common passage for the public.

Applying this Common Law criterion to the Slate River, I have no doubt that it must be considered a private, innavigable stream; and that the patent to Skelton in 1726, conveying the land on both sides, and including the river in its bounds, gave

him the property in the bed of the stream; and that he had, to the extent of his land, the exclusive right of fishery. But, this would give him no right to obstruct the passage of fish; for, all the riparian owners have the same right to the enjoyment of the stream with all its advantages, and the natural run of the fish of passage is one of these. Whether the right to the banks and bed of the stream, derived from the patent of 1726, was an absolute and exclusive right, or a right held subject to the *jus publicum*; in other words, whether the Legislature could, at any subsequent period, have this river rendered navigable, and make it a public highway for boats and other craft, without a violation of the rights of Skelton, and those claiming under him, is one of those questions which I do not mean to discuss. The cause may be decided on other grounds. It will not be derided, I presume, that the Sovereign Power, (with us the Legislature,) in whom resides this *jus publicum*, may, in their discretion, grant it away. It is to be taken, that they will never make this grant, but for the public benefit. Of that, however, they must be the Judges. They have the power; and the grant fairly made will bind them and their successors. The whole course of our legislation shows, that mills have at all times been considered great public conveniences and benefits, and as such, taken under the protection, encouragement

263 and *regulation of the Laws: made in fact public establishments. In proof of this, various Laws may be cited; such as those regulating their tolls, their weights and measures, that they shall grind the grist in due turn, &c. Particular privileges, too, are given them. The miller is exempt (or was till lately) from militia duty. They have a right to condemn an acre of land for an abatement. They may overflow the lands of another. These privileges are forfeited, if a miller fails to keep up his mill for the case and use of his customers. A mill not regularly established by Law, is forbidden to grind for toll. All these provisions, (and others probably might be shown,) prove that mills are highly favoured; and this is wise legislation; for, we all know, that few things contribute more to the convenience, comfort and prosperity of a country, than good mills well regulated. When a mill is to be established, application must be made to the Court of the County. They direct the Sheriff to take a Jury, who are to view the lands, &c.; and among other things, to enquire, "Whether, and in what degree, fish of passage and ordinary navigation will be obstructed; whether, by any, and by what means, such obstruction may be prevented." What is ordinary navigation? Among the meanings assigned to the word ordinary by Johnson, I find the following: established, regular, common, usual. Ordinary navigation then, is established or regular navigation. If there be such, the Jury will report it, and the means necessary to prevent its obstruction; and leave will be given to build the mill, under such conditions as will preserve the existing navigation. If there be no ordinary navigation, there can be no obstruction. The

Jury will so report; and the leave to build the mill will be without any condition as to navigation; and this grant, I hold, will be a perfect one, vesting in the applicant all the public right, or so much at least as is necessary to the full enjoyment of the mill erected under the order. Proceeding under this idea, Nicholas, the owner of both banks and the bed of this

264 *private, unnavigable stream, in 1802, applied to the County Court of Buckingham, for leave to build a mill. An Inquest was held, a report made, that no navigation would be obstructed, &c. Leave was given, and the mill built, which is now owned by the Plaintiffs. The evidence shows, that this mill has proved a signal benefit to the country; and all the witnesses, who speak to that point, say, that (if they cannot have both,) they had much rather have the mill without navigation, than navigation without the mill.

After this mill had thus been in successful operation for seventeen years, a Law is passed, raising a Company for the purpose of rendering the river navigable; directing these millers (and all others, of whom there are four,) to erect locks through their dams, and keep constant attendance, to give free and ready passage; and that on failure, their dams shall be destroyed as nuisances. The evidence shows, that to build such a lock at the mill of the Plaintiffs as would answer, will cost \$7,000. The cost of keeping them in order, and of giving constant attendance, is not so easily estimated. It seems probable, also, that in some seasons, the water required for the locks will interfere materially with the grinding; and upon the whole, it seems doubtful whether it would not be better for the Plaintiffs to suffer their mill to go down, than to keep it up on the terms imposed by the Law. It is the decided opinion of the witnesses, that none of the other four millers on the stream above, could afford to keep up their mills on the terms of the Law. Here then, is a Law, imposing upon the citizen a burthen, which would render his property worthless, or destroying the property in case he refuses to comply. The question forces itself upon us: Can such a Law bind? That the eminent domain of the Sovereign Power, extends to the taking private property for public purposes, I am free to admit. But then, to render the exercise of this power lawful, a fair compensation must always be made to the individual, under some equitable assessment established

265 by *Law. This is laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country. Thus Blackstone, volume 1st, p. 139, speaking of the power of the Legislature to take private property, says, "not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the Legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the Legislature indulges

with caution, and which nothing but the Legislature can perform." Far be it from me to intimate, that the Legislature intended to violate this great principle. I am well assured that they had no such idea. They thought they were promoting the public good, without trenching at all on private right; and they may be right, and I wrong. Each of us acts under the highest sanction, and must walk by the light of our own understanding. Following this guide, I must declare it as my solemn conviction, that whether we judge this Law by the principles of all civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void.

JUDGE GREEN.

I concur in what has been said, as to the preliminary questions in respect to the jurisdiction of the Court of Chancery in a case like this, and the equity alleged by the Appellees, against the person under whom the Appellant claims.

After giving to this case, all the consideration demanded by the importance of the questions which it presents, I have been led to the conclusion, after a careful examination of the legislation of England and Virginia, from Magna Charta downwards, and resorting to all other sources
266 *of information accessible to me, that at the Common Law, as adopted here, the public have a right *prima facie*, notwithstanding the granting of the bed and banks to individuals, to the use of all water-courses, for the purposes of navigation, which can in any way be applied to that purpose; leaving the full use of them to the riparian owners, in any way which may be beneficial to them, until they are appropriated by the public to that object, and even afterwards, to any extent, which shall not impair the beneficial enjoyment of the public right.

It cannot however be denied, that the Sovereign Power of the State may effectually confer on individuals, by General Laws or Particular Grants, rights in opposition and paramount to this public right; and such, I think, have, by our General Laws, been vested in the owners of mills legally established, as that of the Appellants has been. This makes it unnecessary to state the grounds of my opinion as to the existence of the public right; especially as my brethren decline the consideration of that question.

That the public right, if it existed, and whatever is its nature or extent, was intended to be surrendered in favor of mills legally established, to the extent of authorising the obstruction of the stream, and the use of the water necessary for working their mills; and that with a view to the promotion of another public interest, not inferior in value to that of navigation, is, I think, clearly proved by the whole course of our legislation.

Mills have always been treated as public establishments, subject to public control in various ways; and the building of them has been encouraged by condemning the property of others, for the use of one wishing to build, and allowing him to overflow the lands of others, upon making just com-

pensation; privileges, which were forfeited, if the mill was not kept up for the use and case of those who were customers to it. When the Legislature thus invited and encouraged individuals to vest their money in

establishments so eminently useful
267 to the public, it cannot be doubted that they intended to give them an indefeasible inheritance in the property so acquired, and all its incidents and appurtenances, as complete as in the soil granted to them by their patents. This inference is fortified by the consideration, that all the Acts of Assembly of a general nature, prohibiting or directing the removal of obstructions in water-courses, uniformly except mill dams legally established. With a view to ascertain the opinion from time to time entertained by our Legislature on this point, I have examined most of the very great number of Acts of Assembly, in relation to obstructions in particular streams, used for, or devoted by Law to, the purpose of navigation, and am satisfied that the opinion of the Legislature, whenever their attention has been particularly called to the question, has conformed to that which I have expressed; although in many cases, commencing with the Act for clearing Appomattox and Pamunkey Rivers, passed in 1752, the owners of mills are required to make locks in their dams for the passage of boats, under the penalty of subjecting the dams to be abated as nuisances. Yet, there are many indications that such provisions were sometimes considered as unjust invasions of private property, and sometimes as of doubtful character. Thus the first Act directing the abatement of dams, (that of 1745, for clearing James and Appomattox Rivers, then ordinarily navigated,) required that the owners of mills on those rivers, should make convenient locks in their dams, for the passage of boats, within a limited time, under a penalty, and on failure therein, that the dams should be abated, and the owners compensated, at the expense of such counties as should be thereby benefited, and prohibited expressly the building of dams across either of those rivers in future; thus taking away, in respect to those rivers, the power vested in the County Courts by the General Laws, to give leave to build mills which required dams. It is probable, that the Courts did not so construe it, and continued to allow mills and dams to be built;

for, by an Act of January 30,
268 *1803, this prohibition is more explicitly enacted in terms. The Act of 1787, incorporating the Appomattox Company, directs the owners of dams to make and keep up locks for the purpose of boats, and to have them well attended, under pecuniary penalties; and upon failure, authorises the abatement and removal of the dams, at the expense of the owners. This is the precise prototype of the provision on the same subject of the Act of 1819, under consideration, and of most of the other Acts directing the owners of dams to make locks, &c. This provision in the Act of 1787, in respect to the dams on Appomattox River, was perfectly just, and violated no private right whatever; for, the Act of 1745, presented to the owners of

mills the alternative, either to make locks, in their dams, or to submit to have them abated; in which case, a full compensation was provided for them. The owners of mills, then established, probably preferred the former alternative, or we should have seen a provision in some subsequent Act of Assembly, for making the compensation, which could not be made without a new Act. They were, therefore, under an obligation by compact, to keep up the locks which they had made, and as to all mill-dams subsequently built, they were not legally established, being built in opposition to the express prohibition of the Act of 1745, and were actually public nuisances. It was, therefore, an indulgence, not an injury, to them, to allow the dams to remain, upon condition of their making locks, &c. I am inclined to think, that the similar provisions found in subsequent Laws, were in a great degree founded on this example, upon the supposition that it was founded, not upon the particular circumstances existing in relation to that river, but upon an universal public right, preferable to those of mill-owners. I should indeed feel confident in this conjecture, but for the fact, that a similar provision was made at the same Session, in respect to mill-dams on Willis's River, with this difference only, that they were not to be abated at the expense of the owners. The Acts

269 incorporating *the James River and Potomac Companies, after authorizing the condemnation of lands for the use of the Company, and without saying any thing about mills, declare that it is not intended by those Acts to interfere with private property, but for the purpose of improving and perfecting the navigation; and prohibit the use of the water by the Company, for any purpose but that of navigation, reserving to the owners the convenience of erecting mills, forges, and other water-works.

The Act of 1794, relating to the Slate River, saves the rights of mill-owners, without intending to impair or confirm them; and the Act incorporating the Rappahannock Company provides a compensation to mill-owners, for the privilege of making locks in their dams.

I shall notice only one other of these Acts, relating to particular water-courses. An Act of 1810, declared Middle Island Creek to be a public highway, for an extent of near seventy miles, and directed that the owners of all mills already established, or that should thereafter be established thereon, should make slopes in their dams of prescribed dimensions, for the passage of boats and fish; and that, on failure thereof, the dams should be abated as public nuisances. At the next Session, on the representation of William M'Coy, the owner of a mill and dam on that creek, built before the passing of that Act, another Act was passed, which declared, that the former Act was "equivalent to the abrogation of a vested right," in respect to M'Coy's mill, and provided, that the county of Ohio should make a full compensation to him, for the injury which he might suffer by making such a slope in his dam, before it was made. This Act is the more strik-

ing since it related to a stream, whose bed and banks were declared by the Act of 1802, to belong to the public, for the common use of all, and incapable of being granted to any individual, by any prior or subsequent patent.

The Legislative interference to prevent obstructions to the passage of fish, proceeds upon a different principle.

270 *Such an obstruction violates no public right; for, the right of fishing in fresh water streams, or within the bonds of any Patent, is not public and common to all, but confined to the riparian owners; each of whom is entitled to the natural run of fish of passage upwards, as he is to the natural flow of the water downwards; and at Common Law, an assize of nuisance by the party injured, lay in such a case, as "for levying a goss to intercept the course of fish coming from the sea, usque ad gurgitem meam superiorem." Fitz. N. B. 184, A. Whilst the Legislature, therefore, might properly yield the public right of navigation to individuals for the sake of securing the public convenience of mills, they could not justly sacrifice to this object, the individual rights in respect to the natural run of fish; and therefore, have properly guarded against such obstructions to the passage of fish, by imposing it as a condition upon the leave to build a dam, that the owner shall give a free passage to fish, and seem always to have considered it as a condition implied, even when it was not expressed.

The next enquiry is, whether the Appellants' dam and mill have been legally established, or not? To the several objections made on this point by the Counsel, for the Appellees, an answer has been given on the other side, which, if true, puts an end to any further enquiry. It is insisted, that the uninterrupted enjoyment of a water-course, by obstructing or diverting it in any particular manner, for twenty years, as in this case, gives per se a perfect right to continue the use in the same way forever, and against all the world. This is true in respect to individuals, as to whose rights such a possession and use are adverse, upon the presumption that they have surrendered their rights by compact, and by analogy to the Statute of Limitation of the right of entry; the only remedies for such a wrong, the assize of nuisance or quod permittat, being in their nature possessory actions. No such presumption can arise against a public right, unless the circumstances of the case

271 *be such as to amount to a prescription, (if there can be a prescription here,) especially against a public right not in actual use and enjoyment, so that no person has an interest in opposing the encroachment upon it. As to the public right of navigation not in use, there can be no adversary possession; since, as we have seen, the riparian owner is permitted to make any use of the stream for his individual purposes, which does not interfere with the public right in actual use. Nor can any analogy to the Statutes of Limitations, apply to any public right; since they do not run, in any case, against the Commonwealth. The question then is, whether

the Appellants' mill has been established according to the provisions of the Acts of Assembly upon this subject.

The first objection taken to it is, that the Order of Court giving leave to build the mill, does not, in terms, give leave to build a dam. In all our Laws in relation to the building of mills, up to that of 1785, the word dam is not to be found, except in the provision of the Act of 1705, prohibiting the building of a mill or dam within a mile below another mill on the same stream. On the contrary, the Acts of 1667, and 1705, do not even speak of leave to build a mill, but the leave to build the mill, as well as the dam, was left to be inferred from the condemnation of an acre of land, for the use of one wishing to build a mill. And, so as to the Acts of 1745 and 1748, which provide further for compensating the owners of lands, "which may be affected or laid under water by building such mill." The condemnation of the acre of land, or leave to build the mill, implied permission to build the dam, which was considered as a necessary incident; and the words mill and dam, were used as synonymous. The Act of 1785, in speaking of leave to build a mill and dam, only spoke in explicit terms, what was necessarily implied from the terms of the former Laws; and, I think, affected no change whatever in the Law. There never was a time, when any person wishing to build a mill, was under
272 any obligation *to apply to the Court, unless a dam was necessary. In all cases of leave to build a mill, or a mill and dam, the party has authority to build such a dam as he may think necessary and convenient for working the mill, unless the height of the dam is limited by Order of the Court; subject, however, to a liability under the Act of 1785, to compensate any individual injured thereby, for any damage done to him, which was not foreseen and estimated by the Jury.

The next objection is, that the Act of 1794, appointing Trustees for opening and improving the navigation of Slate River, devoted it specially to the purpose of navigation, and superseded the power of the County Court of Buckingham, under the General Laws, to grant leave to build any new mill on that river. That Act was permanent and in force, when the Court gave leave to build the Appellants' mill. The river was to be opened; and the navigation improved by means of subscriptions, which the Trustees were authorised to receive; and the Act directed the owners of mills to make and keep up locks in their dams, and to have them properly attended, if not otherwise directed by the Trustees, under a heavy penalty; and upon failing therein, that the dams should be considered as nuisances, and liable to be abated as such. It imposed penalties upon persons who should fell trees, or fix any bridges, or stop, or place any obstruction therein. It concluded, however, with these words: "saying to the owners of mills, their legal rights, which are not intended hereby to be impaired or confirmed." Under this Act, no subscriptions were received; or, if any, they were paid by contributions of labor. Some impediments were removed

by labor furnished by the neighboring inhabitants, in a part of the river of four or five miles or more in extent; but the most important impediments, the great falls just above the site of the Appellants' dam, were not touched. The project of improving the navigation of the river was abandoned by the Trustees; and six or eight years after, when leave was given to build the Appellants' mill, no one in that
273 district of *country seems to have had any idea of ever making any further attempt towards its improvement. It never was in fact navigated except by one loaded, and one empty boat, by way of experiment, and upon a swell of the river; and it was, in no sense, ordinarily navigated. I do not think that this Act impaired the power of the Court to give leave to build new mills on Slate River, or made any special reservation of the public right of navigation, in respect to this particular river. Although it directs the owners of mills to make locks, &c., it expressly reserves their legal rights, referring the question as to the extent of those rights, to the Judicial Tribunals of the country; and the prohibition of other obstructions, was nothing more than enforcing, as to this particular river, by additional penalties, the general provision of the Act of 1785, in relation to all streams. The General Laws gave power to the Courts to give leave to build mills, even when the dams might obstruct ordinary navigation; imposing such terms as the Courts might think expedient for preventing such obstruction. And a fortiori, this power could not be superseded by a contemplated future navigation. The most that can be said is, that in such case, the Court, if they were apprised of the fact, and in the exercise of the discretion given them by Law, (to give or refuse leave in all cases where the mansion-house, offices, curtilage or garden, of any proprietor will not be overflowed, or the health of the neighborhood annoyed by the stagnation of the waters,) should have imposed conditions which would have operated as a reservation of the public right of future navigation; as they would no doubt have done, if any such future navigation had been known to be in contemplation; or, if any one of the Trustees, or any other, had appeared and claimed such a reservation. If, in that respect they had erred, the error might have been corrected by appeal. Their judgment in the exercise of a legitimate, and (in this particular) unlimited power, is final.

274 *Lastly, it is insisted, that a provision of the General Mill Law of 1785, which was in force when leave was given to build this mill, operated as a reservation of the public right of future navigation, in preference to the rights of the mill-owners. That provision is in these words: "The Inquest of the said Jurors, nevertheless, or Opinion of the Court, shall not bar any prosecution or action, which any person would have had in Law, had this Act never been made, other than for such injuries as were actually foreseen and estimated by the Jury." The Legislature, at the Revisal of 1819, changed the phrase-

ology of this section, by enacting, that "no Inquest taken by virtue of this Act, or no Opinion or Judgment of the Court thereupon, shall bar any public prosecution or private action, which could have been maintained, if this Act had never been made, other than prosecutions and actions for such injuries as were actually foreseen and estimated on such Inquest." This seems to be legislative exposition of the before-mentioned provisions of the Act of 1785, rather than a new enactment; although it seems at first sight rather more comprehensive in its terms. Considering it in that light, I do not think it makes any reservation of the public right to appropriate the water and channel of the stream, to the purposes of navigation, in preference of the private right to maintain the dam, and to the use of the water for working a mill.

It may be admitted, that this provision was intended to guard in general, against any unexpected injury, either to individuals, or to the public; whether it be such as any of those, in respect to which the Jury are particularly charged to make enquiry, or any others. As if, for instance, the building of the dam should drown a mill belonging to another, or destroy a ford which was in, and a part of, a public highway; in the one case a private, in the other a public nuisance. Yet it could not be construed to extend to a future use of the stream, for the purposes of navigation; since the subject of navigation being specially in 275 the mind of the Legislature, and a provision having been made for the security of existing and ordinary navigation, whilst nothing is said in respect to future navigation, the necessary inference is, that the public rights in respect to the latter, were intended to be surrendered to the interests of individuals, for the sake of the great public interest in the establishment of mills; *expressum facit cessare tacitum*. And 'his seems to have been the opinion of the Legislature of 1815, indicated by the provision, that in future, every grant of leave to build a mill, should be subject to the condition, that the public should have a preferable right to the use of the water, for the purposes of navigation, and a right to make and keep a lock in the dam, (not to prostrate it,) without compensation to the owner.

The Act of 1819, incorporating the Trustees of Slate River, requires that the owners of mills shall make and keep up locks in their dams, and have them properly attended, at their own expense, forever, upon pain of pecuniary penalties, to be repeated in infinitum: and of their dams being considered as public nuisances, and abated by the Company at the expense of the owners. It manifestly impairs their rights, both in respect to the keeping up of their dams, and the use of the water for working their mills, in preference of the public right to use the channel and water of the stream, for the purposes of navigation.

The last enquiry, therefore, presented by this cause, is, whether the Court has a legal authority to declare so much of the Act of 1819, as impairs the private rights

of the Appellants without compensation, to be void, as being in violation of the Constitution of our own State, or that of the United States.

A very liberal construction has been given to the clause of the Constitution of the United States, which prohibits any State to pass any Law impairing the obligation of contracts. It has, however, never been extended to the protection of private rights, acquired under the operation of the

General Laws of the State, and without 276 out any consideration *given, beyond the general purposes of promoting individual interests directly, and the interests of the community incidentally. Nor do I think it can be justly extended to the protection of rights so acquired.

The Legislature of the State is declared by our Constitution to be a complete Legislature, and consequently has all the powers of Sovereignty, except so far as they are limited by the Constitutions of Virginia and the United States. Our Bill of Rights is a part of our Constitution; and the general principles thereby declared are Fundamental Laws, except so far as they are modified by the Constitution itself. They limit the powers of the Legislature, and prohibit the passing any Law violating those principles. The first Article of this declares: "That all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." To deprive a citizen of any property already legally acquired, without a fair compensation, deprives him *quoad hoc*, of the means of possessing property, and of the only means, so far as the Government is concerned, besides the security of his person, of obtaining happiness. Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of Civil Government, which our ancestors, in framing our Constitution, intended to secure to themselves and their posterity, effectually, and for ever.

The Legislature, in passing the Act of 1819, did not intend to invade private rights, but proceeded, no doubt, upon the belief that the rights of the owners of mills generally, were subordinate to the public right of navigation, and particularly in respect to the Slate River; a question, on

which there may well be a difference 277 of opinion. The Constitution, *however, declares, that the Legislative and Judicial Departments, shall be distinct and separate; so that, neither shall exercise the powers properly belonging to the other. The questions, whether the rights of the owners of mills, or of the public, for the purposes of navigation, are preferred by Law generally, or in any particular case, are emphatically Judicial in their nature, depending on the effect and construction of former Laws; and, if upon a full and careful consideration, we conscientiously differ in opinion in any par-

tical case from the Legislature, we are bound by the highest obligations of duty to ourselves and our country, to pursue our own judgment.

I think the order of the Chancellor should be reversed, the Injunction re-instated, and the cause remanded to be further proceeded in, in order to a final Decree.

JUDGE COALTER.

Many topics of great magnitude and interest, as well to the Commonwealth, as individuals, have been presented by the argument in this case, many of them requiring deep research and reflection.

Borne down, as this Court is, by the great mass of business on the docket, and considering that three-fourths, or more, of our time is occupied in the mere drudgery of sifting out and ascertaining matters of fact, and in examining matters of account, without the aid of a Jury, or Master Commissioner to assist us, I think, in most cases, and especially in such as that before us, we ought to confine ourselves to the fewest points of enquiry on which the case can be safely decided.

The controversy arises under the Act of Assembly, passed the 29th of January, 1819, (Sessions Acts of 1818, ch. 27,) for improving the navigation of Slate River. By that Act, a Company is incorporated to improve the navigation of that river; and for that purpose, certain powers are given them. At the passage of this Act, it 278 was well known, as the fact was, that several mills had been erected on that river, and were then in use; and the 10th section of the Act provides, that the owners of these mills, and every of them, shall, within six months after the navigation shall have been completed to the said mills, erect good and sufficient locks, and keep them in good repair, &c., and cause constant attendance to be given to them, &c., under a penalty of \$20 for every failure, &c. And the 11th section provides, that if any owner of a mill shall refuse or fail to build such locks within eighteen months, then the dam is declared a nuisance, and may be abated and thrown down at the expense of the owner.

It appears that the Company, instead of beginning below, and improving the navigation to the first mill, which is that of the Appellant, and which would have cost but a small sum, and then calling on him to build the locks, and on failure, proceeding to prostrate the dam, so as to bring up this question, so important to themselves, and the owners of the mills, for decision, before much expense was incurred; proceeded to expend considerable sums, to the amount of some four or five thousand dollars, in improving the upper parts of the river. This was an unfortunate course, should it be decided that the owners of mills are not obliged to build locks; for in that case, this money must be lost, unless the Company can be permitted, and will incur the expense of erecting the locks themselves; and shall be entitled to water enough to work them.

The facts proved by the evidence in this record, present a case of a very peculiar character, as it regards the public interest,

apart from the rights and interests of the individuals who are before the Court.

It appears from the testimony of about seventeen witnesses, the greater part of whom reside on, or near the river, and who are from fifty to seventy years of age, that this river passes through a bold and hilly country, and has many rapids and falls in it, some of considerable, others of minor extent and magnitude, which hitherto

279 formed, *what had been considered insuperable obstructions to its navigation: that some fifty years ago and upwards, efforts had been made to remove some of these obstructions, but in vain, that after this, and in consequence of an Act of Assembly, passed about the year 1794, further efforts were made by voluntary associations of labor, &c.; but the thing was finally considered on all hands, as impracticable, and was abandoned. From that time, until since the Act of 1819, no further efforts had been made.

It also appears, that one Nicholas, the then proprietor of the site on which the Appellants' mill stands, had a mill at that place, as early as the year 1765, which was in operation during the Revolution, and perhaps for some time after; but, that it had gone down. In July, 1802, Robert Nicholas, his son and devisee, obtained an Order of Court to build a mill at the same place, and having, in September of that year, conveyed to Charles A. Scott, he proceeded to build the dam and mill, at an expense of nearly \$20,000; and in 1807, sold it to Cunningham for the sum last mentioned, under whose heir at Law the Appellants claim.

In the mean time, also, and before the Act of 1819, four other mills have been erected, at what expense does not appear; but, considering the height of their dams, and the public utility which seems to be ascribed to them by the witnesses, it is not presumable that they can be worth less in the aggregate, than from \$20,000 to \$25,000. All these witnesses agree, that these mills are of much greater utility to the public, than the navigation of the river; and that if one or the other must give way, the mills ought to stand. They give the most conclusive reasons for this opinion; and, what is remarkable, neither the opinion, nor the reasons for it, are contradicted by a single witness on the other side. They all concur too, in the opinion, that the owners of neither of them, unless indeed, by possibility, the Appellant, would be justified, if they were able, to advance the money in building the locks required 280 by *the Act. The estimate of Mr.

Randolph Harrison, the former Superintendent of the James River Improvements, as I understand him, would make the costs of the locks necessary to be erected at the Appellants' mill, about \$7,000. If this, or any thing like it be correct, when we consider the risque, the necessary repairs, the expense of a lock-keeper, and the interest of the money, it cannot be supposed that he would be so imprudent as to encounter this expense; and the more especially, if the use of the locks should deprive his mill of the necessary supply of water during the Autumn, a season of the

year so important to millers. The inevitable result, as seems to be anticipated by these witnesses, is, that for a navigation, by no means good, all these mills, and all this private property, must be sacrificed, and the country left to suffer for the want of bread, besides being deprived of a market, a very good one too as they state, for their grain and various other articles, which is now found at those mills. It seems too, that the ponds of these mills, being, of course, made at the most considerable falls, cover perhaps nearly, if not altogether, one half of the whole fall of the river; although they cover, comparatively, but a small proportion of its bed. The witnesses, in speaking of those falls, describe most of them as rapid, abounding in large rocks, which would have to be blasted; and many of them, and amongst the number Mr. Kandolph Harrison, think, as I understand them, that the style of improvement adopted on the other parts of the river, will not answer for these places; and especially, that covered by the Appellants' mill, and the one immediately above it.

The height of the Appellants' dam is about eighteen feet; that of the mill next above it, about thirteen feet; and there are contiguous rapids to them of about eleven or twelve feet; making a total fall, as well as I understand the testimony, of about forty-two feet in about three miles. If, then, these dams are prostrated, and the other kind of improvement will not answer
281 the purposes of navigation, "the very dams now standing, must be again resorted to, or the work, to all useful purposes, given up.

But again, I collect from the evidence, that the aggregate height of all the dams is above fifty-eight feet; and that of the sluice dams, built by the Company, about fifty-seven feet. Thus, if those dams stand, and the locks are made and kept up by the owners, with lock-keepers, &c., the owners of mills will, at their expense, overcome one-half, and much the most difficult half, of the obstructions to the navigation, and keep it up forever, for the benefit of the Company!

Nevertheless, and however unjust to the individuals, or injurious to the public, it may be; and however truthless the procedure on the part of this body politic towards those individuals; if it was competent for the Legislature to pass the Act of 1819, it is competent for them alone to retract their Act, and put a stop to the mischief, by compensating the Company for their expenses, and re-instating both the public and private interests where they were before the Act of 1819; unless indeed, the Company should elect to make locks, and use them whenever there shall be water enough, both for them and the mill.

The question, then, between these parties, arises on conflicting Acts of the Legislature, under which, both parties have acquired rights; the various Acts concerning mills, on the one hand, and the Act of 1819, above referred to, on the other.

I will not, in this case, consider, or give any opinion, which may bear on the question, how far a mill dam, authorised to be

built across a stream on which there has been ordinary navigation of some kind or other, and where the Inquest has found that no such navigation is obstructed, or the Court has been careless in imposing proper conditions, shall be subject to the resumption, at any time, by the public, of her right to the navigation. Nor will I pass any opinion, as to the effect of the Act of 1815, in regard to its prospective operation on individual rights;

282 "being satisfied, that it can in no way affect the rights, whatever they may be, which were previously acquired by the Appellant. Nor will I at all be understood, as having formed any opinion on the question, how far the owner of the bed of a stream having no ordinary navigation on it, but which may hereafter be used for the purposes of navigation, either as a feeder of a canal, or by dams erected across it, shall be deprived, without compensation, of a fall and site for water-works on his land, on the ground, that before he shall have actually occupied it, as such, the public has occupied it, or is about to occupy it, as aforesaid, for navigation, whether such occupation is claimed by the public under the Act of 1815, or independently of it; the owner of this land having acquired his Patent previous to the Act of 1815. All these, and many others, are questions of deep interest, not arising in this case, and not necessary, in my humble opinion, to be decided at this time.

This case simply presents the question, whether the owner of a mill can be thus disturbed, he having erected the mill under an Order of Court, duly granted in the year 1802, to him who holds under a Patent of a very early date, granting the land, not bounded by the stream of water, but running across it, so as to convey it, water and all, so far as such a Patent can convey the public right to the water, of a stream too, on which there never was any ordinary navigation, and on which, particularly at this place, extraordinary navigation cannot exist, without the aid of dams of some kind, and perhaps of the very kind of that now erected, and in which the claim of the public to this extraordinary navigation has been asserted, long after the mill was so erected.

Not wishing, in this case, as I have before stated, to discuss or decide on the public right to have used this mill-site for purposes of navigation, in exclusion of the owner of the land, had this actual claim on the part of the public been consistent with the application of the owner for

283 "an Order to erect his mill, I may at present, and without prejudice to that question, take it for granted, that an assertion of that public right, if made at that time, would have postponed the individual right; at least, so far as the necessary use of the water itself for the purposes of navigation, leaving it to the individual to elect whether he would use the residue of the water, not so necessary to navigation, for his own purposes.

Be this as it may, the Legislature had an undoubted right to abridge or modify this public right, if it existed, either by Special Acts, in each particular case, or

by some general provision and regulation; especially with a view to promote the public interest in any other way.

In looking, then, to the course of legislation in regard to mills, we find them, at all times, treated of as improvements beneficial to the public. Their tolls are regulated; millers exempted from other public services, &c. &c.; and the public right to the water is only noticed, so far as regards the passage of fish, and ordinary navigation. The right to condemn the lands of others, is granted, which could only be on the ground of public utility, no right existing, by our institutions, to condemn the private property of one man to the use of another, merely on the ground that he will make a better use of it.

The Appellant's right to the use of this water, in exclusion of the extraordinary navigation authorised by the Act of 1819, if it did not exist under his Patent, is undoubtedly secured to him under those Acts; and even if there was any irregularity in the form of the Order of Court granting the leave to erect the mill and dam, that Order has never been revised by a regular proceeding, and could not, I apprehend, be now reversed here. But I see no substantial objection to it. If his rights, thus acquired, are to be invaded for public purposes, it can only be done on the principle of making him compensation. The use of the pond, merely for navigation, I am not prepared to say ought not to be occupied by the public, although the

284 Company are saved the expense of erecting the dam, which creates that pond. Perhaps, this question cannot be said to arise in this case.

How far the erection of a lock in the dam by the Company, may injure the owner of the mill, by rendering his dam less secure, is a question also, which does not seem to be in issue; nor indeed, the right of the Company to use any water for their locks, which may produce an injury to the mill. But as to the latter, it may not be impertinent to say, that the principles on which I decide this case, go to secure the mill-owner against any such injury.

I think, therefore, that the Decree must be reversed.

JUDGE CABELL.

The question as to the nature and extent of the public rights to the use of water-courses, for the purposes of navigation, is one of the greatest importance to the community. But I do not deem it at all necessary to be decided in this case; and therefore I shall give no opinion upon it. Whatever those rights may be, it is competent to the Legislature to relinquish them to individuals, in any mode, and for any purpose, that they may think proper. I concur in the opinion expressed by the other Judges, that whatever rights may have belonged to the public, in relation to the navigation of Slate River, at the site of the Appellant's mill-dam, were relinquished by the Order of Buckingham Court, establishing that mill. And that the rights acquired under that Order, by the owners of the mill, cannot be invaded, even for

public purposes, without just compensation.

I concur in reversing the Decree of the Chancellor, and re-instating the Injunction.

285 *John Claytor, Sheriff of Bedford, v. Mark Anthony.

March, 1828.

Deeds of Trust*—**Impeachment**—**Matter Ex Post Facto**.—If a Deed of Trust be fairly executed to secure a just debt, it cannot be impeached for fraud, for any matter or ex post facto.

Same—**Sale under**—**Effect as to Grantor's Creditors**.—If a Deed of Trust be fair, and the sale under it be fair also, the Sheriff who levies an Execution (issued against the goods and chattels of the debtor in the Deed,) on the property so fairly sold, and in the possession of the purchaser, is a trespasser, and in action will lie against him.

Same*—**Fraudulent Sale under**—**Effect as to Grantors and Creditors**.—And if the sale be fraudulent, (so as to render the sale void as between the purchaser, or cestuy qui trust, and the creditors of the original debtor,) yet the Deed being good, it still operates to shield the property (conveyed for the benefit of the cestuy qui trust) from the Execution of the creditors of the original debtor: In other words, it operates as effectually to prevent an Execution from being levied on the property as if there had been no sale.

Same—**Security for Debt**—**Surplus Rights of Grantor's and Creditors** &c.—If A. makes a fair Deed of Trust to secure the payment of a just debt to B. the property conveyed is first liable to pay the debt of B.; and if any surplus remains after paying that debt, and executing the trust, that surplus is a fund to which the creditors of A. have a right to resort, but it cannot be reached by Execution before a sale under the Deed; because it is an equitable and contingent interest.

Evidence—**Declarations of Confederate**.—If two persons combine to effect a given object, in an action against one of the confederates, the declarations of the other, who is not a party to the suit, may be given in evidence as a part of the res gesta. By two Judges. (CARR and GREEN.)

Same—**Admissibility Dependent on Preliminary Facts***—**How Admissibility Determined**.—When a question occurs before a Court of Law, whether certain evidence is competent or not, the determination of which depends on certain preliminary facts.

***Deeds of Trust**.—See monographic note on "Deeds of Trust" appended to Cadwallader v. Mason. Wythe 188.

***Same**—**Impeachment**—**Matters Ex Post Facto**.—A conveyance not fraudulent in its inception cannot become so by matters subsequent, for the statute requires that the act should be done with a criminal intent; still, if it be afterwards employed for a fraudulent purpose, a court of equity will interpose to prevent such use of it. Harden v. Wagner, 23 W. Va. 366, citing the principal case to the point.

***Same**—**Equity of Redemption**—**Execution**.—The equitable and contingent interest remaining in the grantor of a deed of trust to secure creditors cannot be reached by execution. ALLEN, J., in Shepards v. Turpin, 8 Gratt. 404, citing the principal case to sustain the point: To the same effect the principal case is cited in Lewis v. Adams, 6 Leigh 382.

The principal case is also cited in Fisher v. Vanmeter, 9 Leigh 29.

Evidence—**Confession of Confederate**.—Where a fraud and combination is proved between two persons, the confessions of one are evidence against the other. Dade v. Madison, 5 Leigh 406, citing principal case.

***Evidence**—**Admissibility Dependent on Preliminary Facts**—**How Admissibility Determined**.—As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine, whether a witness is competent, or the evidence is admissible. Whether there is any evidence is a question for the judge; whether it is sufficient is for the jury. And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency, as for example, whether a child understands the nature of an oath, or whether the confession of a prisoner was voluntary, or whether declarations offered in evidence as dying declarations, were made under the immediate apprehension of death; these and other facts of the same kind, are to be determined by the court, and not by the jury. Vass v. Com., 8 Leigh 794, quoting these

those preliminary facts must be decided by the Court. Thus, whether the declarations of a confederate be competent, depends on the previous fact of a combination, or confederacy between the witness and the party, and the Court must decide that fact, to enable it to judge whether the evidence be admissible or not. By the same Judges.

Conveyance of Personality—Possession Retained by Grantor—Effect.—The question, whether, in case of an absolute Deed for personal property, and the possession remaining with the grantor, such inconsistent possession be fraudulent per se. Investigated by GREEN J.

Mark Anthony, brought Trespass in the Superior Court of Bedford, against John Claytor, Sheriff of Bedford, for taking and carrying away, and selling, by colour of his office, a slave of the name of Patrick, the property of the Plaintiff.

One William Trigg, had, by Deed of Trust dated 16th May, 1810, conveyed to Thomas Norvell and William 286 *Mitchell, as Trustees, a number of slaves, and amongst others, the slave Patrick, in the Declaration mentioned, to secure the payment of a large sum of money to James C. Anthony. The Deed authorized the Trustees jointly to make the sale on default of payment, at the request of the creditor.

At the trial, on the general issue the Defendant filing a Bill of Exceptions to the opinion of the Court, stating, that the Plaintiff gave in evidence the Deposition of William Mitchell, who proved, that he alone, at the request of the creditor, James C. Anthony, and by authority of Trigg, the debtor, advertised and sold twelve of the negroes in the Deed mentioned, on the 23d May, 1812; that Patrick was one of them, who was sold for \$253 50, to Mark

Anthony, the Plaintiff, and that the Dependent executed a Bill of Sale for him: and that the whole sale amounted to \$2,757 50; of which \$2,650 29, were paid to J. C. Anthony's order in favor of Mark Anthony, and \$5 50 reserved for expenses of the trust; that the amount due under the Trust Deed was \$2,655 79; which debt was acknowledged by Trigg, on the day of sale, to be justly due to James C. Anthony. On his cross-examination, he said that Mark Anthony paid no money, but the creditor, James C. Anthony, directed the proceeds of sale to be paid over to him: that he had heard Mark Anthony say, that he had remitted a large sum of money to J. C. Anthony, by mail, but heard nothing from the said James, on the subject. Being asked whether he knew any thing in relation to the payment, previous to the sale made by him, of the debt due by W. Trigg to J. C. Anthony, by means of money got from Charles Clay, he said he knew of no payment made by W. Trigg to J. C. Anthony, before the sale, but recollects, that a few days before he was informed of the remittance aforesaid, he saw a large sum in Bank notes, which seemed to be passing from C. Clay to Mark Anthony, and he thinks the latter informed him that he received the remittance before mentioned from C. Clay.

287 *The Bill of Exceptions further states the evidence of James Austin, who proves, that in the year 1811, before the sale under the Deed of Trust, the Plaintiff and Trigg, obtained two bonds from the said J. Austin and John Anthony, executed to the Plaintiff, for the purpose of disposing of them, to relieve the negroes of Trigg, from the Deed of Trust, and that the Plaintiff and Trigg, to indemnify the said Austin and John Anthony, from the said bonds, executed a Deed of Trust, bearing date 26th August, 1811, conveying sundry slaves of Trigg's, amongst whom was Patrick, and a tract of land and sundry slaves of Mark Anthony's. It states that it appeared in evidence, that a large sum of money was raised by the sale of the bonds, but how much did not appear, nor that it was applied to the discharge of the debt due under the Deed of Trust; but that Mark Anthony made considerable advances to James C. Anthony, about this time, he being much indebted in him: it appeared also, that the Plaintiff afterwards discharged the said bonds himself.

It further appeared, that after sale by Mitchell, under the Deed of Trust, the negroes were returned to the plantation on which Trigg lived, being a plantation which the Plaintiff had rented that year from another person, and it did not appear during that year that the said Anthony at all interfered with the management of the said negroes, but it was proved, that the Plaintiff rented the land on which Trigg lived for the years 1811-12 and 13, and in the latter year the Plaintiff employed an overseer for the estate on which said Trigg lived, and placed under him the slaves sold under the Deed of Trust, none of whom were subject to the control of said Trigg, but were entirely subject to the Plaintiff and his overseer, from whose possession

words, cites 1 Phil. L. Ev. 13. (Edl. 1810); *Claytor v. Anthony*, 6 Rand. 299; Chany v. Saunders, 3 Munf. 51. To the same point the principal case is cited in *Snooks v. Wingfield*, 63 W. Va. 441, 44 S. E. Rep. 280. See further, monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 276.

Conveyance of Personality—Retention of Possession by Grantor—Fraud Per Se.—On this subject, see foot-note to Davis v. Turner, 4 Gratt. 422; monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

The principal case is cited on this subject in Davis v. Turner, 4 Gratt. 451.

Same—Effect. Where Possession Changes before Rights of Creditors Attach.—In *Sydnor v. Gee*, 4 Leigh 585, the last headnote is to the effect that, if an absolute sale of chattels, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendor before the rights of any creditor of the vendor attaches, the sale is good against the vendor's creditors. In this case *TUCKER, P.* says (p. 549): "According to the view I have taken of the case, it is unnecessary to examine the interesting question, which has been so ably argued, as to the effect of the subsequent acquirement of possession by the vendee upon intervening rights of third persons. This question has been touched by one of the Judges of this court in *Claytor v. Anthony*, 6 Rand. 305, and by another in *Batton v. Glasscock*, 6 Rand. 78, and is mentioned and waived in the recent case of *Shields v. Anderson*, 8 Leigh 785, 7. But it may not be amiss to say, that it is strongly my impression, that the failure to deliver possession where there is no real fraud intended, does not attach fraud to the transaction forever; and that a subsequent delivery will make it valid and effectual, against all creditors, whose debts are contracted, and all purchasers whose bargains are made after such subsequent delivery. The taking possession will at least make it the same thing as if the deed was then made. See the remarks of *BAYLEY, J.* in *Jones v. Dwyer*, 15 East 27, 8. Farther than this I am not disposed at this time to go; but shall be free to re-examine the question in other aspects, whenever it shall again arise."

To the same effect the principal case is cited in *Shields v. Anderson*, 8 Leigh 787.

the negro in question was taken by the Defendant.

It also appeared, that said Trigg continued to live upon the land aforesaid, and used some corn, the product thereof, for the support of his family, though this was against the consent of the Plaintiff, and his overseer.

288 *The slave in the Declaration mentioned, after being sold under the Deed of Trust, was sold by the Defendant, acting as Sheriff, as the property of Trigg, under an Execution sued out against him, in behalf of one Creery.

It further appeared, that Trigg was much in debt, and the brother-in-law of the Plaintiff.

This being the state of the facts, the Defendant introduced Mr. Leftwich, to prove that he attended the sale under the Deed of Trust, with the intent of purchasing one of the slaves included in the said Deed; "that he was taken out by Trigg, who requested the witness not to bid for the slaves, the said Trigg stating that the Plaintiff was to buy the property for him the said Trigg." This evidence was objected to, and the Court sustained the objection, unless it could be shewn that the Plaintiff was privy to Trigg's statement, or in other manner assented to it, and the evidence was not heard. The Defendant therefore excepted.

The second Bill of Exceptions stated, that after the introduction of the evidence set forth in the first Bill, the Counsel for the Defendant contended before the Jury, that if they should be satisfied from the evidence, that the slave in the Proceedings mentioned, was permitted by the Plaintiff to remain in the possession of Trigg, after the sale by the Trustee, as before set forth, such possession on the part of Trigg, was per se fraudulent, and that during such possession the said slave was liable to the creditors of the said Trigg; but the Court stopped the Counsel, and instructed the Jury, that if the sale of the said slave had been made by the said Trigg, to the said Anthony, and Trigg had afterwards been permitted by said Anthony to remain in possession of the slave, it would have been fraudulent per se, and would have subjected said slave to the creditors of Trigg; but that if the Jury should be satisfied from the evidence that the said slave was sold by the Trustee, and possession thereof delivered to the Plaintiff, and a Deed therefor made by the Trustee to the said Anthony, and that afterwards possession of said slave was permitted by

289 *the said Anthony to be with the said Trigg, during part of the year 1812, such possession on the part of said Trigg, was not per se fraudulent, so as to subject said slave to the creditors of Trigg, in the year 1813, when the Plaintiff had the actual possession of the slave in question: if the Jury shall be satisfied by the evidence, that the Plaintiff had the actual possession at the time when the trespass complained of is alleged to have been committed: And the Court further said, that it did not consider such possession of Trigg, in 1812, to be fraudulent per se, so as to subject said slave to the demand of Trigg's creditors,

by Execution, even if the Execution had been levied in 1812, which was not this case; but the Jury might consider Trigg's possession in 1812, as a circumstance of fraud in this case. To which opinions and instruction, the Defendant excepted, and appealed to this Court.

Johnson, for the Appellant.

Stanard, for the Appellee.

March 29. The Judges delivered their opinions.*

JUDGE CARR.

This case comes up on two Exceptions taken to Opinions of the Court below. William Trigg, being indebted to James C. Anthony between two and three thousand dollars, executed to him a Deed of Trust on twelve negroes as a security for the debt: an advertisement and sale took place under the Deed of trust; and Mark Anthony a brother of James and brother-in-law of Trigg, became the purchaser of all the slaves for the sum of \$2,747 50, overgoing the debt and interest due on the Deed \$97 21. The Trustee executed a Bill of Sale to the purchaser, and the slaves were returned to the possession of Trigg,

290 who lived *on a tract of land then rented by the purchaser. The sale took place May 23d, 1812, and the slaves remained with Trigg for the rest of the year. In the beginning of the next year, they were taken by Anthony from the possession of Trigg, and placed under his own overseer; still, however, on the same plantation where they had lived the last year, which Anthony had again rented, and on which Trigg continued to reside. On the 28th of January, 1813, an Execution issued from the Office of Bedford county, in the name of Pleasant Creery against Trigg, and was levied on one of the slaves bought by Anthony under the Deed of Trust, and then in possession of his overseer. The Sheriff returned, levied and not time to sell; a venditioni issued, and was returned satisfied. Anthony brought trespass against the Sheriff for seizure and sale of the slave. The Defence was placed on the ground of fraud, not in the origin of the transaction, (for, it seems agreed on all hands, that the Deed was fairly executed to secure a just debt,) but in the sale under the Deed. The first effort of the Defendant was to prove, that for some time previous to the sale, Mark Anthony and Trigg were united in a common design to protect the property of Trigg (who was deeply in debt,) from his creditors; that to this end, they in 1811, borrowed of James Austin and John Anthony two bonds, executed by them to Mark Anthony for 450l. each, with the avowed purpose of raising money on them, to relieve Trigg's negroes from the Deed to J. C. Anthony; that to secure these bonds, they executed a Deed of Trust on Trigg's slaves, (included in the first Deed,) and on several slaves, &c. of M. Anthony; that a considerable sum of money was raised on the bonds, and that Mark Anthony remitted money to James C. Anthony; but how much was not proved, nor that it was on account of Trigg's debt, Mark Anthony being also in debt to J. C.

*The PRESIDENT absent.

Anthony. That on the day of sale, Mark Anthony appeared as a creditor of James C. Anthony, having an order from him for the whole proceeds of the sale, though he *was, not long before, his debtor. That though the Deed of Trust was made to two Trustees, who were to act jointly, yet when only one appeared on the day of sale, Trigg removed the difficulty, by giving him a written power to proceed alone. These facts being proved, the Defendant offered to examine a witness, to prove that he had attended with the intention of buying one of the slaves, but was taken out by Trigg, and requested not to bid for them; for, that Mark Anthony was to buy the property for him. This evidence being objected to, the Court sustained the objection, unless it could be shown, that Mark Anthony was privy, or in some way assented, to Trigg's statement. I think this evidence ought to have been admitted. It is laid down in many cases, that "a community of interest or design, will frequently make the declarations of one, the declarations of all." (See 2 Stark. on Evid. 44, and the cases there cited.) And this is not confined to contracts, but extends to trespasses, and even crimes of the highest grade. (See Stark. on Evid. 47, and the cases.) In the case before us, the Court had to judge for itself, whether such a community of purpose, between Trigg and Anthony, was proved, as laid a proper ground for admitting the declarations of one, to be evidence against the other. I think there was such proof, and therefore, that the evidence should not have been rejected. There is another ground. A transaction consists often of various parts, which, connected together, form the whole. Thus, in the question of fraud, you can hardly ever establish it by direct and positive proof. You must collect the acts, circumstances and declarations of the parties concerned. So far as these form a part, and assist in giving character to the transaction, they are good evidence. Such facts, declarations, &c. are called part of the *res gesta*. Thus, when the character of a particular act is questioned, the declaration of the party doing it, made at the moment, is evidence to explain it. As in the case of bankruptcy, the declaration of the bankrupt, made when leaving his house, is evidence to explain the *meaning of his absenting himself. On the same ground, it was held in Lord George Gordon's Case, that the cry of the mob might be received as part of the transaction. In these cases, the weight of the evidence does not depend on the credit of the witness, but on its connection with the circumstances. (See 2 Stark. on Evid. 46-7-8.) In the case before us, a public sale of twelve negroes had been advertised to be sold at a certain place in the Town of Lynchburg. This would naturally collect people, and we know from the record, that some did attend besides the immediate parties. Yet, we hear of no bidder but Mark Anthony. It is natural to ask, how this happened? Suppose it could be proved, that there were twenty persons present, and that each of them had been requested

by Trigg not to bid, because Mark Anthony was to buy for him. Would not this account for the fact, and go far to give a character to the transaction? Look, too, at the situation of Trigg. He was the owner of the slaves, deeply interested, (if the sale was real,) in raising up bidders, and enhancing the price of every slave. Does not such a man hold an important station in such a transaction? And are not his acts and declarations, done and made at the moment, during the progress of the sale, a very material part of it? The very sale itself would not have been made by one Trustee, without his leave. I think then, on both these grounds, the evidence was clearly admissible. The second exception is, on account of an instruction, given by the Court to the Jury. That was to this effect, that if Trigg had individually sold the slave to Anthony, and had afterwards remained in possession, this would have been fraud per se; but that if the slave was sold by the Trustee, under the Deed, delivered by him to the purchaser Anthony, and a Deed made to him, and afterwards suffered by Anthony to remain in possession of Trigg for the year 1812: This was not per se fraudulent, "so as to subject said slave to the creditors of Trigg in the year 1813, if then, in the actual possession of Anthony."

293 *I do not consider this instruction as raising the simple question of fraud per se, decided in *Edwards v. Harben*, and many other cases; but, admitting that doctrine as settled, the Court considered this case an exception, and that is the point for our consideration. For my view of the general doctrine of fraud per se, I refer to my opinion in the case of *Land v. Jeffries*, 5 Rand. 211, with the single remark in addition, that I agree fully to the rule of *Edwards v. Harben*, "That the absolute transfer of personal chattels without a delivery of possession, is in Law fraud per se;" but, I add, that this being a legal presumption, is not absolutely conclusive as to fraud, but may be explained; and where this explanation is satisfactory to prove the perfect fairness of the transaction, and that the inconsistency of title and possession formed no part of the original contract, the case is taken out of the rule, and I refer to 2 Stark. on Evid. 617-18-19-20, and the cases there, to show that I am supported in this position by that excellent writer, and also by some of the ablest Judges who have sat on the English Bench. Passing the general question by: The opinion of the Court below presents two points interesting and important in their character. 1st. Does the sale of a slave by a Trustee under a Deed of Trust, and a delivery of possession by him to the buyer with a Bill of Sale, so change the property, that the buyer may suffer the slave to return to the possession of the former owner, without danger of coming within the rule of *Edwards v. Harben*? 2d. If possession of the slave do not accompany and follow the conveyance, but yet the purchaser takes possession before the issuing an Execution by a creditor of the vendor, can such Execution be levied on the property in possession of the pur-

chaser? I would not be understood to give a decided opinion on either of these points, because I think the cause may be decided without it; but, on the first, (as it was discussed at the Bar, and will, I understand, be noticed by some of my brethren,) I will give my present impressions.

294 In *Kidd v. Rawlinson*, 2 *Bos. & Pull. 59, it is decided, that if A. buy the goods of B., sold by a Sheriff under an Execution, he may suffer them to remain in possession of B., without subjecting them to B's creditors. The circumstances distinguishing this from *Twyne's Case*, seem, 1st. The publicity of the sale: 2dly. That the purchaser was not a creditor: 3d. That the sale was not by the party himself, but by the Sheriff. "The object of the Statute (as is well observed by *Starkie*, 2 vol. 620,) was to prevent covinous and fraudulent sales by the owner to the prejudice of creditors, and not, as it seems, to sales made by a third person, as a Sheriff under an Execution, or a Landlord under a Distress, without proof of some fraud or collusion on the part of the owner, which in effect, makes such a sale his own act." The case of *Guthrie et al. v. Wood*, 1 *Starkie's Cases*, 367; 2 C. L. R. 430; was shortly this: Eastman a packer, assigned the goods in question to W., as Trustee for H.; to secure the payment of an annuity sold by E. to H: remaining in possession, he afterwards assigned his counting-house, fixtures, and utensils in trade, to Guthrie and others, for the benefit of his creditors. E. remained in possession of the goods, and Pearson, the Landlord, sent in a Distress for rent, and the goods in question were sold under the Distress, and purchased by Guthrie with the funds of the creditors, for whom he was Trustee, and for their account. The goods were still suffered to remain in possession of Eastman, and they were seized under an Execution at the suit of W., as Trustee for H., and Guthrie brought trover against Wood, to recover their value. After argument by *Scarlet* and *Spankie*, for the Plaintiffs. *Marryatt* and *Comyn*, for the Defendant, Lord *Ellenborough* said, "I had supposed that evidence would have been given of some collusion on the part of Pearson, the Landlord, with the Plaintiff; but nothing of this kind appears. The Plaintiffs acquired a property in the goods by purchasing them at the sale under the Distress. Guthrie, as a Trustee, was not on that account

295 precluded from *becoming a purchaser; he purchased them as any other person might have done; and though he had taken the money with which he purchased them from the strong box of another, that would not have vitiated the sale. His motive for buying was, that the goods might not be removed from the premises, but might remain there for the benefit of the creditors, and he was quite at liberty, if he chose, to leave Eastman in the possession. The doctrine of possession applies to cases of conveyance from the party himself. The Statute of *Eliz.* does not apply to a case like this, where the property is sold not by the party, but under a Distress for rent." See also, *Meggot v. Mills*, 1 Lord Raym. 286; *Cole v. Davies*, Id. 724;

Watkins v. Birch, 4 Taunt. 823; *Steel v. Brown*, 1 Taunt. 381. These are most of them cases under Executions, or Distress warrants, but the following comes nearer to the question before us. *Leonard v. Baker*, 1 Mau. & Sel. 251: One Clee, the husband of the Plaintiff's mother, assigned his effects to Trustees for the benefit of creditors, and absconded, leaving his wife in possession of his house, and goods at Pershore, and notice of such assignment was advertised in the newspaper, and the goods were afterwards sold by the Trustees, at public auction; and the Plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some, but left the greater part in her possession, she continuing to reside in the house, and take in lodgers as before, and at the ensuing Michaelmas, he also took the house of the Landlord, at an advanced rent. In the December following Collin's Execution was levied on the goods, when the Plaintiff gave notice to the Sheriff, that the goods were his property, under the appraisement and sale, which was the first time that Collins was apprised of that circumstance. The Plaintiff brought Trover against the Sheriff. The Judge at Nisi Prius, left it to the Jury to consider: 1st. Whether the change of property by the assignment, and subsequent sale made to the Plaintiff, was notorious at Per-

296 shore; upon *which the Jury found in the affirmative: And 2dly. Whether the assignment had been executed with an intent to defeat either the general body of creditors, or any particular creditor: The Jury found in the negative, whereupon, a verdict was found for the Plaintiff. *Jervis* moved to set aside the verdict, and enter a non-suit, on the ground that it was improperly left to the Jury to say, whether the change of property was notorious, there being no evidence of any change of property at all; inasmuch as Clee's wife was suffered to continue in possession of the goods, after the assignment to the Trustees, and after the sale to the Plaintiff, precisely in the same manner as before. The Court were unanimous against the motion. Lord *Ellenborough* said, "I think the verdict is according to the law and the facts, as they appeared to the Jury. As to the point respecting the change of property; what was done respecting it, was not done secretly, but the Trust Deed was known and advertised in the public papers; and the sale under it was by public auction. The Trustees, indeed, for a time allow the wife to continue in possession after the assignment; and do not themselves interfere with the goods by removing them, except on occasion of the man's coming in and taking away the saw; which, however, is a circumstance in the case, although I do not much rely upon it; but when the sale took place, the Plaintiff removed a part of the goods, and the rest only he suffered to remain with his mother for her accommodation. At all events, an effectual change took place in September, when the house was re-taken by the Plaintiff, at an advanced rent; but it seems to me, there was a bona fide change before that time: to hold otherwise would be to

pronounce that a person could not make a bona fide purchase of goods in the possession of another for his accommodation, and for the purpose of continuing them in the same possession." This seems to me a very strong case, and accords with my ideas of sound reason, and the meaning of the Statute. Where a fair, open, public

297 sale of a man's property is made "by a third person, whether as Sheriff, Bailiff or Trustee, it never could be the intention of the Statute to prevent a friend from buying as the highest bidder, paying his money, and then leaving the property with the former owner. Deeds of Trust, with us, "take effect as to subsequent purchasers for valuable consideration, without notice, and as to all creditors, from the time when such Deeds shall have been acknowledged, proved, or certified according to Law, and delivered to the Clerk of the proper county to be recorded," and this Court has, in many cases, laid it down that the Trustee is the agent of both parties: leaving, therefore, the questions of fraud and collusion to depend on the evidence, and to be decided by the Jury in each particular case, I think that as a general question of Law, we may pronounce, that a fair sale, under a fair Deed of Trust, does so change the property, that the purchaser may permit it to return to, and remain with the former owner, without subjecting it to be taken for his debts, unless it be suffered to remain with him more than five years.

I have thus given my opinion on these questions, taking them in the point of view in which they were passed upon by the Court below, and discussed at the Bar here. But, there is an aspect of the case which seems to me conclusive, and renders all the points made, and the Opinions given in the Court below, immaterial and irrelevant. The Deed of Trust from Trigg to James C. Anthony, seems agreed on all hands to have been fairly executed, to secure a just debt. In *Shep. Touch. 67; Eatwick v. Caillaud, 5 Term Rep. 425*, and other cases, it is said, "that the question whether a Deed be legal or not, depends on the intention of the parties, at the time when it was executed: and that when a conveyance is not fraudulent at the time of making it, it shall never be said to be fraudulent for any matter *ex post facto*." Now, the sale was either fair, and must stand good, or it was fraudulent and void; if good, the Sheriff of course was a trespasser, in taking the property.

But how, if it was void? Why then 298 it seems to *me, that being a mere nullity, it leaves the Deed of Trust in full force and vigor. I do not mean to say, that as to Trigg, the sale is a nullity; for, though fraudulent, it would be binding on him; he could not be heard to impeach it. But, putting the sale out of the way of creditors, would not the Deed of Trust still operate to shield the property from their Executions? That property is fast bound for the debt of James C. Anthony. If, after a fair application of it to that debt, any surplus should remain, this would be a fund to which the creditors of Trigg ought to have resort, and could have

resort: but it cannot be reached by Execution, for it is an equitable and contingent interest.

I think, therefore, that whether the sale were good or bad, the slave was not liable to Execution, and the Sheriff was a trespasser; that, in this point of view, the Opinions of the Court furnish no ground for reversing the Judgment, and that it must be affirmed.

JUDGE GREEN.

The Appellee brought this action against the Appellant, a Sheriff, who levied an Execution against Trigg on, and sold, a slave, which the Plaintiff alleges belongs to him. The Plaintiff claimed the slave, as a purchaser of that and other slaves from a Trustee to whom Trigg, the brother-in-law of the Appellee, had conveyed them, for securing a debt to James C. Anthony, a brother of the Appellee. The slave conveyed, had remained until the day of sale in the possession of Trigg, who lived on a tract of land rented by the Appellee. At the sale on the 21st May, 1812, the Appellee purchased all the slaves embraced in the Deed of Trust, at a sum a little short of the amount of the debt for which they were pledged, but paid no money; James C. Anthony having given an order, directing the money to be paid to the Appellee. After the sale, the slaves returned to the possession of Trigg, who kept them in his possession until the

299 end of the year 1812, when they *were put under an overseer, employed by the Appellee to manage the plantation on which Trigg resided, and still continued to reside, when the Sheriff levied the Execution on the slave in question, it being the same plantation before rented by the Appellee, and which he had rented for the year 1813. The negro was taken by the Sheriff from the possession of the overseer early in 1813, but it does not appear when the Execution was issued, or delivered to the Sheriff, or levied. The Appellee had procured, before the sale by the Trustee, the bond of another person, for the avowed purpose of raising money to pay Trigg's debt to James C. Anthony; and he and Trigg gave a Deed of Trust upon the slaves of Trigg embraced in the former Deed of Trust, and upon some of the Appellee's property, to indemnify the person who had given his bond to the Appellee. Money was raised upon this bond, to what amount does not appear, and money was remitted by the Appellee to James C. Anthony, but to what amount does not appear, he being also indebted to James C. Anthony. All this was done before the sale by the Trustee. The Appellee paid the amount of the bond which he had borrowed, to the holder. On the day of sale under the Deed of Trust, one only of two joint Trustees named in the Deed being present, Trigg gave his consent in writing, that the single Trustee should make the sale, in the absence of the other. Evidence was given of this fact, and that Trigg was much in debt. The Defendant offered to prove by a witness, that he attended the sale under the Deed of Trust, in tending to purchase some of the negroes, but was prevented from bidding by Trigg's telling him, that the Plaintiff

was purchasing them for him. This evidence was rejected by the Court as inadmissible, to which the Defendant excepted.

Whenever the question, whether any evidence offered is, or is not admissible, depends on other facts already proved, the Court, whose province it is to decide the question as to its admissibility, must of necessity judge and determine
300 *the effect of the evidence ordered to prove the fact upon which that question depends.

In this case, I think it clear that the Appellee and Trigg acted in concert for the purpose of erecting a common object. Whether the fair and honest object of disposing of the trust property, for the purpose of satisfying his debt to James C. Anthony, and consequently, to deprive Trigg of all interest in the property disposed of for that purpose; or, under colour of a sale, to defeat the just claim of Trigg's creditors, to have satisfaction of their debts out of the surplus of the trust property, after a fair disposition of so much of it as might be necessary to satisfy the debt for which it was pledged, by procuring a feigned sale of the whole for the amount of the debt, and securing the whole of it to the use of Trigg, subject only as before, to the payment of the original debt, or so much of it as was really due, thus really preserving, whilst apparently extinguishing, Trigg's interest in the property. These were questions for the Jury, to be determined upon the weight they might give to the facts, if they were proved to their satisfaction, namely, the pecuniary embarrassments of Trigg, the connection of the parties concerned, the promotion of the sale by the voluntary act of Trigg, which resulted apparently in the total loss of all his interest in the property, whilst he still continued to enjoy it, and that no money was paid on the sale; and upon the fact, if the evidence offered to prove it was admissible, and credited, that he interposed to prevent the property from selling for a better price. In order to determine whether this evidence was or was not admissible, it devolved on the Court to determine, for itself, not for the Jury, whether the other facts were sufficiently proved, and whether these facts were prima facie sufficient proof, that the parties had combined to effect the fraudulent design of defeating the rights of Trigg's creditors in the manner above stated. And if so, then the proof of Trigg's interposition to prevent a real sale to a stranger to these

301 contrivances, was admissible *evidence against the Appellee, not because it was necessary, in order to satisfy the Court as to the fraudulent design of the transaction, of which the Jury was finally to judge, but as fit evidence to be considered by the Jury, in forming their judgment upon the whole case. Nor is this an improper interference, on the part of the Court, with the province of the Jury, but the necessary effect of the constitution of our Judicial Tribunals, consisting of Courts and Juries. It is well settled, that in the case of several combining for an illegal purpose, the acts and declarations of each in respect to the common object,

are evidence against the others; yet, before such evidence can be admitted, the Court must decide for itself, that there is sufficient evidence prima facie, to prove such a combination, which the Jury may nevertheless negative. 2 Stark. on Evid. 44, 47; Rex v. Inhabitants of Hardwick, 11 East. 584; Rex v. Stone, 6 Term Rep. 527; Phillips' Law of Ev. 71-2-3.

If it were otherwise relevant to the issue, this evidence ought, I think, to have been admitted, not to prove that in truth the purchase was made for Trigg, but as proof of his act, tending to prevent a competition in the sale, from which the fraudulent intent aforesaid might be inferred.

The enquiry as to the propriety of the instruction given by the Court, presents the question, as to the doctrine of fraud per se, a few years since thought to be conclusively settled by an uniform course of decisions in England, and in the Supreme Court of the U. S., and now thought (as seems to me without good reason,) to be entirely unsettled and doubtful. This doctrine is deeply founded in the early principles of the Common Law, and declared and enforced by many ancient Statutes. It proceeds on the ground, that a possession and use of the property professedly transferred to another, inconsistent with the professed object of the transaction, is conclusive proof of a secret trust for the original owner, and therefore fraudulent as to his creditors, and liable to their Executions.

302 *As early as the 1st of Rich. 3, provisions were made by a Statute intended to protect purchasers against secret Uses, now called Trusts. This was effected by declaring that the conveyance of the cestui qui trust, whether the use were secret or open, should pass the legal title as against the Feoffee to the use, and all claiming under him, subsequent to the disposition of the property by the cestui qui use.

The Statute of 3 Hen. 7. ch. 4, enacts, that "all Deeds of Gift of goods and chattels, made in trust to the use of the grantor, to defraud creditors, shall be void." 13 Vin. Abr. 517, pl. 1. The Statute of 50 Edward 3, ch. 6, provided, that "fraudulent assurances of lands, or goods, to deceive creditors, shall be void, and they may have Execution thereof, as if no such gift had been made." This Statute was the first in order, and applied only to debtors who fled to Sanctuaries. That of Rich. 3, applied only to land, and chattels real, conveyed to the use of the grantor, and that of Hen. 7, only to the case of goods and chattels conveyed by the grantor, in trust for himself. These Statutes applying only to particular cases, the 13th of Elizabeth was enacted, in terms which embraced all conveyances, suits, bonds, judgments, and executions, intended to defraud creditors, and avoided them as to the creditors thereby defrauded, and this Statute we have introduced into our Code. These Statutes against Fraud have always been held to be declaratory of the Common Law, with this difference, that at Common Law, no one could complain of any fraud, unless he had an existing right when the fraud

was committed, which was prejudiced by it; whereas, the Statutes enabled any subsequent creditor to impeach the fraudulent transaction, if there were any other creditor at the time, who might be defrauded by it. 3 Co. Rep. 82-3, *Twyne's Case*.

It is observable, that two of these Statutes were pointed particularly to the cases of frauds practised by means of secret trusts; the most ready expedient, and most commonly resorted to, for perpetrating

303 ing frauds, indeed almost "the only one. The real object of those transactions being, in general to preserve the property, for the benefit of the debtor, against the claims of his creditors, by representing it as belonging to another, whilst he enjoys the use of it: accordingly, the Courts must have considered the continued possession, and use of the property, by the debtor, notwithstanding an absolute transfer in form to another, as a proof of a secret trust, and therefore fraudulent and void, as to creditors, under the Statutes of Rich. 3, and Hen. 7, as a fortiori, under that of 13 Eliz., and also by the Common Law. So confirmed was this doctrine in the time of Elizabeth, that in *Twyne's Case*, it was treated as a settled doctrine, that wherever there was any trust for the donor, there was fraud against creditors, and that possession by the donor was considered as conclusive evidence of fraud. A gift to a child, was considered as fraudulent and void, not because it was voluntary, and without valuable consideration, but because a trust was inferred, that the "child, in consideration of the gift being voluntarily and freely given to him, and also in consideration of nature, would relieve his father, and not see him want, who had made such a gift to him." Indeed the drift of the argument in that case, is not to show that a secret trust avoids the transfer of the property, as being conclusive evidence of fraud, but taking that for granted, to show that if there is any trust whatever, express or implied, (the distinction between which is carefully explained,) the conveyance does not come within the proviso of the Statute, which excepts from its operation bona fide conveyances only. One of the reasons for the Judgment in that case, was, "Here was a trust between the parties, for the donor possessed all, and used them as his own proper goods;" and "every gift made on a trust, is out of this proviso, for that which between donor and donee is called a trust, per nomen speciosum, is in truth, as to all the creditors, a fraud," and "the continuance of the possession in the donor, is a sign of trust."

304 *From the manner in which the subject is treated in this case, and the terms of the Statute of Hen. 7, I should think that the decision was founded upon a long and well-settled doctrine, that a continued possession, inconsistent with the professed purpose of the transaction, was a fraud per se, that is, conclusive evidence of a trust, and therefore, a fraud. However this may be, this doctrine, which is called the rule of *Edwards v. Harben*, comparatively a very modern case, has never been questioned in England, or here,

until very recently. This was the doctrine held in *Stone v. Grubham*, 2 Bulst. 226; in 12 Jas. 1; and *Hungerford v. Earle*, 2 Vern. 262, in 1692, and in *Bucknall v. Roiston*, Ch. Prec. 287, in 1709. In the latter case, Sir Edward Northey said, that it had been ruled so forty times, in his experience at Guildhall. This was also the doctrine in the Supreme Court of the U. S., in *Hamilton v. Russell*, 1 Cranch. 310, and has been repeatedly affirmed in this Court, without exception or reserve. *Fitzhugh v. Anderson*, 2 H. & M. 303; *Alexander v. Deneale*, 2 Munf. 341; *Robertson v. Ewell*, 3 Munt. 1; *Thomas v. Soper*, 5 Munf. 28; *Williamson v. Farley*, Gilm. 15. The decisions elsewhere, which are supposed to be modifications of, or exceptions to, this rule, are not so. In all those cases, the possession was not inconsistent with the professed purposes of the transaction, as if the sale be conditional, or the situation of the parties or property be such, as that it cannot be conveniently delivered to the purchaser, so it be delivered as soon as it conveniently can; or, it is avowedly pledged as a security for the payment of debts, by being conveyed to Trustees for that purpose; in all of these, and such like cases, the possession is not inconsistent, and the character of fraud is not necessarily stamped upon it. This rule is so fortified by the most venerable authority, and so well-founded in justice, and sound policy, that I should be very reluctant to depart from it lightly, or to fritter it away by refined distinctions.

305 *The only circumstances which can be alleged as taking this case out of the rule, are, that the legal title to the slaves was in the Trustee, who transferred it to the Appellee; that a large sum of money, secured by the Deed of Trust, was really due, either to James C. Anthony, or to the Appellee, if he had paid it to James C. Anthony, and that the Appellee had taken possession of the property before the Execution was levied. The circumstances, that there was a real debt due from Trigg, is of no consequence in itself; for, if a true creditor uses his debt in any way to cover the property of his debtor, and protect it from his other creditors, and with that intent, his title is void for fraud, so far as other creditors are impeded by it; as if a creditor, who has an Execution levied on the property of his debtor, directs the Sheriff not to sell it, but to leave it in the debtor's possession, a trust is implied as a matter of law, his Execution is fraudulent, and any other creditor may take the property in execution. 13 Vin. Abr. 524, pl. 3. In *Twyne's Case*, there was a real debt due to the purchaser of the debtor's property, and the Court said that it was not within the proviso of the 13th Elizabeth, which excepts conveyances made bona fide, and upon good consideration, "for, although it is on a true and good consideration, yet it is not bona fide, for no gift shall be deemed bona fide within the said proviso, which is accompanied with any trust: as if a man be indebted to five several persons, in the several sums of 20l., and hath goods of the value of 20l., and makes a gift of all his goods to one of them in satisfaction of his

debt, but there is a trust between them, that the donee shall deal favorably with him, in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use, or have possession of them, and is contended that he shall pay him his debt when he is able; this shall not be called bona fide within the said proviso."

Nor does the fact, that the Appellee had taken possession of the property, before the Execution was levied, prevent
306 *the operation or application of the rule. That being founded upon the legal inference, from the continued possession, that there was a secret trust between the parties for the benefit of the debtor, it attaches upon all cases in which the possession has continued beyond the time, when the property might conveniently have been delivered to the purchaser, and the possession of the purchaser after the presumption of Law is fixed upon the transaction, cannot impair the force of that presumption. Accordingly in *Edwards v. Harben*, the rule was applied to the purchaser, as Executor de son tort, taking possession after the death of the debtor, who had continued in the possession only a few days after the sale. If the possession of the debtor be such, as that, during that possession, a creditor might have taken the property in Execution upon the ground that such possession made the conveyance fraudulent per se, and void in its inception, the change of possession could not make that good which was already void, and a creditor may take in Execution property fraudulently conveyed, and in possession of the fraudulent donee.

The remaining question, as to the effect of the Deed of Trust, which was valid in its inception, is important, and in respect to which, so far as I am informed, we have no satisfactory precedents. I do not mean the question, whether a sale under a Deed of Trust is, as a sale under an Execution, exempted from the operation of the rule of *Edwards v. Harben*; but the question, whether applying that rule, and finding that the sale under the Deed of Trust was fraudulent, it should be held that the property is liable to creditors, as if the Deed had never been made: or, vacating the sale only the creditor should be restored only to his original right to have satisfaction out of the surplus of the property left, after satisfying the debt for which it was pledged.

In the case of *Hungerford v. Earle*. 2 Vern. 261. (in 1692,) Commissioner Hatchins held, that a Deed not at first fraudulent may afterwards become so,
307 by being concealed, *or not pursued, by which means creditors are drawn in to lend their money. No Decree was, however, pronounced, but an issue was directed to try the question of fraud, the event of which is nowhere reported. This dictum is approved by Chancellor Kent (whose opinions are entitled to great respect,) in *Hildreth v. Sands*, 2 John. Ch. Rep. 35. On the other hand, it was held in *Stone v. Grubham*, in 1615, before cited, and in *1 Dews v. Brandt*, Select Ch. Cases, 7, in the 11th year of George the

first, by Raymond and Gilbert, Commissioners, that a Deed not fraudulent in its inception, could not become so by matter subsequent. And in this opinion I agree. The very terms of the Statute require that the conveyance, or security, shall, to render it void, be had or made with intent to defraud creditors or purchasers. Although a Deed valid in its inception is not rendered void at Law under the Statute, by using it for a fraudulent purpose, yet a Court of Equity, acting upon its general principles, would put it out of the way of a creditor, or purchaser, so far, if that were entirely, as might be necessary to put the party affected by it in the same situation in which he would have been but for the fraud.

I should consider the continued possession of Trigg in this case, as per se, making the sale under the Deed of Trust fraudulent and void, so far as it affected his interest in the trust property which was intended to be withdrawn, under colour of that sale, from the just claims of his creditors; a sale under a Deed of Trust, when no money is paid, being different in principle from a sale under Execution where the money is paid; the public officer performing his duty according to Law, and the trustee acting as the agent of both debtor and creditor, according to their directions, if they concur in them, as in this case they did. Other views, however, render it unnecessary to pursue this branch of the subject.

The Deed of Trust being valid, although used for a fraudulent purpose, and the sale under the Deed of Trust being
308 *fraudulent, and therefore void as to creditors, but good as between the parties, the case in effect is that of a mortgage of personal property in possession, the mortgagor having an interest in it, to the extent of the surplus which may remain after payment of the debt, liable to his creditors in some form. And the question is, whether such interest is the subject of an Execution upon a Judgment at Law.

The 30th section of our Statute of Conveyances, provides, that estates of every kind holden or possessed in trust, shall be subject to the debts and charges of the cestui qui trust in like manner, as if he owned the interest in the things so holden or possessed, as he owns in the uses or trusts thereof. This provision embraces those of the Statute of Richards, before referred to, and of the 10th section of the Statute of Frauds of the 29th Charles 2, combined, in respect to lands and chattels real, to which only they extend. A conveyance of personal property, or chattels real, by the legal owner, in which there is any trust for the owner, is void as to creditors, under the Statutes of Hen. 7, and 13th Eliz., and by the Common Law; but, personal property conveyed by a third person in trust for a debtor) or by a debtor in trust for the payment of debts, is not in England liable to an Execution on a Judgment against the cestui qui trust, either by force of any of those Statutes, or by the Common Law as has been there decided.

Our Statute, I think, goes further, and

provides for this case. The terms, "estates of every kind, holden or possessed in trust," "the things holden or possessed," which are not found in the Statute of Rich. 3, and Chas. 2, were I think, intended to embrace all possible descriptions of property, real and personal: and this construction is strongly fortified by the fact, that the Statute concerning joint rights and obligations, prepared by the same Revisors who prepared this Act, has the same expression, ("the estates or things holden, or possessed,") applied clearly by the context to personal property. But, still

309 it can apply to no case where the cestui qui trust has not an immediate equitable right to the possession and enjoyment of the property; for, if it were a remainder, or contingent, as such a right, if legal, would not be subject to Execution until it fell into possession, so neither would such a trust. Trigg, having no immediate right, and none until the debt for which the property was pledged was satisfied, and the surplus ascertained, the Sheriff had no legal authority to take it from the possession of the Appellee, and was a trespasser. In this view, the evidence of Trigg's interposition to prevent competition, had no tendency to justify the levying of the Execution on the slave, and was therefore properly rejected, it being irrelevant to the matter in issue. And for the same reason, and not for those assigned by the Court, the instructions excepted to, declaring that in a certain state of facts, the sale would not be fraudulent per se, afford no ground for reversing the Judgment, since each of them was qualified by the expression "so as to subject the said slave to the creditors of the said Trigg," which was true. The creditor, whose Execution was levied on this slave, mistook his remedy. That was in a Court of Chancery, to have the debt due on the Deed of Trust ascertained, the property sold, the debt paid, and the balance, if any, applied towards the satisfaction of his Execution.

The Judgment should be affirmed.

JUDGE COALTER.

There are two Bills of Exceptions: one as to the rejection of evidence offered by the Appellant; the other in regard to an instruction as to the Law, given by the Court to the Jury. They both have reference to the same statement of facts, and I will consider the last first.

The Bill of Exceptions give a summary of what was proved before the Jury, from which it appears that one Trigg, being indebted to James C. Anthony, in the 310 sum of \$2,680 29, executed a Deed of Trust on sundry slaves; that Mark Anthony, the Appellee, and who was brother-in-law of Trigg, was also indebted to James C. Anthony; that wishing to assist Trigg, he procured James Austin and John Anthony, to execute two bonds; one for 450l., payable the 19th January, 1812, and the other for 450l., payable the 19th January, 1813. The object, it seems, was to sell those bonds, and pay off the Deed of Trust. Trigg and Mark Anthony executed a Deed of Trust, to save harmless Austin and John Anthony, as to the bonds

so given by them. In this Deed was comprised the slaves in the Deed of Trust to James C. Anthony, and also some slaves and lands belonging to Mark Anthony. A considerable sum, it appears, was raised on the bonds, but what amount was not proved; and about the time, Mark Anthony made considerable payments, but to what amount does not appear, to James C. Anthony, in his own name. No credit appears to have been entered on the Deed of Trust. These bonds were executed on the 26th August, 1811: when the money was raised on them, does not appear.

On the 23d May, 1812, William Mitchell, one of the Trustees in James C. Anthony's Deed, with the assent of Trigg, advertised and sold the slaves in that Deed, and Mark Anthony became the purchaser, received possession, and a Bill of Sale from the Trustee. The slaves were thereupon returned to the plantation of the Appellee, whereon Trigg lived, being a plantation which the Appellee had rented for the years 1811, 1812, and 1813; and it is stated, that it did not appear that Trigg interfered at all with the negroes. It was also proved, that in the year 1813, the Appellee employed an overseer for the said plantation, and placed under him the slaves purchased by him as aforesaid, and that none of them were subject to the control of Trigg, but were entirely under the control of the Appellee and his overseer, from whose possession one of them was taken under Execution as the property of 311 *Trigg; and for which alleged trespass this action is brought. The Execution bears date on the 28th January, 1813; but when it came to the possession of the Sheriff, or was levied, does not appear.

There is no proof whatever, nor any ground whereon to raise a suspicion, that this plantation was rented for Trigg, and that he was the real owner of the lease. On the contrary, it seems that he had not at any time any control over it, or the slaves on it, and that he certainly had none during the year 1813. There seems to have been no question raised, but that the overseer, from whose possession the slave was taken, was there during the whole of the year 1813; and of course, that he was so in possession when the Execution issued. It was clearly so understood by the Judge, and no dispute at all raised on that point. Whatever might have been the case, then, in 1812, the purchaser clearly had possession during the whole of the year 1813, and of course before the Execution issued. I think the Judge was right in his instruction given as to the Law on this state of the facts. But, this was a public sale, under the deed of Trust, by one having the legal title; and who, Trigg having assented to dispense with the presence of the other Trustee, was authorized by that assent, and the terms of the Deed, to make the sale. He did so, delivered possession, and conveyed the legal title from him, so far as he could convey it. As at present advised, I am unable to distinguish such a case as this from a sale under execution, or for rent; and if the purchaser in such latter case might permit the former

proprietor to remian in possession, without being subject to the doctrine of fraud per se, I cannot see why he might not in this case.

It is true, a sale under a Deed of Trust, or even under an Execution, may be a mere cover to a fraudulent and secret trust for the benefit of the alleged debtor; but, such open and public transactions as these, are not, it seems to me, within the operation of the rule aforesaid. I therefore think, at present, that the Judge was right in
312 the *other branch of his instruction; and that such possession as was proved to be in Trigg in 1812, was only a circumstance which might avail with others to prove actual fraud in the transaction; and was, therefore, properly left to the Jury for that purpose, and that only. This alleged actual fraud the Jury negative by their verdict.

But, the other Bill of Exceptions shews, that evidence going to prove actual fraud, and combination to defeat creditors, was rejected, and the question is, was the testimony offered, properly rejected or not?

In considering this point, it seems to me that James C. Anthony must be taken to be a bona fide creditor of Trigg to the amount of \$2,650 29, for the payment of which the sale was made.

The Plaintiff was his agent, and receiver of this money on the day of sale, and became the purchaser of the property. It would seem that Trigg was his debtor also, on account of the transactions in relation to the bonds which were sold as aforesaid, and which the Appellee has since paid off in the hands of the holders.

The property incumbered by Trigg to James C. Anthony, and which was sold as aforesaid, was the only property which stood between the Appellee and harm, and he may be considered a second incumbrance on it, for his indemnity. He received the amount the bonds sold for, but he was to take in those bonds or his estate would suffer. The incumbered property of Trigg was to be applied first to take them in. If it proved insufficient, he would lose the difference between what the bonds were sold for, and what he had to pay for them. It was natural, and proper, then, for him to get himself into such a situation, that he could bid at the sale without having to advance the money, to the full extent of the first incumbrance, so as to purchase in, and make his second incumbrance cover whatever the slaves might be worth, to have what they would sell for in cash. He could have bid up under the second
313 incumbrance too, so as to save *his own property so far harmless in regard to the bonds, and the Deed of Trust aforesaid.

Had he been in no wise connected with Trigg, this course would have tended to produce the best possible sale. It was the natural and proper course, according to the evidence, had he been a stranger. But, he was the brother-in-law of Trigg, in addition to which he had permitted Trigg to live on his plantation, and Trigg had agreed that one Trustee might proceed to sell. If, in addition to this, it had appeared hat the negroes were worth more in cash

than both the incumbrances, and that if he could get them in, without paying more for them, he might aid Trigg in future, there would be some ground to suspect that in fact it had been agreed, that if he could so get them in, he would hold them for his benefit, to the extent that their real value exceeded both debts.

Had there been proof then, of the amount the bonds sold for, so as to show what was the extent of both debts, and that the real cash value of the slaves exceeded that amount to any considerable extent so as to make a project of this kind really available to him, the near connection, and friendship between the parties might have led to a suspicion of such combination. But, neither the extent of the debts, nor the real cash value of the slaves is proved. They seem to have been set up singly, except one family, and sold for considerable prices. And it does not appear but that they were sold for full prices: nothing appears to the contrary. They may have sold for more than they could have been sold for, had not the Appellee had it in his power to bid to the extent of the debts aforesaid. There is no unfairness of conduct imputed to the Trustee. He knew of no fraud or combination, but sold for as much as he could get.

If, however, there was in reality nothing due on those Deeds of Trust; if they have been merely used as a cover, to enable the Appellee to purchase in this property, and

cover it for Trigg, creditors might
314 have enquired into it *on a bill for that purpose, or perhaps might have proved it in this suit; but, there being no proof of fraud or combination, we ought not to suspect it, merely on the ground of the connexion subsisting between the parties. Acts of benevolence from one connexion towards another ought not to be repressed, for fear of imputations of this kind, unless they can be supported by pregnant circumstances.

Under this state of the evidence, William Leftwich is introduced to prove, "that he attended the sale under the Deed of Trust, with intent to purchase one of the slaves; that he was taken out by Trigg, who requested him not to bid for the slaves, stating that the Appellee was to buy the property for him, the said Trigg." This evidence was rejected, unless it could be shown, that the Appellee was privy to Trigg's statement, or in other manner consented to it.

The witness deos not even state, that he forbore to bid, if that would have made any difference, or that this was generally understood, and the biddings repressed; or that the Trustee knew or suspected it, or that the slave he intended to bid for, or any other slave, was sold for less than he would have been willing to give.

This evidence was offered as the declaration of one of two confederates in an unlawful act; but, before such evidence can be given, there must be proof of the confederacy, of which proof the Court is to judge. The declarations of a third party not on oath, are not evidence, until by some legal evidence the combination is proved. That cannot be proved by declarations not on oath, in order to let in those very decla-

rations as proof before the Jury. Neither Court nor Jury are to hear such declarations, until a foundation is laid for their introduction. Here, the only evidence of fraud or combination is the say so of Trigg. This I think was properly rejected.

The Judgment must be affirmed.

315 *JUDGE CABELL.

The Deed of Trust executed by William Trigg, for securing the debt due by him to James C. Anthony, left in Trigg an equitable and contingent interest in the property conveyed by the Deed of Trust: and such an interest is not liable to execution. The opinions given by the Judge during the progress of the cause, could not, therefore, even if they be erroneous, (as to which, however, I express no opinion,) furnish any ground for reversing the Judgment.

In the case of Land v. Jeffries, (See Appendix to 5th Rand. p. 599,) I had occasion to express, at large my opinions on what is commonly called "the rule of fraud per se;" as also on the exceptions to it. It cannot be necessary to repeat them here.

316 *Redford's Administrator v. Peggy and Others.*

March 1828.

Evidence—Handwriting—Witnesses—Refreshing Memory.—The evidence of a witness as to hand-writing, who has formed an acquaintance with it from seeing the party write, or from a course of correspondence, is not rendered incompetent, nor its weight impaired, by his having referred to papers in his own possession, known to be written by the party, to refresh his (the witness's) memory. By the whole Court of four Judges.

Same—Same—Comparison of Hands.—Two Judges (CARR and COALTER) were of opinion, that the evidence of a witness, who has frequently seen the testator write his name to receipts, and who has resorted to those receipts, before he gives his evidence, to refresh his memory as to the hand-writing, but who testifies that he believes the body of the will and signature to be the hand-writing of the testator, though he forms that belief from comparison, and that he would not be able to prove the hand-writing, except from comparing it with the signature to the said receipts, was competent evidence to prove the hand-writing, and when supported by the evidence of another witness to the hand-writing, and by corroborating circumstances, is of sufficient weight to support a Testament of chattels. Two other Judges, (GREEN and CABELL,) were of opinion, that the evidence was not competent.

Same—Same.—Qn: In a Court of Probate, it is not competent for the Court to compare the hand-writing of the paper in question with that of papers produced in Court admitted to be genuine, or

*For monographic note on Handwriting, see end of case.

†**Evidence—Handwriting—Comparison of Hands.**—In *Hanriot v. Sherwood*, 82 Va. 18, it is said: "In the first case cited by counsel, decided in this state, *Redford v. Peggy*, 6 Rand. 816, the question whether evidence by comparison of hand be admissible, was not directly before the court; yet the nature of the case seemed to bring the point under review; and out of the four Judges who sat two say that such evidence is inadmissible, and it is claimed that the same conclusion may be drawn from the opinion of a third." In this case the last headnote reads: Under the rules of evidence in this state, expert testimony is admissible to test the genuineness of disputed writings by comparison of writings admitted or proved to be genuine with writings alleged to be forged. To the same point the principal case is cited in *Rowt v. Kile*, 1 Leigh 222; *Sharp v. Sharp*, 2 Leigh 254.

In *Pepper v. Barnett*, 22 Gratt. 406, it is said: "Where the witness has seen the party write, and is able to swear to his belief, that the writing in question is the hand of that person, such evidence is clearly admissible as legal proof of hand-writing, and is considered as distinct from evidence by compari-

proved to be so? Is not the rule before a Court of Probate different from that in trials before a Jury?

Wills—Proof of—Witnesses Necessary.—By the Ecclesiastical Law, which, as to proof of Wills in Courts of Probate, is still our Law, two witnesses are necessary to prove Wills of chattels. By the whole Court.

Olograph Will—Establishment of—Witnesses Necessary.—But by GREEN and CABELL, the rule is different as to olograph Wills, or such as are written wholly by the Testator. They thought, that by our Statute an olograph Will of lands may be established by the evidence of one uncontradicted and unimpeached witness; and, on the principle, that omne majus continet in se minus, such a Will of chattels might be so proved. The other two Judges did not express a concurrence in this opinion.

The Appellees, Peggy and other negroes, who had been slaves of George Redford deceased, appeared in forma pauperis, before the County Court of Powhatan, and applied to the Court to admit to probate a Testamentary Paper, purporting to be the last Will and Testament of the said Redford. The application was resisted by Benjamin T. Davis, Administrator of the estate, and the Court on the 10th October, 1825, decided that it was not the Will of Redford, and refused to admit it to Probate. From that Judgment, the paupers appealed to the Superior Court of Law for Powhatan, where the Judgment of the 317 County *Court was reversed, and the Will admitted to Record. From this last Judgment, the Administrator appealed to the Court of Appeals.

The following is a copy of the Testamentary Paper:

"Being of sound mind and memory do make this my last Will and Testament in manner and form following: My Will is that all my slaves may at my death be emancipated and sit free, to wit, Lewis, Peg, and all her chil-

and dren and grand-children, Tener and all her children and grand-children them and their heirs forever; but Lewis, Essix, Tim, & Charles, Will, Daniel and Tarlton are to pay to some person appointed by the Overseers of the Poor for the support of Milly a lunatick ten dollars per year, and her mother Tener, and if they, or either of do not the sum o ten dollars each the said Overseers are to hire them to some person to rease the sum of said ten dollars each: If the Assembly will not permit them to stay within this State my desire is that my Ex'rs or either of them do employ some person to carry them to some free State, and pay it out of my estate: I do appoint

son, Greenl. on Ev. §§ 876-877: *Redford v. Peggy*, 6 Rand. 816." See further, monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 276.

‡**Will of Personality—Witnesses Necessary.**—In *Worsham v. Worsham*, 6 Leigh 589, it was held that before the statute of 1834-5, ch. 60, a testament of personal estate might well be proved by a single witness. JUDGE CARR, in delivering the opinion of the court, said: "In *Redford v. Peggy*, three Judges did intimate their opinions, that two witnesses were necessary to a will of chattels; but we did not consider that as a solemn decision on the point, because each of those three Judges decided the case upon other points distinct from that."

The principal case is also cited on this subject in *Moore v. Moore*, 8 Gratt. 381.

See further, monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 209.

It is well settled that emancipated slaves may propound for probate the deed or will conferring their right of freedom. *Reld v. Blackstone*, 14 Gratt. 366, citing the principal case to sustain the point.

my friends Benjamin Davis and Saml. Marshall Ex'rs of this my last Will and Testament: In witness whereof I set my hand seal this 24th day of December, 1818.

Geo. Redford."

"I have not had this witnessed as I think my is well enough known and no person present.

Geo. Redford."

The evidence given at the trial before the Superior Court was spread on the Record, and is as follows:

Henry W. Watkins, senr., a witness for the paupers, says that he is well acquainted with the hand-writing of the Testator, and believes the paper now in controversy to be wholly in the hand-writing of the Testator, including the signature thereto: the witness saw the Testator frequently, and some short time before his death, perhaps

a year or two, had business with him, and thinks he was as *capable in relation to soundness of mind of making a Will then as any man he had ever known who was any thing like as old; he was becoming feeble, and was getting very deaf, and frequently got other persons to do business for him: the witness thinks it very probable that the Testator would have been more easily influenced in his latter days by persons in whom he had confidence, than he would have been in early life: he thinks the cancelled Will, dated 4th August, 1811, and offered in evidence by the paupers, is in the hand-writing of the Testator, and more like that hand when he knew it well than the writing of the paper in controversy: being shown a Deed dated 16th November, 1803, and offered as evidence by the paupers, the witness said he believed it to be in the hand-writing of the Testator: and upon being shown the paper offered in evidence dated November 12th, 1820, said he did not believe it to be in the hand-writing of the Testator. The witness says, that he became familiar with the hand-writing of the Testator in 1792, and from thence for ten or fifteen years they did much business together, so that the hand-writing of the said Testator was nearly as familiar to him as his own; after that, the Testator becoming old, did much less business of that sort which required him to write more than his own name, with his manner of doing which the witness continued familiar to the time of Testator's death; but, in his general writing there was manifest deterioration from what it had been at an earlier time of the Testator's life, when in the course of business his general hand-writing was familiar to the witness as aforesaid; that the witness knew the signature to the Will as soon as he saw it; says he verily believes it to be in the hand-writing of the Testator; but, the hand-writing of the body of the Will is so changed from the time before spoken of, that had he seen it without the name and signature, he doubts whether he could have pointed out the author, and thinks he could not have done so without some circumstance, other than the writing itself, to point his attention to him; that had *he been named he would still have perhaps hesitated to say it was his hand-writing until his memory

was refreshed, on the change produced by old age, by reference to other papers which from time to time the Testator had written, and are in possession of the witness: on thus refreshing his memory, the witness says, the writing though worse, retains in a good degree its original character, and on close inspection, he now verily believes that the Will is wholly written by the Testator: and he thinks he should have said so without reference to any other paper, but not with that certainty and promptness that he would have answered as to the signature: with respect to the second, or last signature to the Will or note, the christian name is unlike the Testator's writing, so that on seeing that without the other, he should have said the Testator did not write it: but, the surname (Redford,) appears to have been written by the Testator, whose manner of making the letter R, was very peculiar.

Claiborne Watkins, another witness for the paupers, says, that he has seen the Testator write his name frequently to receipts, and believes from comparison, that the paper now in controversy with the signature, is wholly in the hand-writing of the Testator; believes he should not have been able to prove the hand-writing of the Testator, except from comparison with the signature to the receipts aforesaid. The witness says, he was a near neighbour of the Testator, who was remarkably lenient, and indulgent to his slaves; never thought his mind was injured by age, or other cause; he was very deaf, but had a good recollection of the events of his early life.

There were also sundry witnesses examined in the Administrator.

George B. Davis heard the Testator say not long before his death, that he was not able to attend to business, and had gotten Joseph B. Davis frequently to attend to business for him: heard him frequently express his dislike to free negroes, and knows that he had sold one of his 320 women *because she had a free husband: has heard him complain of one of his nephews for allowing free negroes to remain on his land: thinks the Testator was unable to attend to his business, from old age and infirmity, and not from want of soundness of mind.

Joseph B. Davis was at the Testator's house on the day he died, in October or November, 1820, and examined, with some gentlemen, the Testator's papers. They found no Will, except one that had the name torn off. The Testator's papers were afterwards carried to the witness's house by one of the Testator's negroes. Some days afterwards, he was about again to examine the papers, and upon opening the chest which contained them, he found the paper now in controversy at the top of the papers in the chest. There was room to slip in the paper under the lid when the chest was locked. The witness acted as Agent for the Testator for several years before his death, and thinks that about 1818, it was hard for him to understand things. He was very deaf, and from the debility of his body and mind, he was scarcely able to have made and written a Will in the year 1818. He left a tract of

land of three hundred acres, and other property not named in the paper in controversy. Several persons were engaged in the examination of the papers; and after the examination at the Testator's house, the papers were thrown promiscuously all in a chest together. The Testator was very tender to his slaves, and seemed to feel very much for them when distressed, but sold one of his negro women expressly because she had a free husband. The recollection of the Testator for some years before his death was so much better in relation to things which had happened some number of years previously, than in relation to things which had lately occurred. The Testator's wife is named in the cancelled Will, dated 4th August, 1811, and was dead before 1818. The negro Will, intended to be emancipated by the Deed dated 16th November, 1803, remained in slavery till the Testator's death. The negro woman 321 Fanny sold *by the Testator to Thomas T. Tuggle, was the daughter of Peggy, one of the negroes named in the paper in controversy. The paper offered in evidence by the paupers, dated 12th November, 1820, was brought to the witness by Tarlton, one of the negroes included in the Will in controversy, shortly after the Testator's death, who said he found it near the Testator's house.

Thomas T. Tuggle deposed, that he bought of the Testator in January, 1819, the woman whom he sold on account of her having a free husband. That free man had behaved badly. He insisted on visiting the witnesses's house against his will, and finally attempted to carry her off. The witness made the contract with the Testator in person, and paid him the money, and thinks he was in his proper mind.

Benjamin B. Hughes and John Maxcy, jr. deposed, that they assisted with several others to examine the papers of the testator, and did not find the paper now in controversy. The persons engaged in the examination, would take different bundles or parcels of papers, and after looking at them, would throw them into the chest, announcing that no Will was found.

Samuel Davis testified, that the Testator had a great dislike to free negroes for many years before his death; particularly to the husband of a woman whom he had sold for having a free husband.

William Forlines testified to the testator's dislike to free negroes, and has heard him express his opposition to the emancipation of negroes: Heard him say the year before he died, that he had made a Will in his wife's life-time by which he had given her six or seven negroes, but that since her death he had made another Will.

William Smith heard the testator say about 1817, he wished there was not a free negro in America, and heard him express the same sentiment, after he had sold the negro woman, for having a free husband.

Thomas Watkins says, that he knew the hand-writing of the testator some 322 *which time the Testator acted as a sort of Assistant Deputy Sheriff with the witness, and the witness had then frequent opportunities of seeing his writing in

lists of Juries made out by him, and sometimes in other cases. He thinks there is not any great resemblance between his hand-writing then, and that of the paper in controversy; thinks he formerly wrote a much better hand. The Will, dated in August, 1811, offered in evidence in this cause, being shown to the witness, he said he could not be positive whether it was the Testator's hand-writing, or not. The Deed, dated in November, 1803, being also shown to him, he said he did not know, and could not say, whether or not it was in his hand-writing. He did not think he was acquainted with the Testator's signature.

Benjamin Bennet testified, that Mr. Redford frequently told him, that he never would set free his negroes, and expressed considerable hatred against free negroes. The witness once told Redford, that if he would let him have a little negro for a nurse, if he R., wished to set her free at a certain age, when she arrived at that age, he would discharge her and give her one hundred dollars. Mr. Redford considered himself insulted at this proposition, and said with much warmth, that he never would free one of his negroes. The last conversation they had on the subject was the summer before he died.

William S. Dance, a witness for the paupers, testified, that he heard the Testator examined as a witness in Powhatan Superior Court, in a pauper cause, in May, 1820, in which he gave evidence of occurrences in 1761. He was very deaf, but gave in a clear and distinct statement of facts. He exhibited no want of understanding, or debility of mind, but seemed clearly and readily to understand questions propounded to him, as soon as he could be made to hear them. The Deed offered in evidence, dated 16th November, 1803, has not been recorded.

The original writing or Deed tendered in evidence, is as follows: 323 *'Know all men by these presents that agreeable to an Act of the General Assembly of Virginia, I do hereby immanypate, and set free my negro boy Will, son of Tener, who was born 16 August 1791, and my desire is that the said Will be by the Court set free: and that Eliasa Maxcy, and Horatio Maxcy as to the carrying the same into effect: As witness my hand & seal this 16 November 1803.

Geo. Redford (Seal.)

"The above is done at the request of them that is no more."

The original writing or Will, herein-before mentioned, dated 4th August, 1811, is as follows:

"I George Redford being of sound mind and memory do make this my last Will and Testament in manner & form following: First, I lend to my beloved wife Jane the following slaves that is Lewis, Peg, and all her children, and grand children, Beck and their increase during her life, and at her death my will and desire is that they, and their increase be freed, and immanypated, and if the Law of this State will not suffer them to stay here, or the General Assembly will not permit them to stay here that my brother Richard Red-

ford or his heirs do contrive to get them to the State of Kentucky, and county of Shelby; do git them carried there, for which trouble they are to serve him five years, and then to be free, & their increase.

'Item, my will further is, that the rest of the slaves, Tener, and all her children be freed, or immancipated with all their increase, and if cannot be permitted to stay as above that may stay in this Commonwealth, they may be sent to my brother Richard to stay with him five years, except Will to stay four years, and that each of them be furnished with five dollars to bear their expenses there, and to have my small cart, and horse called Chancellor, or one as good; and that my still be sold to raise the money, and bal's afterwards to be applied to carrying Lewis, Peg, and children, and to be made up five dollars for each of them out of my estate; then Lewis, Peg, & children to be free.

324 *'Item, I give the rest of estate not given above or freed except my land to my beloved wife Jane, to her & her heirs forever.

"Item, I lend my to my said wife my land & plantation whereon I now live, but the land is not to be rented out, on forfeiture of her claim, during her life: My desire is that that my estate may not be appraised and hereby appoint my said wife, Elisha Maxcy, & Josiah Forlines, Executrix and Exors. of this my last Will, and Testament, hoping they will use their best endeavours to fulfill my desire with trying the Assembly to git them suffered to stay in this Commonwealth as many of them have husbands and wives to leave behind, and they are as industrious & honest any other slaves:

"Witness my hand & seal this 4 day of August one thousand eight hundred & eleven.

"Powhatan, this 4 May, 1811."

And the original writing or Will, dated 12th November, 1820, herein-before mentioned, is as follows, to wit:

"And I give the mar to Betsy Forlines, if she have your foal give that to Jane; if should dy, I want Joseph Davis set them all at liberty: I have toiled if the behave themself that the never serve nobody after my death: I have been very much interested about what Thomas Tuggle said to me my negroes that tha shod suffer after my death, but set them all at liberty at my death: Joseph Davis & Lucy Davis I depend on to see my negroes sot free.

George Redford.

"November 12, 1820.

"Lucy Davis leave gig & gig mar to you, and all the cows your Joseph Davis & Ben: Davis, all but one, give that to Misis Jordan, she has been good to me indeed: all my negroes to sot free: Mary & Daniel must 5 dollars; vary sick when roat this, weak with all, I roat this is my negroes might not be imposed by no one. I hope Joseph Davis will see them righted.

325 I depend on Joseph Davis *to see them righted; her I say Mary & Daniel must have 5 dollars between them equally divided at my death.

George Redford.

"I hope that Lucy Davis is satisfied with

what I have given her; all the cows she has got she must keep them to herself, but set them free at any rate: I depend on your see them righted allways Joseph Davis to—

George Redford.

"November 12th 1820."

Here ends the evidence.

The Superior Court certified that the evidence of Claiborne Watkins, going to prove the hand-writing of the said George Redford deceased, by comparing with other writings signed or written by him, and all the evidence of like character, was objected to by the Administrator of Redford, but its competency, as well as its effect, was reserved by the Court for the final decision.

The Attorney General for the Appellant. Nash, for the Appellee.

March 29. The Judges delivered their opinions.*

JUDGE CARR.

This is a case of Probate. George Redford died at a very advanced age, without wife or child, and possessed of a tract of land, and a number of slaves. A paper was produced to the County Court of Powhatan, purporting to be the Testament of Redford. There was no witness to it; but persons were produced to prove that the body of the writing, as well as the signature, were wholly written by Redford. It is a Testament of personals entirely, no notice being taken of the Testator's

326 land, and the whole intent *of the paper appearing to be, to give freedom to his slaves, and directions about the dispositions to be made with respect to them, if the Laws did not permit them to remain in the State. Executors were appointed; but, the contest here is, between the slaves seeking Probate, and the Administrator resisting it. The County Court decided, that the paper was not the last Will of Redford, and ought not to be recorded as such. On appeal, the Superior Court reversed this decision, and directed the paper to be recorded as the last Will and Testament of Redford; from which the appeal is taken to this Court.

In the argument of this cause, there were (among others) two very important questions raised, which I do not mean to consider: 1. Whether the Ecclesiastical Law, with respect to Testaments was the Law of this State: 2. Whether a Testament of personals, written (body and signature) by the Testator himself, can be established on proof by one witness of the hand-writing. I do not examine these points, because I can decide this case with perfect satisfaction to my own mind, without touching them.

The first witness to the hand-writing of the Testator, is Henry Watkins; and I consider his evidence full to the fact, and given under circumstances entitling it to great weight. He says that he is well acquainted with Redford's hand-writing: that he became familiar with it in 1792, and from thence, for ten or fifteen years, they did much business together; so that the hand-writing was nearly as familiar to him as his own; that after this, the Testator growing old, did much less business of that

*The PRESIDENT absent.

kind which required him to write more than his name; with his manner of doing which, the witness continued familiar to the time of his death: that he believes the whole Will to be in the hand-writing of Redford: that he knew the signature as soon as he saw it; but, of the body of the Will, he at first had doubts, the hand-writing in that part being much changed for the worst, since he was familiar with it. He states then, the course of reflection and examination, which, * (with the aid of refreshing his memory by inspection of some papers in his possession known to be written by Redford,) had banished all doubt, and enabled him to speak with confidence. The resort to these papers was not improper; and I repeat, that so far as one witness could go towards it, this hand-writing is proved.

Next is the evidence of Claiborne Watkins, who says, "he has seen the Testator write his name frequently to receipts, and believes, from comparison, that the paper now in controversy, with the signature, is wholly in the hand-writing of the Testator; believes he should not have been able to prove the hand-writing of the Testator, except from comparison of the signature with the receipts aforesaid."

It was objected, that this evidence was not admissible, being founded on comparison of hand-writing.

In the first place, I question whether the strict rule with respect to the admissibility of evidence before a Jury, applies to a Court, who, in a question of Probate, are to judge upon the whole matter, both of law and fact, and who, by their Constitution, are the tribunal in all cases to decide the Law.

But passing this by, I think that before a Jury, the evidence of this witness would be admissible; its weight, of course, to be greater or less, as to the Jury should seem right. When it is laid down as a rule, that evidence by comparison of hands is not admissible, we must recollect, that "by comparison, is now meant a comparison by the juxta-position of two writings, in order, by such comparison, to ascertain whether both were written by the same person." See Starkie's Evidence, vol. 2, p. 654, and the cases he cites. Formerly, if a witness, called to prove hand-writing, said he had seen the party write, and believed this to be his hand; this was considered as evidence by comparison of hands, and as inadmissible, at least in criminal cases; as appears from the Statute reversing the attainder of Algernon Sidney; and in the case of the seven Bishops. 4

328 State Trials, 338. But, such *evidence is clearly admissible now, as legal proof of hand-writing, and considered as distinct from evidence by comparison. This is laid down as settled Law, by Peake, Phillips, and Starkie, and the cases they refer to, to support them. There is also a strong case upon this subject, *Eagleton v. Kingston*, 8 Ves. 472. Nor do the cases stop here. In *Lord Ferrers v. Shirley*, Fitzg. 195. Lord Raymond, laid it down, that it was not necessary in all cases, that the witness should have seen the party write, to whose hand he

swears; for, if there has been a fixed correspondence by letters, and it can be made out that the party writing such letters, is the same man that attested the Deed, it will enable the witness to swear to that person's hand-writing, although he never saw him write.

The general rule seems to be, that the best evidence of hand-writing is the witness who actually saw the party write it; but, as this can seldom be had, in its absence, any person may be called to prove the hand, who has, by sufficient means, acquired such a knowledge of the general character of it, as will enable him to swear to his belief, that the writing in question is the hand of that person; and this knowledge may be acquired from having seen him write, though but once, or from a correspondence with the party on matters of business, or from any other transactions between them; as, from having paid Bills of Exchange, according to his written direction, for which he afterwards accounted. See the cases referred to by 2 Starkie, 651-2-3. This doctrine has been often acted upon also in New York.

In *Titford v. Knott*, 2 Johns. Cas. 211, the Plaintiff called his confidential Clerk to prove the endorsement of the note by the Defendant. The witness testified, that the Plaintiff and the Defendant (who resided in London,) had long been correspondents, and that these letters came to his hands; and though he had never seen the Defendant write, he believed the endorsement to be his hand from the knowledge he had acquired from the correspondence.

329 *The opinion of the Court was delivered by Kent, J., who said, that the evidence was undoubtedly admissible and competent; that it was usual for witnesses to prove hand-writing from previous knowledge of the hand, derived from having seen the person write, and from authentic papers received in the course of business. He added, "if the witness has no previous knowledge of the hand, he cannot then be permitted to decide it, in Court, from a comparison of hands." The same question was settled in the same way, in *Jackson v. Van Dusen*, 5 Johns. Rep. 144; *Johnson v. Davenport*, 19 Johns. Rep. 134; see also, *Peake's N. P. Cas.* 21; 1 Esp. Cas. 15, 351-2.

Now, what is the evidence of C. Watkins? That he has frequently seen Redford sign his name to receipts, and believed from comparison, that the body and signature of the Will was wholly written by him. If he had stopped here, there could have been no question about this evidence; for, the comparison spoken of, would have been taken as nothing more than that comparison which every witness must make in his mind, when he testifies in a case of this kind. But he adds, that he believes he should not have been able to prove the hand, except from comparison with the signature to the receipts aforesaid. Now, it must be observed, that this comparison was not made by placing the different papers together, and thus forming an opinion; nor was it made in Court, by a witness having no previous knowledge of the hand, and then for the first time deciding from

comparison. But, this was a witness who had often seen the party sign his name to receipts, and who having, as it would seem, those receipts in his possession or power, resorted to them, (I presume after he heard that he was to be examined as to the Will;) and having refreshed his memory by inspecting them, says, on his examination, that he believes the Will is in the hand-writing of Redford. From the cases cited, I believe that this would have been good evidence, if he had never seen the party write. Suppose he had had dealings with Redford, and had paid him
 330 *money, upon which Redford had (though not in his presence,) executed these receipts, and given them to him, he had looked at them, after receiving them, and then put them safely away. Afterwards, on being told that he would be called on to testify as to Redford's hand-writing, he had turned to these receipts, examined them carefully, put them away, and in Court had said, he believed the Will was written by Redford, and stated these facts as the grounds of his belief. The case would have stood upon the same ground with those, where a knowledge was derived from letters in a course of correspondence, or paying bills by his written directions, &c.

But, the case is stronger here; for, Watkins had often seen Redford write; and though he says he believes he could not have proved the hand-writing, without a recurrence to the receipts, he does not say that his present opinion is derived wholly from that source. He might have a recollection of the party's writing, from having seen him write, but so faint and indistinct, that he could not, from it alone, have proved the Will; and yet, this recollection might form a material ingredient in his present belief. I am decidedly of opinion, that he was an admissible witness.

In addition to this, there are strong and pregnant circumstances, concurring to support the witnesses. In a Deed, dated the 16th of November, 1803, Redford set free a negro boy named Will. In 1811, he made a Will, by which he gave some of his slaves to his wife for her life, and to be free at her death; the best of them to be free on his death. These papers, (proved to be genuine,) taken in connection with the Will of 1818, show a fixed determination, during all that time, to free his slaves. When his wife was living, he gave her some of them for her life; but she being dead, and he having no child, the slaves seem to have been the first objects of his bounty. There are in these papers some other striking peculiarities, strongly indicating that they are the work of the same

331 *hand. One is, his manner of spelling the word emancipate. It is used four times, once in the Deed, twice in the second Will, and once in the last; and each time, it is spelt im-mancy-pate. I have never seen it so spelled before; and I think it a strong circumstance. In addition to this, Redford told Forlines, the year before he died, (which was after the date of this last Will,) that he had made a Will in his wife's life-time, in which he had given her six or seven negroes; but that since

her death, he had made another Will. Nobody speaks of any other than this, except that in 1820; which, though certainly not proved, and too imperfect for any thing, I have a strong impression was written by Redford; and if so, still further shows, how strongly possessed he was of the idea of freeing his slaves. The circumstances on the other side deserves no weight in my mind; and I am clearly for affirming the Judgment.

JUDGE GREEN.

The paper offered for Probate, as the Will of George Redford, is alleged to be wholly written and signed by him. There is no subscribing witness to it, nor any proof that it was acknowledged by him as his Will, to any person whatever; or that any person ever saw it, until after George Redford's death. The proofs given to establish the fact, that the Will was wholly in the hand-writing of G. Redford, are the testimony of Henry Watkins and Claiborne Watkins; the first of whom testifies, that he is well acquainted with his hand-writing, and believes that the paper in question was wholly in his hand-writing, including the signature thereto: that he was familiar with his hand-writing from 1792, and for ten or fifteen years did much business with him, and was as familiar with his hand-writing as with his own; and after that, becoming old, he did much less business of the sort which required to write more

than his name; with his manner of
 332 doing which, he *continued familiar until the time of his death: that in Redford's general hand-writing, there was a manifest deterioration since he had been in the habit of doing business with him, as aforesaid; but, that he knew the signature to the Will to be his, as soon as he saw it: that the hand-writing of the body of the Will is so changed, since the witness did much business with him, as aforesaid, that had he seen it without the name and signature, he doubts whether he could have pointed out the Author, and thinks he could not have done so, without some circumstance, other than the writing itself, to point his attention to him: that, if he had been named, he would still perhaps have hesitated to say it was his hand-writing, until his memory was refreshed on the change produced by old age, by reference to other papers, which from time to time the Testator had written, and were in the possession of the witness; and in thus refreshing his memory, the witness says, that the writing, though worse, retains in a good degree its original character; and on close inspection, he now verily believes that the Will is wholly written by the Testator, and he thinks he should have said so without reference to any other paper, but not with that certainty and promptness, that he would have answered as to the signature; that, with respect to the signature to a memorandum at the foot of the Will, the christian name is unlike the Testator's writing; so that, seems that without the other, he should have said that he did not write it; but, the surname appears to be written by him, his manner of making the R. being very peculiar.

The other witness testifies, that he has

frequently seen the Testator write his name to receipts, and believes from comparison, that the paper in question, with the signature, is wholly in his hand-writing; but, believes he should not have been able to prove the hand-writing of the Testator, except from comparison with the signature to the receipts aforesaid.

333 *Upon this evidence, the Appellant insists, that the paper in question is not proved to be in the hand-writing of Redford; or if it is so proved, it is only proved by one witness, and that the proof of one witness is not sufficient to establish a Testament of personals.

The proof by the first witness is certainly full to the point. It is sufficient for the proof of hand-writing, that the witness states that he is acquainted with it, showing that he had due means of forming such an acquaintance, and that he believes from that acquaintance, that it is the hand-writing of the person; and this is the substance of the testimony of the witness. He concludes, that upon close inspection, he verily believes it to be the hand-writing, and thinks he should have said so, without reference to any other paper. That he had actually referred to other papers to refresh his memory, does not impair the validity of his testimony, and but slightly affects its weight. It can hardly be expected, that any cautious and conscientious man would speak promptly and confidently upon such a subject, which is at last only a matter of belief and opinion, without a close inspection of the writing, and refreshing his memory by all means in his power. It is like an acquaintance with the human countenance. We frequently know the face upon first sight, without knowing when or where we have before seen it; and having forgotten to whom it belongs, we are reminded, by circumstances brought to our recollection by some extraneous information, of the name of the person, and the time, place and circumstances of our former acquaintance, which enables us to speak with confidence as to the identity of the person; not upon this information, but upon our own recollection thus refreshed, although time may have made a considerable change in his features. One speaking confidently, under such circumstances, would be entitled to belief, in a degree little, if any, less than one who had a daily and intimate intercourse with the person in question.

334 *I think the proof of the other witness, incompetent. Although he had seen Redford write, he does not profess to be acquainted with his hand-writing, and declares that his belief is founded on comparison with other writings, which he knows to be genuine; but could not say, that such would be his belief, except from such comparison. His evidence is nothing more than would be that of any other, who compared the writings proved by this witness to be genuine, with the writing in question. I am not however, prepared to say, that in a question of Probate, such a comparison might not be made between writings admitted, or clearly proved (by witnesses above exception, and who had seen them written,) to be genuine, with the

writing in question. Such evidence has, it seems, been usually admitted in the Courts of Probate in England, and they have even called to their assistance in making the comparison, experienced Proctors. There seems to be a difference between submitting such papers for comparison, to the inspection of a Jury, (which cannot be done,) whose judgment on the fact cannot be revised, and to a Court of Probate, whose judgment in that particular may be revised. There is, however, no occasion to consider this question in this cause, since no such comparison was made in the Court below; the receipts, spoken of by the witness, not being produced.

This, then, presents the question, whether such a Testament can be established, upon the proof of one witness.

The Ecclesiastical Courts of England have jurisdiction of the Probate of Testaments of personals, and proceed, in the exercise of this jurisdiction, according to the Civil Law in respect to Testaments; with this difference, that abandoning the solemnities prescribed by the Civil Law in ordinary cases, they adopted the rules of the Civil Law as to Military Testaments, and applied those rules to all cases indiscriminately. By the Civil Law, soldiers in actual service might make testamentary dispositions, without any solemnity whatever, even without writing, and

335 might revoke *them in like manner. They might die intestate in part, and in part testate; they might appoint a temporary heir; they might pretermitt their own children, and might call any number of witnesses to their Will, many or few, so that there were a sufficient number to prove the fact of the Will, according to the general rule of the Civil Law, which required two witnesses to establish any fact. These privileges were allowed to no others. *Vultei* (or *Vultijus*) in *Institut.* 262, sec. 4.* This was the out line of the English Law; and hence the power to dispose of personal property by nuncupative Wills was unlimited, until restrained by the Statute of Frauds of the 29th Car. 2, except as to soldiers and seaman, who were unrestrained by that Statute. 1 Rob. on Wills, 161. Both before and after this Statute, any scrap of paper not signed by the Testator, whether written by himself or another, might be established as a written Will, if it could be proved to have been written or approved by the Testator, *animo testandi*; and even after the Statute of Wills of Hen. 8, the principles of the Ecclesiastical Law were applied to Wills of land, before the Statute of Frauds; the Common Law Courts only requiring, that it should be in writing, no matter by whom written, nor whether it was signed by the Testator, and attested by witnesses subscribing their names, or not. See the cases collected by Roberts on Wills, 15, 22, 149, 156. The total absence of all solemnity in making testamentary dispositions, which prevailed, was a strong reason for enforce-

*This Author is a German Commentator on the Institutes of Justinian. His Work, which is written in Latin, is very rare and ancient. The title is "*Hermann Vultij. J. C. in Institutiones juris civilis a Justiniano compositas, Commentarius.*" It was printed at Marburg, in Hesse, in 1606.

ing the Civil Law rule, that such Testaments could not be established, any more than any other fact, by less than two witnesses to the facts necessary to prove the Will. Otherwise, a single person might dispose of the estate of a decedent, by writing himself any paper, and testifying that it was written by the direction of the deceased, and approved by him as his Will. Accordingly, there is no rule better established in England, than that as a general rule, no Testament can be established upon the evidence of a less number of 336 witnesses than two. *Whether there is an exception in the case of an olograph Will, will be the subject of enquiry hereafter.

Bracton lays down the rule in express terms, B. 2, ch. 26, sec. 2, "*Fieri debet testamentum liberi hominis, coram duobus vel pluribus viris legalibus et honestis, clericis vel laicis, ad hoc specialiter convocatis.*" In repeated instances, attempts have been made to compel the Ecclesiastical Courts to admit Wills to Probate, upon the proof of one witness, by prohibition; which has been uniformly denied by the Courts of Common Law, upon the ground, that this being a matter of Ecclesiastical Jurisdiction, it belongs exclusively to them; and according to their Law, a Will cannot be proved by less than two witnesses. Many cases to this effect are collected in all the Abridgements, under the title Prohibition, which it is unnecessary to examine particularly, since all the Elementary Writers agree that this is the general rule.

Upon the settlement of Virginia, all the Laws of England, Common, Statutory, Chancery, Maritime, of Merchants, and Ecclesiastical, so far as they were suited to the circumstances of the society, were introduced with the Colonists. The jurisdiction for the administration of all these Laws, was vested originally in the General Court, consisting of the Governor and Council, and has been gradually distributed, as convenience required, amongst the various Courts established from time to time; but, the transfer of jurisdiction left the principles upon which it was administered, unchanged, and unimpaired. I cannot doubt that the Courts of Virginia, having the Probate of Testaments of persons, were always, and are now, bound to proceed according to the Ecclesiastical Law upon that subject, that being as much a part of the Common Law in its enlarged sense, as it has been adopted here, as the Law Merchant or Chancery Law. The security against fraud, intended by the requisition of two witnesses, was as necessary here as in England. This doctrine, and upon these principles, has been affirmed in Pennsylvania, in the case of *Lewis v. Maris*, 1 Dall. 278.

337 *The case of *Glasscock v. Smither & Hunt*, 1 Call. 479, is supposed, and at first view seems, to be contrary. But a careful examination of the report, and the original record, and the manuscript note of Judge Pendleton, the President of the Court, will show that this question was not considered or intended to be decided. The paper presented as the last Will, was

not written or signed by the Testator; but, a single word was interlined with his own hand. At the same time, a Will previously made and duly executed, was also presented; and the Court below held, that the last paper was not such a "subsequent Will, Codicil, or Declaration in writing," however proved, as would, under the Act of Assembly, be sufficient to revoke a former Will duly executed. At least, this was considered as the ground of the Judgment by the Court of Appeals, as appears from Mr. Pendleton's note; and is indicated by the Judgment of the Court, which was pronounced, not on evidence given to the Court of Appeals, (as it must have been, if the validity of the second Will had been in question,) but on the record only. In the first case, the Will must have been finally established or rejected; but, the case was sent back, that the paper might be recorded as a Will, unless it was contested on some other ground. Other than what? Than that it was not a sufficient Will, Codicil, or Declaration in writing, however proved, to revoke the former Will.

The question remains, whether there is in this respect, any distinction between a Will wholly written by the Testator and others. There seems to have been a distinction by the Civil Law, in the case of Military Testaments, between written and unwritten Testaments. "*De militis voluntate, constare potest etiam sine testibus, ex scriptura ipsius; quod si in nulla appareat scriptura nuncupata ejus voluntas, duobus minimum testibus probanda est, non quo modo et qua forma testamentum factum sit, sed testamentum factum esse.*" Vultei, (or Vultajus) 263, sec. 1. The

338 difference seems to me to have consisted *in this; that if the Will was nuncupative, it was necessarily to be proved by at least two witnesses called upon to witness that such was his Will; in the words of Bracton, "*ad hoc specialiter convocatis;*" but if written, then, whether written by the Testator, or only signed by him, the mere fact of his writing or signing it, proved by any witnesses, (by proving his hand-writing or otherwise, whether they knew it to be, or were called upon to witness it as his Will, or not,) was sufficient to establish it as a Will; but that two were indispensably necessary to that end, as in all other cases to establish any fact whatever. The declaration of Swinburne, p. 300, that if a Will be wholly written, or only subscribed by the Testator, it will be good without any witnesses at all, can only mean that no subscribing witnesses, nor any called specially to witness that such a Will had been made, were necessary; but that in that case, proof that the Testator had written or subscribed the paper purporting to be a Will, by any person who neither saw him write or sign it, nor heard him declare that it was his Will, or that he had made or signed any Will, would be sufficient proof that it was his Will. It surely did not mean, that no proof of the writing or subscribing, was necessary; for, without such proof, the Court could not know that it was written or subscribed by him. In giving the proof of the fact of writing or subscribing, two witnesses were

necessary to establish the fact, as any other fact in the Ecclesiastical Court. "Unius responsio testis omnino non audiatur." Cod. 4, 20, 9.

It is said, however, by Roberts, p. 199, that where the Will has been wholly written by the Testator, and there are corroborating circumstances, the clear testimony of one witness has prevailed in the Ecclesiastical Court. He cites no authority for this; and if it is so held, this is probably a relaxation of the Civil Law rule, as it is relaxed in the Court of Chancery, allowing the Defendant's Answer to be overruled by one witness and strong corroborating circumstances. Roberts also states, that

339 it is said that one subscribing *witness is sufficient, but, for this he refers to no authority. In *Twaite v. Smith*, 1 P. Wms. 10, a Will, proved by one subscribing witness, failed simply on the ground, that there was but one such; the other two being incompetent.

It is however, I think, unnecessary in this case to enquire, how far the original rule requiring two witnesses in all cases, (which, considering the total want of solemnity in the execution of Testaments, ought not; in general, to be departed from,) has been relaxed in England, when the Will is wholly written by the Testator, or signed by him in the presence of one subscribing witness, or how far, in the latter case, the rule should be relaxed here; since I think our legislation has a decisive effect upon the question, as to an olograph Will. Such a Will of lands may be established under our Statute, by the proof of one uncontradicted and unimpeached witness; and this is such a legislative declaration that such proof is sufficient for any Will, as, I think, binds the Court conclusively. The maxim, *omne majus continet in se minus*, might be well applied.

But it was argued, that as in the case of *Eagleton v. Kingston*, 8 Ves. 438, so in this, the custody of the paper, and the declarations of the Testator, were sufficient to show, that although written by him, it was either improperly procured from his imbecility, or was not made *animo testandi*. It seems to me, that the fact is directly the reverse; and that the circumstances show clearly, that it was written as and for his last Will; and in pursuance of a long settled determination in respect to the disposition of his property. The facts relied upon by the Appellant, are, first, that upon an examination of the Testator's papers, by various persons examining different parcels at the same time, the paper in question was not found; that they were thrown loose into a box, which was carried to a neighbour's by one of the slaves emancipated by the Will and the paper afterwards found upon the top of the

340 papers in the *box; there being a crack in it, through which the paper could have been introduced, although it was locked. From this it is inferred, that the paper was in the possession of the slave who carried the box. If the paper was in the box, with the other papers belonging to the Testator, it was in the proper custody; and I think it very probable, that

the examination was very hasty and careless, from the manner in which it was made. But if it were really in the possession of the slave, that was no improper custody, but where (if that slave was one in whom the Testator had confidence,) it might well be expected to be found. The testator was a very old and infirm man, without any family, or any one living with him but his slaves. The object of emancipating them, was steadily in his mind for several years; and he might well suppose, that his Will in the hands of one of them, would be safer than with his other papers, which, after his death, might fall into the hands of some one interested, to suppress the Will, which had no provision in it, but to emancipate his slaves. If this were the case, the fact that the slave having the custody of the Will, slipped it into the box, may well be accounted for by the embarrassment, which one ignorant and friendless, and of that class, might feel, as to the proper course to be pursued on such an occasion.

Another circumstance relied on, is, that another paper, dated two years after the paper in question, purporting to be signed and written by the Testator, was produced by another of his negroes, who said he had found it near the gate; and which H. Watkins, the witness who proved the Will of December, 1818, to be in the Testator's hand-writing, declared he did not believe to be in the Testator's hand-writing. This paper, in which the words are very badly spelled, and some of them not written with all the letters belonging to them, and in broken sentences, purports to be a Will written in three successive paragraphs, each signed G. Redford, and the first and last dated on the same day. It is hardly intelligible, but may be decyphered.

341 *It gives to Betsey Forlines a mare; and her colt, if she had one, to Jane; a gig and a gig-mare to Lucy Davis; all the cows, to Joseph and Benjamin Davis, except one to Mrs. Jordan; and L. Davis to keep all the cows she already has. It recites, that he is very weak and sick, and sets all his negroes free in each of the paragraphs, and leaves \$5 to be equally divided at his death, between Mary and Daniel; and requests Joseph and Lucy Davis to see them righted and set free. This paper is dated only a few days before the Testator's death. His Will was offered for Probate on the 21st of December; and it was some days after his death, that the Will was found. I have myself, little doubt, that this paper was also written by the Testator, and given to one of the negroes, when he was, as it states, very sick and weak, and at broken intervals. The spelling is very bad in the papers proved unquestionably to have been written by him. He was very old and infirm when he wrote the Will in question in 1818; and his hand-writing had then materially changed, though retaining enough of its original character to be identified by those who had before known it. Two years after, upon the eve of dissolution, the character of his writing might well be supposed to have so changed, that none could affirm that they believed it to be his. If this was

a forgery, it affords no presumption that the former was so; for, the person who could have imitated his hand-writing in 1818, and write intelligibly in his name, could surely have imitated it as well, and written as intelligibly in 1820, as before. He would never have fabricated such a production as that of 1820, when that of 1818, having the same effect was in existence.

Another circumstance relied on, is, that the Testator had frequently declared his hostility to free negroes, and that he would not emancipate any of his, and wished that there were no free negroes in the State. This may be well accounted for. In 1803, he had executed a paper in the form

of a Deed of Emancipation of one of his negroes, which he had kept by him until his death, and which appears to have been intended to operate as a Will; for he desires, that "the said Will be by the Court set free; and that E. Maxcy and H. Maxcy as to the carrying the same into effect;" and noted at the foot, "the above is done at the request of them that is no more." In May, 1811, he made a Will, afterwards cancelled, by which he gave to his wife a part of his slaves for her life, and then to be free, and if they could not be permitted to stay in the State, he requested his brother to carry them to the county of Shelby, in Kentucky; to enable him to do which, they were to serve him five years. All the rest were to be immediately free; and if they could not stay in the State, to serve his brother five year, except Will, the one mentioned in the Deed of 1803, (then only 12 year old,) who was to serve four years; and each to have \$5 out of his estate, and his small cart and horse to enable them to remove; his brother living in Shelby county, Kentucky. He gave his land to his wife for life, and the balance of his property absolutely, but made no further disposition of his land, and begs his Executors, Eliash Maxcy and Josiah Forlines, to use their best endeavours to fulfil his desire, by "trying the Assembly to git them suffered to stay in this Commonwealth, as many of them have husbands and wives to leave behind him, and they are industrious and honest any other slaves." This was in the Testator's own hand-writing, and without a witness.

One of the Testator's negro women had a free negro for a husband, who is proved to have been a bad and troublesome man; and in consequence of this connection, he sold her in January, 1812. This accounts for his expressions of hostility to free negroes, made subsequently. On the other hand, it is proved, that he was very tender to his slaves, and seemed to feel much for them when distressed; and that the year before he died, he told a witness that he had made a Will in his wife's life-time, in which he had given her six or seven negroes; but that since his wife's death, he had made another Will.

343 "It is impossible to examine the documents and evidence in this cause, without a perfect conviction, that the writing in question is written by the Testator himself, as and for his last Will,

and in pursuance of a long settled determination to that effect. The word emancipate, is uniformly spelled in the same way, in the confessedly genuine writings of the Testator 1803, and 1811, and in that in question, "immanycypate;" and the general character of the composition and phraseology of all these papers are the same, the peculiarity of omitting many of the smaller words is alike in all. But above all, there is a perfect identity of objects in all. In his first Will, of 1811, his wife and negroes were the sole objects of his bounty. He left the reversion of his lands after his wife's death, undisposed of. In his last, his wife being dead, his whole care was for the emancipation of his negroes; and he left all the rest of his property undisposed of. He knew there was some obstacle to emancipated slaves remaining in Virginia; and in the Deed, he appoints persons to solicit the Court to set Will free; and in the two Wills, he provides, that if the General Assembly will not permit his slaves to stay here, they shall be carried to another State, at the expense of his estate, in part by the first Will, and in whole by the last.

The last objection is, that the Will is imperfect; the Testator not having done all he intended to do, as he concludes the writing, "Witness my hand and seal," and failed to affix his seal. This, I think, entitled to no weight; and upon the whole I am clear and confident in the opinion, that the Judgment should be affirmed.

JUDGE COALTER.

This is a case of considerable consequence on the subject of the Probate of Wills, and ought to be examined with caution and deliberation.

344 "If I could be satisfied that Claiborne

Watkins's testimony was competent, it would relieve me from the consideration of other questions, as to which I have some difficulty. This Will is offered as one altogether in the hand-writing of the Testator. It has never been published in the presence of any witness. It is not enough to prove that the signature is in the hand-writing of the Testator; the proof must go to the hand-writing of the whole Will.

A Testament of chattels, written in the Testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his hand-writing. 2 Black. Com. 502. What is sufficient proof of this? According to the Canon Law, which is recognized as obligatory on the Common Law Courts, the proof of hand-writing, as well as any other fact, before a Court of Probate, must be by two witnesses. *Lea v. Libb*, 3 Salk. 396; *Twaites v. Smith*, 1 P. Wms. 10; *Shotton v. Friend*, 2 Salk. 547. This is the Law of England, and was our Law also, obligatory on our Court of Probate, and now obligatory on them, unless it has been altered, as to Wills in the hand-writing of the Testator, by some Statute.

If there are two witnesses in this case to the hand-writing, we are relieved from the enquiry, whether there has been any alteration in this respect, by our Statute.

Henry W. Watkins is undoubtedly one

competent witness as to the hand-writing, not only of the signature, but of the whole body of the Will. Is C. Watkins a witness as to either? He says, that he has frequently seen the Testator write his name to receipts, and believes, from comparison, that the paper in controversy with the signature, is wholly in the hand-writing of the Testator; believes he should not have been able to prove the hand-writing of the Testator, except from comparison with the signature to the receipts aforesaid. This is the whole of his evidence as to the hand-writing.

345 *If his evidence is competent, then,

whether it is entitled to much or little weight, is not the question now under consideration. There would be two competent witnesses as to the hand-writing, and then the only remaining question would be, as to the sufficiency of the whole evidence to establish the Will. He does not profess to have seen the Testator ever write any thing, except his signature, which he had frequently seen him write; yet, he testifies to the whole body of the Will signature and all. Had he confined his testimony to the signature alone, which, in a case of a Will of chattles, would not be a necessary part of the Will, and had said nothing about the hand-writing of the body of the Will, it could not perhaps be said that there were two witnesses to the hand-writing of the body of the Will. A witness, who has only seen a party write his name, may not be able to form an opinion as to the hand-writing of the body of the paper, which, in this case, it is necessary to prove; proof merely of the signature not being enough. But here, the witness undertakes to speak of the hand-writing of the body of the Will, as well as of that of the name subscribed; and although his opinion might not be entitled to very great weight it is still legal and competent evidence, if there is no other valid objection to it. A witness may have very full knowledge of the hand-writing, or he may have seen him write only a few words, and only once. The weight of the evidence is one thing; its competency is another. 1 Phill. Evid. 422. But he says, from comparison, he believes it to be his hand-writing; believes he could not have proved the hand-writing, except from comparison with the signatures to the receipts. What kind of comparison he made, does not appear. It does not appear that the receipts were in Court; so that he made the comparison when he gave his evidence. If such was the fact, and if that would alter the case, it ought to have appeared in the Bill of Exceptions. There can be no doubt, I presume, that if a witness knows he is about to be examined

346 as to hand-writing, and *has frequently seen the party write, and has in his possession papers that he saw him write, and looks at them so as to refresh his memory as to the character and manner of writing, and then deposes, that this would not destroy his testimony. A witness is called on to identify a man he had before known; but, before he sees him, he looks at a picture which he recognizes to be a likeness; which recalls the features and expression of countenance, and notwithstanding

alterations by age, &c. he testifies to his identity. He might have been able to identify him, without having looked at the picture; yet, he may think, that was a material aid to him in doing so. He knew him, however, formerly; and on the whole, thinks he is the man. This would be a very different thing from the evidence of one, who never knew him, but who identifies him by a mere comparison with the picture. Why shall a man, because he has seen another write, be better able to judge of hand-writing, than he who is a good judge of writing, and who has on the trial, compared fair specimens of his writing with the paper in question? I suppose it is because he acquires a better knowledge of the character of the hand, by seeing him write, and has a knowledge of it previous to the dispute; and is not governed by a mere juxta-position, and comparison between paper, of which he had no previous knowledge. A witness may believe, that he cannot prove the hand-writing, having no recollection of it, until it is produced to him; and then, he knows it. A witness, having authentic writings in his possession, which he has not seen for many years, may believe that he cannot prove the hand-writing, until he sees those papers, and he may then recollect it. Had the witness said, that on seeing the receipts, though he knew them to have been signed by the Testator, he still had no recollection of the hand-writing, then he could have given no other evidence in the case, than any other judge of writing could have given; except to prove that the receipts produced had been signed by the

Testator, so as to show that they 347 were fair *specimens of his signature, to compare by. If such was in reality, his testimony, it ought to have been so stated. He has certainly more knowledge on the subject than one who saw him write; and therefore, I cannot say he is incompetent, merely because he had looked at writings known to be writings of the Testator, unless he had gone on to say, that having done so, he still had no recollection of his hand, and spoke entirely from comparing the one writing with the other; in which case both ought to have been before him at the time he testified; as must have been the case, had the comparison been made by one who never saw him write. It does not appear, nor can it be presumed in this case, that he had had the Will at his house, and compared the writings, or that he had compared them together in the Clerk's office where it seems this paper had been lodged for some time before the trial.

On the whole, it seems to me, though not without some doubt that however small the weight due to this evidence, it was competent, and that consequently there were two witnesses to the hand-writing.

This relieves me from the necessity of deciding positively, the very important question, whether, because our Act of Assembly, 1 Rev. Code, 375, has made a Will, if written altogether by the Testator, a good Will of lands, that the intention was to alter the Law as to the number of witnesses necessary to establish such Will.

As at present advised, however, I cannot think it was the intention of the Legislature to lessen the guards theretofore existing as to the proof of Wills. It requires two subscribing witnesses as to Wills of lands, where not so written by the Testator; leaving the Law as to personals as it stood before, to wit, that the witnesses need not subscribe, and that the testator need not sign such Will. In other respects, they were left equal, the Law requiring no greater number of witnesses as to Wills of real estates, than those of personals. If Wills of lands were proved here as in

England, merely before the Courts of 348 Common Law, some "argument might be made, that the Common Law mode of proof was intended. But, the same tribunals are to take jurisdiction of Probates of Wills of lands as of personals; and if it was intended to place Wills of lands on a different footing from those of personals, where written by the Testator, or to alter the Law as to the kind of proof in the latter case, it seems to me it would not have been left to mere implication. The man who forges the Will, may prove it.

From the view I have taken of this case, it is perhaps not necessary for me to do more than to suggest my present impressions as to this point.

In addition to the two witnesses in this case, there are strong corroborative circumstances in favor of this Will, which I need not recapitulate. One has had a good deal of bearing on my mind. The Testator, in all the Wills and instruments which have been produced, has shown an intention to do his own writing. He has never called on any one else to write for him. This shows, that he was apprised that a Will in his own hand-writing was good without witnesses.

The sentence of the Superior Court must be affirmed.

JUDGE CABELL.

It is essential to the proof of hand-writing, that the witness shall be acquainted with the hand-writing which he is called on to establish. The mere fact of having seen a person write, if it did not impart an acquaintance with the hand-writing, is of no importance whatever. I am, therefore, of opinion, that Claiborne Watkins was an incompetent witness.

Upon the other points in the cause, I concur in opinion with Judge Green; and he has gone so fully into them, as to leave me nothing new to add.

I am of opinion, to affirm the Judgment.

HANDWRITING.

I. Proof of Handwriting.

1. Mode of Proof Generally.

a. By Comparison.

- (1) Comparison by Experts.
- (2) Comparison by Nonexperts.
- (3) Comparison by the Jury.
- (4) Comparison by the Court.

b. Proof of in Actions under Statute.

c. Burden of Proof.

d. Sufficient to Submit Case to Jury.

Cross References to Monographic Notes.

Forgery and Counterfeiting, appended to Coleman v. Com., 25 Gratt. 865.

Wills, appended to Hughes v. Hughes, 3 Munf. 200.

I. PROOF OF HANDWRITING.

1. MODE OF PROOF GENERALLY.

Must Have Knowledge of Writing.—To render a person a competent witness to testify to the hand-writing of another, it is not sufficient to show the receipt of friendly letters purporting to come from such person alone, but some admission or acquiescence equivalent to an acknowledgment that such person was the writer of the letters must be shown independent of their receipt and contents. *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. Rep. 871.

Evidence Must Be Direct.—And it is not proper for a witness to state, in a prosecution for forgery, that "he is perfectly familiar with the hand-writing of the accused," stating the circumstances which make him so, and "expresses the confident opinion from his knowledge of accused's hand-writing that he was incapable of writing the order" in question. *Burress v. Com.*, 27 Gratt. 948.

Having Seen Party Write.—A witness who had seen party write, is a competent witness to prove his hand-writing, though some years had passed since he saw him write, and he could not be positive in his statements. *Chahoon v. Com.*, 20 Gratt. 732.

And so, a witness is competent to prove hand-writing who saw the party write only once, and who states that he would not be able from his knowledge to distinguish it from that of others; but that his opinion was, from a comparison, that the hand-writing was the same. *Pepper v. Barnett*, 23 Gratt. 405. See *Hanriot v. Sherwood*, 82 Va. 14; *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. Rep. 871; *Chahoon v. Com.*, 20 Gratt. 732.

Having Never Seen Party Write.—It is competent to prove by a witness who has never seen testator write, but who has acquired a knowledge of his hand-writing from examination of his papers, that the will is in the hand-writing of testator. *Sharp v. Sharp*, 2 Leigh 254.

And a witness is competent to testify who has never seen the alleged author of the paper in dispute write, and whose impressions are drawn from recollections of orders seen by him casually in the way of business thirteen years before. The weight of such testimony is for the consideration of the jury. *Cody v. Conly*, 27 Gratt. 323. See *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. Rep. 871.

Witness Who Had Seen Paper in Question.—Also, a witness who has seen the paper in question, but who has it not before him at the time, is competent to prove the hand-writing, and this too, without distinct proof that the paper he saw and the paper in question are the same. *Nuckols v. Jones*, 8 Gratt. 273.

Maker and Attesting Witness Being Dead.—Where the writing in dispute was attested by a witness who made his mark and since died, it was proper, under the circumstances, to establish the due execution of the paper to prove the hand-writing of the deceased party executing it. *Gilliam v. Perkinson*, 4 Rand. 325. See *Raines v. Phillips*, 1 Leigh 423; *Hanriot v. Sherwood*, 82 Va. 1; *Steptoe v. Flood*, 31 Gratt. 322.

Handwriting of Propounder of Will.—And it is held, where the genuineness of a holograph will is in question, contestant may prove by witnesses ac-

quainted with the handwriting of propounder, but not with testator's, that the will is in the handwriting of such propounder. *Brown v. Hall*, 85 Va. 156, 7 S. E. Rep. 182.

Refreshing Memory by Other Writings.—The evidence of a witness as to handwriting, who has formed an acquaintance with it from seeing the party write, or from a course of correspondence, is not rendered incompetent, nor its weight impaired by his having referred for the purpose of refreshing his memory, to papers in his own possession, known to be written by the party. *Redford v. Peggy*, 6 Rand. 816.

Who May Prove Instrument a Forgery.—On a prosecution for forgery, proof that the instrument is a forgery may be had upon the evidence of others than the party whose signature is forged, and without accounting for his absence. *Foulkes v. Com.*, 2 Rob. 841.

a. By Comparison.

(1) **Comparison by Experts.**—Under the rules of evidence in this state expert testimony is admissible to test the genuineness of disputed writings by comparison of writings admitted or proved to be genuine with writings alleged to be forged. *Hanriot v. Sherwood*, 82 Va. 1; *Tower v. Whip* (W. Va.), 44 S. E. Rep. 179.

And in an action on promissory note, when defendant denies the execution of it, an expert on handwriting may compare the signature to the note with the defendant's signature with pleas signed and sworn to and filed by him, and expressed his opinion whether the same person made the signature to notes and pleas. *Tower v. Whip* (W. Va.), 44 S. E. Rep. 179. See *Hanriot v. Sherwood*, 82 Va. 1.

(2) **Comparison by Nonexperts.**—The evidence of a witness who has frequently seen a testator write his name to receipts, and who has resorted to those receipts before he gives his evidence, to refresh his memory, as to the handwriting, but who testified he believes the body of the will and signature to be the handwriting of the testator, though he forms that belief from comparison and that he would not be able to prove the handwriting, except from comparing it with the signature to the said receipts, was competent evidence to prove the handwriting. *Redford v. Peggy*, 6 Rand. 816.

And a witness who has seen the party write but once, and who admits his knowledge of the handwriting is very imperfect may compare the disputed writing with that he had seen written, and give an opinion thereon. *Pepper v. Barnett*, 22 Gratt. 406.

(3) **Comparison by the Jury.**—On the trial of issue on a plea of *non est factum* whether the party's signature to the instrument in question be genuine or not, it is inadmissible to lay other proved specimens of the party's handwriting before the jury, that it may judge by comparison whether the writing in question be genuine. Such comparison of handwriting is not proper evidence. *Rowt v. Kile*, 1 Leigh 216. See *Clay v. Robinson*, 7 W. Va. 362; *Clay v. Alderson*, 10 W. Va. 51. Compare *Hanriot v. Sherwood*, 82 Va. 1.

But, upon a trial for uttering a forged receipt, witnesses may testify as to the handwriting in the alleged forged receipt; and being acquainted with the signature of the person's name purporting to be signed thereto, may before the jury, make the letters of such person's name as they think he makes them, and the jury may compare such letters so made, with the letters in the alleged signature. *State v. Henderson*, 29 W. Va. 147, 1 S. E. Rep. 235.

Upon such trial the jury will not be permitted to receive the proved, and not admitted signature of the person, when none had been alleged to have

been forged, so as to permit them to compare the two signatures. Much less would it be proper to permit evidence to go to the jury by a witness that he had compared the alleged forged signature with one admitted to be genuine, and they were exactly alike. *State v. Henderson*, 29 W. Va. 147, 1 S. E. Rep. 235.

Nor, upon the trial of an indictment for forgery, when it becomes necessary to prove the genuine signature of the party whose name is alleged to have been forged, is it admissible to give in evidence to the jury the genuine signature of such party, although written in the presence of the jury, that they may judge by comparing the same in whole or in part with any part of the alleged forged signature, whether the party who made the forged signature tried to imitate any part of the genuine signature of the party whose name is alleged to have been forged. *State v. Koontz*, 81 W. Va. 127, 5 S. E. Rep. 828.

(4) **Comparison by the Court.**—*Quare*, is it competent for a probate court to compare the handwriting of the papers in question with that of papers produced in court, admitted to be genuine, or proved to be so? And is not the rule in a probate court different from that in trials before a jury? *Redford v. Peggy*, 6 Rand. 816.

b. Proof of In Actions under Statute.—In a suit against the assignor of a bond the handwriting of the assignor prior to his own need not be proved upon the trial of the case. *McWilliams v. Smith*, 1 Call 123.

For, the statute, dispensing with proof of handwriting in certain cases only applies where the declaration alleges that the defendant, or the person stated to have made the writing, subscribed his name thereto. *Kelly v. Paul*, 3 Gratt. 191. See *Shepherd v. Frys*, 3 Gratt. 442; *Clason v. Parrish*, 93 Va. 24, 24 S. E. Rep. 471.

And, in an action of debt at common law, on a negotiable note, the plea of *nil debit* put in issue the execution of the note, and all transfers thereof, but, by statute, when the execution and endorsement of the note are averred in the declaration, no proof thereof is required, unless an affidavit be filed with the pleadings putting it in issue, denying that such endorsement, etc., or other writing was made by the person charged therewith or by anyone thereto authorized by him. *Clason v. Parrish*, 93 Va. 24, 24 S. E. Rep. 471. See *Phaup v. Stratton*, 9 Gratt. 619; *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. Rep. 703; *Robinson v. Dix*, 18 W. Va. 528; *James River, etc., v. Littlejohn*, 18 Gratt. 53; *Code of Va.*, § 3379; *Code of W. Va.*, ch. 125, § 40.

So, also, where a defendant in chancery, in his answer, alleges that plaintiff's decedent delivered his three receipts to respondent for money paid him on account of the matter in controversy, and files with his answer, as a part thereof, what purports to be the original receipts, such receipts will be regarded as genuine, without any proof of the handwriting, unless the fact that such receipts were made by plaintiff's decedent is denied by affidavit. *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. Rep. 703; *Clason v. Parrish*, 93 Va. 24, 24 S. E. Rep. 471; *Phaup v. Stratton*, 9 Gratt. 619; *Robinson v. Dix*, 18 W. Va. 528; *James River, etc., v. Littlejohn*, 18 Gratt. 53; *Code of Va.*, § 3379; *Code of W. Va.*, ch. 125, § 40.

c. Burden of Proof.—Where bill or other pleadings sets up a writing and alleges that it was made and signed by defendant's intestate in his lifetime, and defendant denies, by answer under oath, the allegations, and demands proof, such answer puts the genuineness of the writing in issue, and throws the burden of proof on the allegor. *Harnsberger v.*

Cochran, 88 Va. 727, 1 S. E. Rep. 120. See Swecker v. Swecker, 87 Va. 306, 12 S. E. Rep. 1056.

d. Sufficient to Submit Case to Jury.—And, on the plea of *non est factum*, proof of the handwriting of the subscribing witnesses, and that they are dead, is sufficient to submit the case to the jury. Bogle v. Sullivan, 1 Call 561.

349 *Thomas M. Cowling, v. The Justices of Nansemond County.

May, 1828.

Judgments—Finality—Appeal.—*—Though a Judgment of a Superior Court of Law, reversing a Judgment of a County Court, and directing other pleadings in the cause, be interlocutory in its character, yet the finality of the Judgment in the County Court imparts its character to the Judgment of the Superior Court, so as to authorize an appeal to the Court of Appeals.

Executors—Official Bond—Material Defects.—The official bond of an Executor, in the penalty of which the names of the obligees are not inserted, and in the condition of which the name of the Executor, and of the Court to which he was to return the account of his transactions are blank, is materially defective, and no Judgment can be rendered on it at Law.

An imperfect bond, purporting to be an executor's bond, was executed by the Appellant and other obligors, in Nansemond County Court on the 10th October, 1803. The following is a copy of the instrument so executed: "Know all men by these presents, that we, William Coffield, Thomas M. Cowling, and Willis Coffield, are held and firmly bound unto Gentlemen, Justices of the Court of County, now sitting, in the sum of four thousand dollars, payment whereof well and truly to be made to the said Justices, and their successors, we bind ourselves, and each of us, our and each of our heirs, Executors, and Administrators, jointly and severally firmly by these presents. Sealed with our seals this 10th day of October, Anno. Dom. one thousand eight hundred, and three, & in the year of the Commonwealth.

"The Condition of this obligation is, that if the said William Coffield executor of the last Will and Testament Willis Coffield deceased, do make a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of the said cr into the hands, or possession of any other person or persons for and the same so made do
350 exhibit *into the Court, at such time as shall be thereto required by the said Court, and the same goods, chattels and credits do well and truly administer according to Law, and do make a just and true account of acting and doings therein when thereunto required by the said Court, and further do well and truly pay and deliver all the legacies contained, and specified in the said Will, as far as the said goods, chattels, and credits will extend according to the value thereof, and as

the Law shall charge; then this obligation to be void, else to remain in full force.

William Coffield, (L. S.)

Thomas M. Cowling, (L. S.)

Willis Coffield, (L. S.)

"Sealed and delivered in the presence of,"

Debt was brought on this bond in the name of Jeremiah Godwin, surviving obligee of Robert M. Riddick, William Summer, and Fisher Daabiel, Justices of the Peace of the Court of Nansemond County aforesaid, at the relation of Samuel Carrol, Administrator de bonis non, with the Will annexed of Willis Coffield deceased, against the above mentioned obligor, Cowling, to recover the sum of \$1,169, found due from the said executor to the estate of his Testator, by the Commissioners appointed to settle his accounts.

The Declaration recited the bond as being made to the "said obligees;" that is, the persons before named as Justices of Nansemond County, and recited the condition as importing an obligation on the part of the Executor to make a just, and true account of his actings and doings, when required by the said Court of Nansemond County. It further averred, however, "that although the obligation aforesaid does not show the names of the obligees, or persons to whom the same was executed, yet the obligees aforesaid are those to whom, and in whose favor the said obligation was made and executed, as by the records and proceedings remaining in the
351 Clerk's Office of the said *County of Nansemond, (besides other evidence) will manifestly appear."

The Defendant Cowling, cravedoyer of the writing obligatory, and also of the condition thereof, and demurred to the Declaration, for the following causes: 1st. Because there are no obligees actually named in the penalty of the said writing obligatory; 2dly. Because in the condition, the name of the Executor, as well as the name of the Court into which he would have been bound to exhibit an account of his Executorial transactions, are omitted to be inserted; 3dly. Because the condition omits to designate and point out who shall render an account of his actings and doings as Executor as aforesaid when thereunto required. 4thly. Because there is a variance between the Bond and Declaration. There was a joinder in demurrer, and the County Court gave Judgment for the Defendant.

The Plaintiff obtained a Supersedeas, and the Superior Court of Law reversed the Judgment of the County Court, and ordered all the proceedings subsequent to the Writ of Enquiry to be set aside, and proceeding to give such Judgment as the County Court ought to have given, overruled the demurrer, directed that the Defendant below should answer over, and remanded the cause to the County Court for further proceedings to be had therein, and gave Judgment for the Plaintiffs costs in the Superior Court.

To that Judgment, the Defendant obtained a Supersedeas from a Judge of this Court.

*See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425; monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turpike Co., 1 Rob. 263.

The principal case is cited in Janey v. Blake, 8 Leigh 91; Morgan v. Ohio River R. R. Co., 39 W. Va. 23, 19 S. E. Rep. 590.

Chapman Johnson, for the Plaintiff in Error, was stopped by the Court.

Scott, for the Defendant in Error.

May 3. The PRESIDENT delivered his opinion, in which the other Judges concurred.*

352 *Upon the preliminary question, whether the Supersedeas was properly awarded to the Judgment of the Superior Court, I think there can be no doubt; for, though that Judgment, reversing the Judgment of the County Court, and directing other pleadings in the cause, was interlocutory in its character, (though final there,) the Judgment of the County Court, being final as regards the jurisdiction of this Court, it imparted that character to the Judgment of the Superior Court, and an appeal will lay from it to this Court.

On the merits, I think there is as little doubt. A Relator in a suit on an official bond, ought to set out in the pleadings, his interest in, and claim to, relief upon it; which he has totally omitted in this case. On the demurrer to the Declaration, by over taken of the bond and condition, they became a part of it, and might be demurred to for any defect apparent on their face; and that is the ground of the special demurrer in this case. The two first points relate to defects in the bond and condition; as first, because there are no obligees named in the bond. Secondly, because in the condition, the name of the Executor, and of the Court into which he was to return the account of his transactions, are blank. In fact, the bond is only a copy of the blank bond to be found in the Act, except that the names of the obligors are inserted in the penal part of it. It is materially defective. Parties ought to be held to a reasonable strictness, or great injustice may be done. There can be no bond without an obligee; and it ought to be made to the sitting Justices at the time it is executed.

On all these grounds, not noticing some minor objections, I think that the Judgment of the Superior Court ought to be reversed, and that of the County Court affirmed.

353 *Hatcher v. Cabell.

May, 1828.

Assigned Bond—Debt on—Evidence—Payment to Assignor.—In debt on an assigned bond, the assignee being Plaintiff, if the Defendant pleads that he has paid the debt to the Plaintiff, (without pleading payment to the assignor before notice of the assignment,) it is not allowable to give in evidence any set-off against, or payment to, the assignor.

Debt by George Cabell, assignee of Benjamin Perkins, in the Superior Court of Law for Bedford county, against Archibald Hatcher, Edward Hatcher, and Hardaway Hatcher, on a bond, in the penalty of \$5,527 62, conditioned to pay, on or before the 7th of March, 1819, the sum of \$2,763 81, dated in April, 1818, executed by the said Hatchers to Perkins, and by him assigned to the Plaintiff. The Defendants pleaded, "that they have paid the debt, in the Declaration mentioned, to the Plaintiff." General replication, and issue. At the

trial, the Defendants excepted to an opinion of the Court. The Bill of Exceptions sets forth, that on the trial of the cause, the Defendants' Counsel offered as a set-off to the Plaintiff's demand, two notes; the first of which is a negotiable note, dated Lynchburg, 17th January, 1819, executed by Benjamin Perkins to James W. Dibrell, promising to pay him, or order, ninety days after date, that the Farmers' Bank at Lynchburg, \$1,795 57, endorsed by the said James W. Dibrell, John Moore, and Archibald Hatcher. This note was regularly protested at maturity, and the instrument of protest was also offered in evidence. The second note was in the following words: "For, and in consideration of the sum of \$613 22, this day borrowed of James W. Dibrell, I hereby transfer and assign to him a bond, executed to me by A. and E. Hatcher, dated about 7th March, 1818, and payable twelve months after date, for \$2,763 and cents, after deducting \$2,000 for Dr. George Cabell, who now holds the said bond: when the said Dibrell collects the money, he is to pay himself the above \$613 22, with interest, and the balance I am entitled to: This 30th March, 1819.

Benj. Perkins."

354 *With an endorsement, as follows: "I assign the within to A. Hatcher, for value received.

James W. Dibrell."

The Court refused to suffer the notes to go in evidence to the Jury, because it was proved by the Plaintiff, that in December, 1818, or January, 1819, the Defendant, A. Hatcher, had notice that the bond in the Declaration mentioned, had been assigned to the Plaintiff, and that in January or February, 1819, the Defendant, A. Hatcher acknowledged he had no set-off against the same, and there being no evidence offered to show that the whole bond was not assigned to the Plaintiff, other than the second mentioned paper alone.

Verdict and Judgment for the Plaintiff, from which the Defendants appealed.

Wickham, for the Appellants.

Johnson, for the Appellee.

May 5. The PRESIDENT delivered the opinion of the Court.†

The Judgment in this case, ought to be affirmed on the general objection, that the matter on which the questions in the Bill of Exceptions were raised, was not pertinent to the issue made up on the plea of payment to the Plaintiff only.

355 *Elizabeth M. Davis, v. James G. Rowe, and Others.

May, 1828.

Statute of Descents—Effect on Common Law.—The Act of Descents of 1785, (since re-enacted at the Revisions of 1792 and 1819,) entirely repealed and abrogated the Common Law course of descents, and all the principles thereof.

Same—Construction—Per Capita—Per Stirpes—Case at Bar.—If an intestate dies, (without children, or

†Absent. JUDGE COALTER. JUDGE CABELL, being related to one of the parties, did not sit in this case.

§Statute of Descents—Effect on Common Law.—The act of 1785 entirely repealed and abrogated the common-law course of descents, and all the principles thereof; its enactments stand in diametrical opposition to all the rules and canons of the common law; and it is a complete and perfect whole, containing within itself a provision for every case that

*JUDGE COALTER, absent.

†See monographic note on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 400.

their descendants, without a father, without a mother, brother, or sister, but having had a brother and a sister, both of whom died before him;) leaving a niece the only child of the brother, and two nephews, and two nieces, the children of the sister, the real estate of the intestate will descend, and the personal estate be distributed to all of these nieces and nephews per capita, and not per stirpes, they being all in the same degree of consanguinity to the intestate.

Same-Same-Same-Same-Same.—In such case, the estate will not be divided into moieties, to be given, one moiety to the child of the brother, according to the Common Law doctrine of *jus representationis*, and the other moiety to the four nephews and nieces, as representing their mother, but it will be divided into five equal parts, one to each of the nephews and nieces, each one taking *jure proprio*.

Same-Same-Same-Same-Same.—If in such case, the two nieces (children of the deceased sister,) be dead before the intestate, leaving the two nephews, and the niece, (the child of the brother) and one of those deceased nieces has left two children, and the other six children, the estate will still be divided into five parts: of which, one part will be allotted to the niece, (the daughter of the brother,) another part to each of the nephews, one other part to the two children of the deceased niece, as representing their mother, and the other fifth part to the six children as representing their mother; and this, on the principle contained in the 16th section, that if a part of those in the same degree be dead, and a part living, the issue of those dead shall take per stirpes, that is, the share of their deceased parent.

Same-Same-Same-Same-Same.—Although the 16th section of the Act does not provide in terms, for the case of a brother and sister dying before the intestate, and leaving an unequal number of children, and does not in words declare what portion of the inheritance shall descend to those children, yet the spirit of that section taken in connection with the 1st and 4th sections, justify the construction, that they will take per capita.

Same-Same-Same-Same-Same.—It is a just inference from this decision, that if a grand father die intestate, having had two children, A. and B., both of whom died before their father, but A. leaves one child, and B. six children, the estate of the grand-father will descend to all the grand children equally, and the child of A. will only get a seventh part, although if A. had been alive, and the other brother dead A. would have got a moiety, and the other moiety would have been divided between the six children of B., and so of all other cases of like kind.

Elizabeth M. Davis exhibited her Bill to the Chancellor for the Richmond District, setting forth that her uncle

356 *Anthony Gardner, died in the year 1819, intestate, and without issue, seized and possessed of real and personal estate: that his nephew James G. Rowe, administered on the estate. The intestate had had one brother, and one sister, but both of them died before him. The Complainant was the only child and heir of the brother. The sister left four children, two sons, James G. Rowe and Francis Rowe, both of whom are living, and two daughters, both of whom are dead, but each left children; one of the daughters, Mrs. Boyd, left two children, William B. Boyd, and Lucy Anne Boyd, who are still living; and the other daughter, Mrs. Shackleford, left six children, namely, Anthony G., Eliza R., Judith D., Mary Anne, Catharine T., and Martha Ellen Shackleford, who are still living. Such being the collateral kindred, and heirs of the intestate, the

Complainant made them all parties to her Bills and sought a partition of the real estate, and distribution of the personal estate according to Law. The Complainant claimed, that the estate should be divided into moieties; that she, as representing her father, the deceased brother of the intestate, was entitled to one moiety. And that the other moiety should be divided into four parts, whereof James G. Rowe was entitled to one, Francis Rowe to one, and the two children of Mrs. Boyd to another, and the six children of Mrs. Shackleford to the other.

The defendants admitted that the Bill made a true statement of the collateral kindred and heirs of the intestate, but denied that, according to Law, the partition, and distribution could be made as sought for by the Bill.

The question depended on the construction of the Act of Descents, and particularly of the 1st, 4th and 16th sections of the Act. (1 Rev. Co. of 1792, ch. 93, p. 168: See also, 1 Rev. Co. of 1819, ch. 96.)

The Chancellor decreed that the estate, both real and personal, should be divided into five equal parts, and that one of those equal parts should be allotted to the 357 Plaintiff, Mrs. Davis, *another to the Defendant, James G. Rowe, another to the Defendant, Francis Rowe, another to the Defendants, William B. Boyd, and Lucy Anne Boyd, to be equally divided between them, and the other to the Defendants, the six children, by name, of Mrs. Shackleford, to be equally divided between them.

From this Decree, Mrs. Davis appealed to this Court. The following table of the collateral kindred of Dr. Anthony Gardner, will illustrate the relationship of the parties, to each other, and to the intestate.

—See the Plate next page.

359 *Leigh, for the Appellant.

Stanard, and Merit M. Robinson, for the Appellees.

May 10. The Judges delivered their opinions.

JUDGE CARR.

This is a case arising on our Law of Descents, and involving a most important principle of construction. Anthony Gardner had a brother who had one daughter, (Mrs. Davis,) and a sister who had two sons, James and Francis Rowe, and two daughters, Mrs. Boyd and Mrs. Shackleford. The sister and brother of Anthony Gardner died before him, leaving these children. Mrs. Boyd and Mrs. Shackleford, also died in his life-time; the first leaving two children, the last six; and then Anthony Gardner died intestate and without issue, leaving estate real and personal. The question is, how shall this estate be divided between these eleven relations? For the Plaintiff, (Mrs. Davis,) it is contended, that our Statute has no provision by which we can adjust the proportions of the claimants, that we must therefore call in the aid of the Common Law, and by the *jus representationis*, placing Mrs. D. in the shoes of her father, give her half the estate, and divide the other moiety among the rest. For the Defendants it is contended, that the Common Law has been utterly abolished

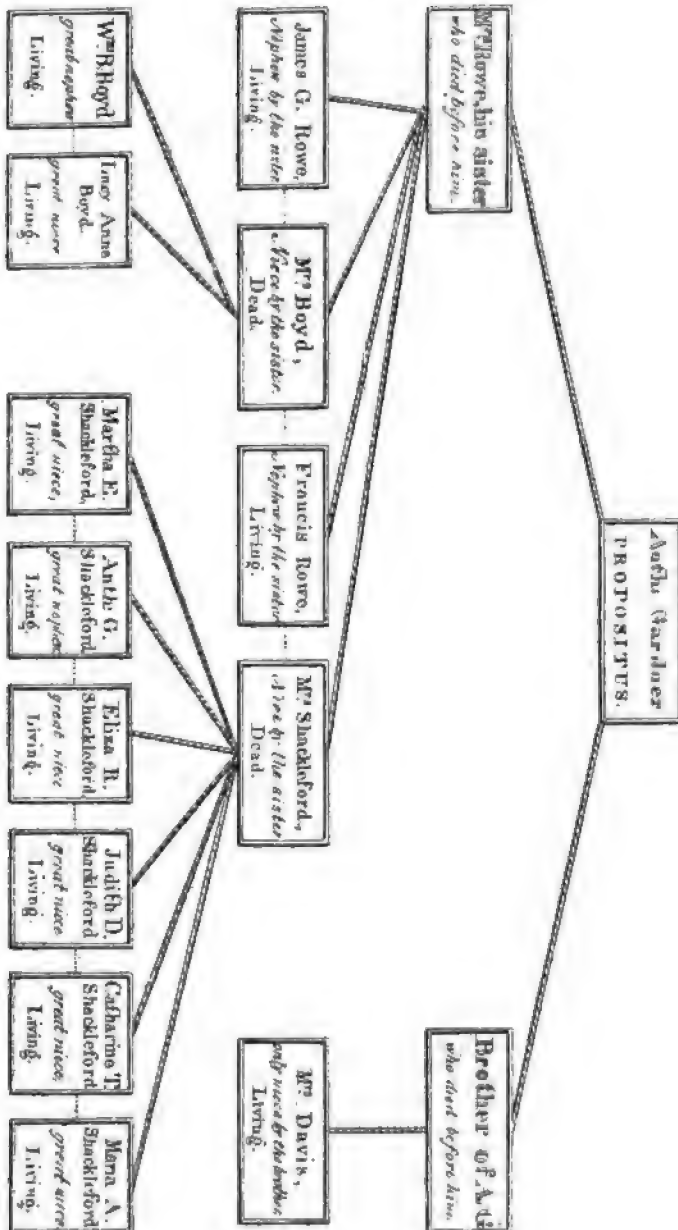
can arise. *Garland v. Harrison*, 8 Leigh 371. 397, citing the principal case to sustain the statement. To the same effect, the principal case was cited in *Bennett v. Toler*, 15 Gratt. 625; *Greenhow v. James*, 80 Va. 646; *Medley v. Medley*, 81 Va. 271. The principal case is also cited in *Ball v. Ball*, 27 Gratt. 327; *Moore v. Conner*, 2 Va. Dec. 66.

See further, monographic note on "Descent and Distribution" appended to *Liggon v. Fuqua*, 6 Munf. 381.

by the Statute, and can in no question of descents be invoked; that the Statute embraces this case, and under it the inheritance should be divided into five portions, one of which should be given to each of the nephews, one to the niece, and the other two to be divided between the descendants of Mrs. Boyd and Mrs. Shackelford. The Chancellor decreed to this effect, from which the appeal is taken. Perhaps a few preliminary remarks may enable us the better to understand the force, effect and extent of our Statute.

360 *From the date of our existence as a Colony, to the Revolution, the Common Law, regulating the descent of real

estates, was the Law of the land. Of this Law the first Canon, as noticed by Blackstone, is, that inheritances shall lineally descend to the issue of the person who last died actually seized, in infinitum, but shall never lineally ascend: 2dly. That the male issue shall be admitted before the female: 3dly. That where there are two or more males in equal degree, the eldest only, shall inherit but the females all together: 4th. That the lineal descendants, in infinitum of any person deceased, shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living: 5th. That on failure of the lineal descendants or is-



sue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser: 6th. This collateral heir must be the next collateral kinsman of the whole blood. Every body knows that these Canons of descent are the creatures of the Feudal System, and, however calculated to support a Government like that of England, are in violation of natural affection, and repugnant to the free spirit of a republic. While the descent of real estate was thus carefully moulded by the Common Law, according to the spirit of the Feudal System, it took no thought of the personality; but left it to the control of a different system; for, where no Will appeared, the Ordinary had the absolute disposal of the personal estate; being not bound (further than in conscience,) to pay the debts of the intestate. The Statute of Westminster 2, ch. 19, 13th Edw. 1st, subjected the Ordinary to the suit of creditors, as Executors were. By 31st Edw. 3d, they were bound to grant Administration to the nearest and most lawful friends of the deceased: and this is the origin of Administrators, who were placed, by this Statute, on the footing of Executors. Still the Ecclesiastical Courts exercised jurisdiction
361 over the subject. They granted Administration, they called the Administrators to account, and undertook to distribute the surplus of the personal estate, among the kindred of the intestate, according to the rules of the Civil Law, *de successoribus, ab intestato*. And this was deemed so reasonable, that it was tolerated for a long time, and the Ordinaries, in the bonds taken of the Administrators to account with them, usually inserted a clause, that the overplus upon such account, should be distributed as the Ordinary should appoint.

This matter was at length brought before the Law Courts, and they decided that the bonds of the Administrator were of no avail and he not compellable to make distribution at all. And as often afterwards as the Ecclesiastical Courts attempted to compel a distribution, a prohibition was granted. In this state of things, the Statute of 22d and 23d Car. 2, commonly called the Statute of Distributions, was passed, at the instance of the Civilians. It is laid down in many cases, that the reason of passing this Law, was to end the contention between the Common Law and Ecclesiastical Courts: that its main scope was to enlarge the jurisdiction of the latter; that it was borrowed from the Civil Law, and to be construed according to the rules of that Code. The provisions of this Law stand in striking contrast with the Canons of Descent of the Common Law. Primogeniture, the preference of males over females, the blood of the first purchaser, the rule that property never ascends, the exclusion of the half blood; all these fundamental rules of the Common Law are violated by the Statute of Distributions. Its great object was equality. In *Edwards v. Freeman*, 2 P. Wms. 441, Sir J. Jekyl, M. R., says, "The Act intended to make the children's provision equal, which was agreeable to the Civil Law, where goods movable,

and immovable, (i. e. lands,) are considered as the same." In the same case, Lord Raymond says, "The Statute of Distributions does not break into any settlement that has been made by the father; it only meddles with what is left undisposed
362 of by him, *and of that only, makes such a Will for the intestate, as a father, free from the partiality of affections, would himself make; and this I may call a Parliamentary Will. The intention of making the provisions of the children equal, goes through the whole Act." This Statute was incorporated into our Colonial Code in 1705, (3 H. St. L. 371;) continued in the Revision of 1748, (5 H. St. L. 444;) and remained in full force until the Laws of the Revision of 1785, went into effect. At the epoch of our Revolution, then, we had these two systems in operation. The Common Law Canons of Descent, founded on the Feudal System, disregarding natural affection and natural justice, and the Statute of Distributions, borrowed from the Civil Law, pursuing the presumed Will of the intestate, and well suited by its equality of partition, to the genius of our infant Government. Among the first cares of this Commonwealth, after the close of the war, was the framing of a body of Laws better suited to our actual situation, than those which had governed us, as part of a Monarchy. For this important work, were selected several citizens, considered most profoundly learned in the science of Law. Our Statute of Descents is a part of the fruits of their labors. It has hitherto been admired as a model of conscientiousness and perspicuity; and so well has it answered its end, that this (I think) is the first serious contest, which has arisen in a period of forty years, on a provision of the Law, which came from the hands of the Revisors. (The case of *Brown v. Turberville*, hereafter to be noticed, arose on an addition made by a subsequent Legislature.) Let us now look to the provisions of this Law. Section 1st. When any person, having title to any real estate of inheritance, shall die intestate, as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course. 2d. To his children, or their descendants, if there be. If none, then, 3d. To his father. 4th. To his mother, brothers and sisters, and the descendants, or such of them as there
363 be. If none of these, then, 5th. *The inheritance to be divided into two moieties; one of which shall go to the paternal, the other to the maternal kindred, in the following course. 6th. To the grandfather. If none, 7th. To the grand-mother, uncles and aunts, on the same side, and their descendants, or such of them as there be. 8th. If none, then to the great grand-fathers, or great grand-father, if there be but one. 9th. If none, then to the great grand-mothers, or great grand-mother, if but one; and the brothers and sisters of the grand-fathers and grand-mothers, and their descendants, or such of them as there be. And so on, in other cases without end. Section 16. "And where the children of the intestate, or his mother, brothers and sisters, or his grand-mother, uncles and

aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree come into partition, they shall take per capita; that is to say, by persons; and where, a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes, or by stocks; that is to say, the share of their deceased parent."

Let us enquire, 1st. Whether this Act did not intend to abolish, and has not in fact abolished, the whole of the Common Law regulating Descents? 2d. Whether our Act has not for its basis the Statute of Distributions and the Civil Law? As to the first: It seems to me, that no one can read our Statute, without being struck at once, with the direct and diametrical opposition, in which all its enactments stand to the Canons of the Common Law. The very first rule, "that estates shall descend and pass in parcenary to the kindred, male and female, of the intestate," destroys, at a single blow, there favorite and cherished principles of the Common Law; primogeniture, sole seisin, and the preference of males. In defect of children, and their descendants, we give the estate to the father. By the Common Law, it would sooner escheat, than ascend lineally.

We pay no respect to the blood of 364 the first "purchaser, (except in the case of infants, and that by a Law after 1785.) At Common Law, land would escheat sooner than descend to any however near of kin, if not of the blood of the first purchaser. We give collaterals of the half blood, half portions. The Common Law excludes them wholly. With us, bastards may inherit and transmit inheritance, on the part of the mother. At Common Law, they are utterly incapable of inheritance. We say, that where there is no kindred, paternal or maternal, the inheritance shall go to the wife or husband of the intestate. At Common Law, husband or wife can never inherit from each other. Do not these instances prove, that the framers of our Law, looked at the Common Law Canons of Descent to avoid, not to imitate? To pull down, not to build up? All its principles are violated: its land marks removed; its fences broken down; its traces obliterated. While these marks of reprobation would seem (even if our Act were confessedly defective,) to forbid our resorting to this exploded system to supply the defect, such resort is entirely unnecessary; for, I insist that our Act is a complete and perfect whole, containing within itself a provision for every case that can arise. As to the persons or classes of persons that are to inherit, it is acknowledged, that the Act is so clear and comprehensive, as to render improper a reference to any other system. And to my apprehension, it seems to be equally comprehensive as to the proportions, in which the persons or classes designated, are to take. As to this last, this Act lays down two rules; within one or other of which, every case must fall. They are contained in the first and sixteenth sections. 1st. The estate shall descend to the kindred, male and female of the intestate, in par-

cenary; that is, in equal shares. The clear effect of this is, that wherever a class is called to the inheritance together, they take equally, male and female. Thus, "to his children, or their descendants, in equal shares. To his mother, brothers and sisters, and their descendants, in equal 365 shares. To his "grand-mother, uncles and aunts, and their descendants, in equal shares;" and so on, in the grades more remote. Thus is one great principle of the Act (equality) established. But, there is another feature equally striking throughout this excellent Statute. It is founded on the affections of the heart: It follows the current in its natural flow, presuming that those that are nearest in blood, are nearest in affection. Thus, it is first to his children, or their descendants, next to his father, then to his mother, brothers and sisters, &c., always exhausting the nearer class before it passes to the more remote. But, in the same class, there are degrees of propinquity and remoteness; as the descendants of children, of brothers and sisters, of uncles and aunts, &c., are more remote than their roots. And while the Statute did not mean to exclude any of these remotes branches of a class called to the inheritance, the same principles of natural affection prescribed, that those of the class, who were nearest the intestate, should have the largest portions; and to effectuate this object, to settle these proportions among the different branches of the same class, (and solely for this end, as it seems to me,) the Statute has called to its aid the *jus representationis*, a rule common to the Civil and Common Law, though of different extent in the two Codes. Thus, (by section 16,) "When children of the intestate come into partition, they shall take per capita; that is to say, by persons; and where a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes, or by stocks; that is to say, the share of their deceased parent." So of mothers, brothers and sisters, grand-mother, uncles and aunts, and the remoter classes, each in its turn. This is the second rule of which I spoke, and I understand it thus broadly: "That wherever several persons succeed to the inheritance at the same time, if they are all related to the intestate in equal degree, they shall take by persons; but, if part of them be more remote, those shall take the share of their deceased parent."

366 If "it be objected, that the words of the 16th section do not justify the deduction of a rule so general as this, but one restricted to the cases there mentioned, I answer, that the cases put are those *quæ frequentius accidunt*, that nothing is more common, than for Statutes to put such cases as examples of a general rule; it being impossible for the Law to enumerate every case, and that here we must give such extension to the rule, or violate the whole scheme and reason of the Statute. But take it, that the rule of the sixteenth section extends to those cases only which are there put, it by no means follows, that the Act is defective, and a resort to another system proper. No! The first rule com-

prehends and governs every case not within the second. If you say, that the jus representationis can only have place in the cases specially stated in the sixteenth section, then under the first, every person of a class that takes, must take per capita. It is a question between the different sections of the Act merely, and however decided the Law, taken as a whole, is equally complete and comprehensive, and equally abrogates the Common Law. And such was the decision in *Brown v. Turberville*, 2 Call, 390, which in my opinion is a strong case on the subject. It was suggested, that the question in that case was merely who should take, not in what proportions, and that every thing beyond this point was extra-judicial; but, that was clearly a mistake: the question was a much larger one. If the case was within the provisions of the Act of Descents, there could be no question who should take: the estate must have been divided into two moieties, and one would go the Plaintiffs, as representing the maternal line, the other to the Defendants, as nearest kindred of the paternal line. But the question was, whether the case was to be decided by the Statute, or the principles of the Common Law. The Legislature having omitted some words in the seventh section, which, if they could not be supplied, would operate, as was contended, a repeal of the Statute of 1785, as to the case at bar, and 367 the case being thus without the Statute, must be decided by the Common Law. The effect of the Statute of 1785, upon the Common Law, was thus brought directly before the Court. Judge Fleming says, "The Legislature conceiving that the Rule of Descents by the Common Law, was not well adapted to the genius of the people, and the form of our Government, totally changed it by the Act of 1785, which appears to have provided for every possible case." Judges Carrington and Lyons, though they do not express themselves so explicitly, seem to have had the same idea. But Mr. Pendleton, (who, it must be recollected, was one of the three who drew the Act of Descents,) could not be more clear and explicit than he is. He says, "To enquire from what source the force of the Common Law of England in this State, is derived, would at present be a useless speculation, since all agree that it is the general Law of the land, where it is not taken away by our Statutes. That the Act of 1785, has totally done away that Common Law, as to the course of Descents, has not been nor can be doubted. The rights of primogeniture are wholly abolished; and wherever there are more persons than one, of equal degree of kindred to the intestate, they share equally in the succession. The succession in the right line ascending, excluded by the Common Law, is here permitted. The objection to the half blood is removed, and the enquiry, through what blood the lands have descended to the intestate, is abolished. The intestate, is in all cases considered as the unrestrained proprietor; and his supposed preference, from natural affection, pursued under this Act, it must be acknowledged, that no possible case, not provided for, can

arise, so as to let in the rule of the Common Law." Surely it cannot be said that this was an obiter opinion, that the mind of this enlightened Judge, was not turned to the subject, when he has stated with such admirable brevity and clearness, all the great principles of the Common Law, which the Statute has abolished. If (as is now 368 contended) the Statute of Descents *meant merely to point out the persons or classes who should succeed to the inheritance, and to designate in some enumerated cases, the proportions in which they should take, leaving all others, (and thousands may happen,) to be settled by the principles of the Common Law, is it not passing strange, that this Judge (so familiar with the subject,) should have solemnly pronounced "that the Act of 1785, has totally done away the Common Law as to the course of Descents," and that "under this Act, no possible case, not provided for, can happen, so as to let in the rule of the Common Law?" I cannot believe he could so grossly have mistaken the meaning and the effect of a Law, all the principles of which he had a hand in settling. Again: In *Templeman v. Steptoe*, 1 Munf. 339, Judge Tucker lays it down, "as too plain to require proof, that by the Act of 1785, all former Rules and Canons of Inheritance and succession to estates within this Commonwealth, whether established by Common Law, or by Statute, were rescinded, abrogated and annulled, and that they cannot be revived in any manner but by some express legislative provision for that purpose." In the same case, Judge Roane says, "The first section of the Act of Descents purports to provide a rule of inheritance as to all cases, and which idea is entirely supported by the opinion of this Court in *Browne v. Turberville*." I conclude, then, that by the Act of 1785, the Common Law of Descents is wholly abolished, and can no more be resorted to at this day to influence the decision of causes, than if it had never existed.

Let us enquire now into the origin of our Statute, whether it is not substantially taken from the Statute of Distributions and the Civil Law? I think this enquiry will strengthen considerably the position taken, that the sixteenth section meant to establish it as a general rule, that equals in degree of kindred take equally, but where part of the class is dead leaving issue, such issue take per stirpes. The most important provisions of our Statute of Distributions, (as taken from the Revision of 369 1748,) are, that after *debts, &c. are paid, the surplus of the personal estate (except slaves) of every person dying intestate, shall be distributed among the wife and children, or children's children, if any such, or otherwise, to the next of kin to the dead person in equal degree, or representing their stocks, according to their respective legal rights, and the rules and limitations herein-after expressed, and not otherwise: that is to say, one-third to the wife of the intestate, the residue to and among his children in equal proportions, and if any of them be dead, to such person or persons as legally represent them. If no children, nor their legal representa-

tives, one half to the wife, the other to the next of kin who are in equal degree, and those who legally represent them; if no such kindred, the whole to the wife: no representation admitted among collaterals, after brothers' and sisters' children. There is also a provision taken from 1 Jac. 2, ch. 17, that if, after the death of the father, any child shall die intestate without wife or children, the brothers and sisters shall have his estate equally with the mother. This Statute, I have said, was taken from the Civil Law, and must be construed according to its rules. All the numerous cases upon the Statute lay this down. Thus, when the Statute says, that in defect of children the estate shall pass to the next of kin, we must look to the Civil Law to ascertain who they are. In *Lloyd v. Tench*, 2 Ves. sen. 213, Sir John Strange says, "some things are so clear they need only to be mentioned: as first, in all questions on the Statute of Distribution, the rule to go by, in computing the degrees of proximity of blood, must be taken from the Civil Law; and on this ground and foundation, stand all the cases which have come in Judgment since the Statute of Distribution, either at Law or in this Court." Who then, are the next of kin, when the descending line is exhausted? The father and mother. In England, the father of course, takes in exclusion of the mother, but if there were no father, the mother would have taken in exclusion of her

children, but for the Stat. 1st Jac. 2, 370 under which, if the "father be dead, the mother, brothers and sisters, take per capita; and if any of the brothers or sisters be dead, leaving issue, such issue will take per stirpes, but here representation ceases: all beyond, come to the inheritance according to proximity of blood, reckoned by the rule of the Civil Law, the nearer excluding the more remote, and where several of the same grade concur, all taking per capita. Nor is the half blood any objection, for they are in the same degree of kindred as the whole. No one can examine this course of succession, without being struck with the strong and clear resemblance which our Law of Descents bears to it: and whoever will look into the Civil Law, especially to the 118th Novel of Justinian, (Corp. Jur. Civ. vol. 1st, 606, Cramer's Ed.) will be convinced that that is the fountain from which both these streams have flowed. But, though there is this strong general resemblance, there are several points in which our Statute has varied from its models. The most important of these is the *jus representationis*. This, we know, was at the Common Law, universal, whether in the descending or collateral line. In the Civil Law it held as to descendants in infinitum; as to ascendants, not at all; as to collaterals, it extended to the children of brothers and sisters of the intestate, no further. The Statute of Distribution has, certainly, copied the Civil Law with respect to representation among collaterals, stopping it at the children of brothers and sisters. Whether it has followed that Code as to the ascending line, is not so clear. Professor Cooper thinks not, as may be seen in his

Notes on the 118th Novel, (Coop. Just'n. 394.) He puts this case: A. dies leaving grand-children by three different sons, already dead; three by one, six by another, and twelve by another. There is no reported adjudication in the English Books on this point, which I have been able to find; and Mr. Cooper states that he has seen none, but thinks it probable, that the Courts there, would in such a case, order the division to be made among the grand-children per capita; and this, partly from a motive

of equity, and partly from a consideration of the intent of the Statute, which directs an equal and just distribution: and, when the Act mentions representation, it must be understood to refer to it, in those cases only, where it is necessary to prevent exclusion; not where all the claimants are in equal degree, and therefore can take each in his own right. I confess, there seems to me, a good deal of forcing this reasoning; but, as it is not necessary to the decision of this case, I have formed no opinion upon it. Our Statute, setting out with the broad declaration, that the state shall descend to the kindred, male and female, of the intestate in parcerary; and calling that kindred to the succession by classes, has resorted to the right of representation, for the sole and exclusive purpose of adjusting the proportions in which the nearer and more remote branches of each class shall share the inheritance; and so far as it is necessary for this purpose, the Statute has applied the principle without limit, as well to the collateral as the descending line. Another difference between our Statute and its prototype is, that when it takes up a class, it exhausts it, before it calls another; thus, it is not mother, brothers, and sisters, only; but, mother, brothers, and sisters, and their descendants, or such of them as there be, and so of the other grades; and this is by the extension of the *jus representationis*, which, embracing the whole class, brings the most remote members of it into the succession with the rest. Another difference is as to the half-blood; the Common Law excludes it wholly, the Statute of Distributions not at all; the Civil Law, if there be brothers and sisters of the whole blood or their children, excludes brothers and sisters of the half-blood, but if there be none of the whole, then the half-blood are called. Our Statute calls collaterals of the half-blood along with those of the whole, but gives them half portions only. These differences prove to me this, and nothing more: that the framers of our Law did not act as mere copyists; but, availed themselves of the lights which their profound learning, great experience, and sound judgment

372 furnished, to improve upon the systems from which they were borrowing, and adapt them more exactly to the state and condition of their country. Most ably did they perform this duty; and I trust that the Statute, as a monument of their skill, may be suffered to descend, undefaced, to late posterity; et nati natorum et qui nascentur ab illis.

There are other reasons which satisfy me, that the Statute of Descents meant to conform in the main points to the Act

of Distributions. In the printed report of Prepared Bills, made by the Committee of Revisors to the General Assembly, at page 16, we find the "Bill directing the course of Descents," (marked in that report, chapter 20;) and on the same page commences the "Bill concerning Wills; the distribution of Intestates estates, &c," (marked in that report, chapter 21.) This last Law enacts, that after debts, &c., and the portion of the widow, the surplus of the personal estate of intestates, "shall be distributed in the same proportions, and to the same persons, as lands are directed to descend, in and by an Act of the General Assembly, entitled, "An Act directing the course of Descents." And these two Acts are passed together by the Legislature, at their October Session of 1785, making chapters 60, 61. 12 H. St. L. 138-40. This is a positive Declaration, that Descents and Distribution should be identical; that land and personality should pass to the same persons, and in the same proportions: Was it intended by this to change the course of Distribution, so just in itself, so exactly suited, by its spirit of equality, to our situation? Was it meant to place personal property under the guidance of the Common Law, with its feudal principles of preference and exclusion? A thing never done even in England, the personality there, being always regulated by the Civil Law, as administered in the Ecclesiastical Courts. It is impossible to believe this, and yet it must be so, unless we admit that the Statute of Descents meant to abolish all the principles of the Common Law in relation to this subject.

373 "Another piece of evidence has lately come to my knowledge, which, as tending to show the understanding of the Revisors, has strengthened and confirmed the opinion I had already formed; and which I think it not improper to state. Having some faint recollection, that in a conversation with Mr. Jefferson formerly, he had mentioned that he drew the Law of Descents, I thought there might be something among his papers casting light on its origin. I therefore wrote to a gentleman, who has access to his papers, requesting him to send me an extract of any thing he might find on that subject. I received from him the following passage taken from a memoir of himself, written by Mr. Jefferson, and which, I understand, will probably be published during the present year. I may, therefore, I presume, appeal to it as matter of history. It will be recollected, that of the committee of five appointed to make the Revision, Mr. Jefferson, Mr. Wythe, and Mr. Pendleton, were the only members who acted, though the whole plan was settled before the death of Mr. Lee, or the resignation of Mr. Mason. The memoir says, "The other two gentlemen and myself divided the work among us. The Common Law and the Statutes to 4th James 1st, (when our separate Legislature was established,) was assigned to me; the British Statutes from that period to the present day, to Mr. Wythe, and the Virginia Laws to Mr. Pendleton. As the Law of Descents, and the Criminal Law, fell of course within my portion, I wished

the committee to settle the leading principles of these as a guide for me in framing them; and with respect to the first, I proposed to abolish the Law of Primogeniture, and to make real estate descendible in part to the next of kin, as personal property is by the Statute of Distribution. Mr. Pendleton wished to preserve the right of primogeniture; but, seeing at once that that could not prevail he proposed we should adopt the Hebrew principle, and give a double portion to the eldest son. I observed, that if the eldest son could eat twice as much, or do double
374 "work, it might be a natural evidence of his right to a double portion; but, being on a par in his powers and wants, with his brothers and sisters, he should be on a par also in the partition of the patrimony; and such was the decision of the other members." I leave this extract to speak for itself. I will only further remark on this point, that I have no doubt that our Act was taken (with the changes stated) from the Statute of Distribution and the Civil Law.

How, then, would such a case as ours be decided under these systems? We must remember there are eleven claimants descended from a brother and sister of the intestate in the manner before stated. This is a case of collateral kindred called to the inheritance. We must recollect, that in the collateral line, representation extends only to the brothers' and sisters' children of the deceased, under the Statute of Distributions and the Civil Law, while with us it is unlimited. To test the principle, then, we must look for cases within the range of representation with them; that is, cases where brothers and sisters of the intestate concur, or where a part of them being dead, their children concur with the survivors; or where all the brothers and sisters being dead, leaving children in unequal numbers, those children concur. There can need no case to show, that where brothers and sisters concur alone, they take equally. *Walsh v. Walsh*, Pre. Che. 54. A. has three brothers; one dies, leaving three children, another two, and a third five; then A. dies intestate. Per Lord Keeper. On time taken to consider of this case, distribution shall be per capita and not per stirpes; and that all the children should have equal, because none take by way of representation, but all in equal degree, as next of kin. *Johnson v. Bury*, Bunb. Rep. 157. B. had several brothers and sisters, (some of the half, and some of the whole blood,) who all died in his life-time, leaving several children; and now, upon a Bill for distribution of his estate, it was decreed per totam curiam, that the distribution should be per capita, and not per stirpes; for, now
375 "they do not take by representation, but as next of kin. But, if one of the brothers or sisters of B. had survived him, the children of the rest must have taken only by representation; that is to say, per stirpes, and the case of *Wall and Theedham*, was cited by the Court. W. died intestate: He had two sisters, *Susanna*, of the half blood, *Elizabeth*, of the whole: Both died before him, one leaving

one child, the other three. The estate was divided into four equal parts, and they took per capita. The case of *Clarkson v. Sparteman*, was also cited, in which the Judges Delegates decided, "That distribution should be per capita, and not per stirpes, all the old stock being gone; for, they claim as next of kin, and not by representation; aliter, if any of the old stock had survived." *Lloyd v. Trench*, 2 Ves. sen. 215, Sir John Strange says, "If there is one brother living, and another has left children, however many, they take but a moiety with the brother: but if that brother had been dead, all in the same line of equality take per capita." *Bowers v. Littlewood*, 1 P. Wms. 595, Lord Chancellor said, "It may seem hard, that if an intestate leave a deceased brother's only son, and ten children of a deceased half-sister, the ten children of the deceased half-sister shall take ten parts in eleven with the son of the deceased brother; and yet the Law is so, because they all take per capita, and not by way of representation." I will not cite, (though I could) more cases to this point. These are surely enough to show, that under the Statute of Distribution, it is a general rule, that equals in degree take equal portions, and that representation is only resorted to, to bring in one more remote; in which case, he takes per stirpes. The same rule holds in the Civil Law. Thus, *Cujacius*, vol. 2, 553, in his *Exposition of the 118th Novel*, says, "Succedunt quidem fratrum filii cum fratribus defuncti in stirpes, non in capita; quod si soli sint fratrum filii, succedunt in capita." *Huberus* also, vol. 1, 277, *De successione ad intestato* lays down the

376 same doctrine expressly "as settled.

Heineccius, in his *Elementa Juris*, p. 218, sec. 696, lays it down, that the sons of brothers, if they come alone to the inheritance, take per capita; if with their uncles, per stirpes. *Domat* also, in his *Civil Law*, vol. 1, 686, puts the case of brothers and brothers' children, and considers it established Law, that where the children concur with their uncles, they take per stirpes; when with one another, per capita. Thus we see, in both these systems, the foundation of the rule, established by the 16th section of our Act, that equals in degree take equally, while representation is used only to take in the more remote of the class, and to assign them the share of their parent; and the rule in our Law is only more extensive, because representation is unlimited; and when we call a class as next of kin, we embrace the remotest members of it, to all of whom, whether children, grand-children, or great grand-children of the class, the rule extends, equals, equally, unequals, per stirpes. Applying this rule to the case before us, I would divide the inheritance into as many parts, as there were members of the grade nearest the intestate, of which any survive, taking the survivors, and those who have died leaving issue. Thus, *Anthony Gardner* left a niece and two nephews living, and had had two other nieces, who died before him, leaving issue. I would, therefore, divide the estate into five equal parts, of which each living

niece or nephew (I mean living at the death of A. G.) should have one, and the other two should go, one to the issue of *Mrs. Boyd*, the other to the issue of *Mrs. Shackelford*, to be divided among them according to the same rule. Those who contend that this is a case without the Statute, and to be decided by the principles of the Common Law, would place *Mrs. Davis* in the shoes of her father, and give her one half the estate, leaving the other half to go among the ten other kindred, two of whom are as near to the intestate as herself. It is never for a purpose of this kind that the Statute of Descents resorts to the jus representationis. There are several

377 *other proofs, (and strong ones too,) which have occurred to me as showing still further, that our Law draw its origin from the Civil Law; but, I pass them over, having already dwelt upon the subject too long. If I am wrong, it has not been for want of laborious investigation and anxious reflection on this important and interesting subject. Nor do I err alone, but in company with the fathers of the Law, the cotemporaneous exposition, and the general understanding of the country. I think the Decree ought to be affirmed.

JUDGE GREEN.

This case presents, for the first time, the question, whether the nephews and nieces, and grand-nephews, and grand-nieces of the intestate, succeeding together (his mother, brothers and sisters being dead,) shall, under our statute of Descents, take per capita, or in stirpes: and if in stirpes, whether the deceased brothers and sisters, or the living nephews, and nieces who have left children, shall be taken as the stocks.

It is admitted, that the Statute does not in terms provide for such a case. These questions must, therefore, be determined upon the best construction which we are enabled to make of the Statute itself, aided by a due attention to the Laws of Descents and Distribution, in force when it was enacted.

The Common Law of Descents looked for the heir of an intestate, first amongst his children or their descendants, if any there were. If there were none such, then amongst his brothers, and sisters, and their descendants, if any there were. If there were none such, then amongst his uncles and aunts, and their descendants, if any there were, and so on, without end, passing to the children, and their descendants, of the nearest ancestors of the intestate, any of whose descendants existed, excluding in all cases the ancestors themselves. Of all who could by possibility

378 succeed *to the inheritance, the children alone, (either of the intestate or his nearest ancestors, as the case might be,) could claim jure suo proprio; and when several such children succeeded together, they took per capita. All others, (to wit, the descendants of such children,) could only claim as representing such children, and as succeeding jure representationis, to what they would have been entitled to, if alive; and when several such descendants so succeeded together, they succeeded in stirpes by stocks: that is, each descendant repre-

sented his immediate parent, and took what he would have taken if alive, and no more. Thus, if there were grand-father, father and son, and the grand-father would, if living, be the heir of the intestate *jure proprio*, as being the child of one of his ancestors, and the grand-father, and father were dead before the intestate, the son could not claim as the immediate heir of the intestate, even if in his own person he was his nearest of kin, nor as immediately representing his grand-father, who, if alive, would have been heir, but as representing his own father, who, if alive, would have represented the grand-father. And so, the son would represent the grand-father through the medium of the father: and in such case, the descent would be mediate, and the grand-father and father would transmit the inheritance to the son. The consequence of this principle of representation was, that if any intermediate ancestor, who by possibility might have inherited, if alive, was disabled to inherit himself, by reason of his alienage, bastardy, or attainder, he could no longer transmit the inheritance to his descendants, since he would, if alive, have been incapable of taking it himself. Thus, in the case of the grand-father, father, and son before stated, in which the grand-father, if alive, would be heir to the intestate, if the father was disabled as aforesaid, the son would be barred of the inheritance; for, representing the father, who, if alive, could take nothing, he can take nothing. And so, if the grand-father was disabled, the son would be barred for representing the father, and entitled to take only what

379 he, if alive, could have *taken, and the father, if alive, representing the grand-father, and entitled only to take what he could have taken, if alive, and he being incapable of taking any thing by descent, the grand-son could take nothing, as thus mediately representing him. The disability, however, of an ancestor, common to the intestate, and his brother or other collateral heir, whether by alienage, bastardy, or attainder, was no impediment to a descent between them, because, the Law prohibiting the ancestor to succeed in any case to his own descendant, nothing could in any case be claimed, in respect to the inheritance, of any of its descendants, by any other of his descendants, as representing him; and the inheritance was consequently never transmitted through him: and therefore, a descent from brother to brother, was held to be an immediate descent. Another consequence of these principles of descent and representation, was, that no one could succeed, with his own ancestor living, to the inheritance; nor at all, if any of his ancestors was living, except in the case of a common ancestor, whose existence in full life was no impediment (for the reason aforesaid) to a descent between his descendants.

These general rules, which applied universally to all descents, even those of Gavelkind and Borough English, were directed in their application to each particular case, by various other rules, namely; the maxim *paterna paternis, v. aterna maternis*, which restored estates descended on the

part of the father to the paternal, in utter exclusion of the maternal kindred, and vice versa; that in all descents to collaterals, the male lines throughout should be preferred to the female lines; that the half-blood should be wholly excluded; that males should be preferred to females, and amongst males the oldest; and that females should succeed together in parcenary. (a)

380 *In respect to the distribution of personal estates: before the Statute of Ed. 3, by the theory of the Law, the personal estates of intestates devolved upon the Ordinary, to be applied to pious uses. In practice, the Ordinary usually distributed them to the wife and children, and kindred of the intestate, according to the customary Law, (b) which agreed with the Civil Law, as it existed before the time of Justinian, by which, if there were no children, the father was preferred to all others, excluding the mother. (c) That statute directed that the Ordinary should depute the next and most loyal friends to administer. Under this Statute, the husband was considered as his wife's next and most loyal friend, and was preferred to all others; the wife and children as the next and most loyal friends of the husband, and next to them, the father. The Statute of Hen. 8, directed administration to be committed to the widow, or next of kin, allowing the Ordinary to elect between two or more in the same degree of relationship. Under these Statutes it was held, that the Administrator could not be compelled to make distribution; in consequence of which, the Statute of 22d and 23d Car. 2, ch. 10, directed distribution to be made equally to the children, (after payment of debts, and the provision for the widow,) or to such persons as legally represented them, if any were dead; and if there were no children, nor any legal representatives of them, then equally amongst the next of kin in equal degree, and their legal representatives, provided that no representation be admitted beyond brothers' and sisters' children. Under this Statute, although in case of a failure of descendants, the 381 next of kin in equal degree *were appointed to take, yet by virtue of an expression in another part of the Statute, directing distribution to be made "to the next of kin *pro suo cuique jure* according to the Law in such cases," the ancient preference given to the husband, was con-

(a) Co. Litt. and Black. Com. *Collingwood v. Pace*, 1 Lev. 59, in the Exchequer Chamber, 13th and 14th Car. 2, in which it was held by seven Judges against three, that the alienage or attainder of the common ancestor before the birth of his children, would not impede a descent between them, a conclusion ever since adhered to, contrary to the opinion of LORD COKE, in Co. Litt. 8. a.—Note in Original Edition.

(b) By Doctor Lane, in *Blackborough v. Davis*, 1 P. Wms. 48, father preferred to mother. Per HOLT, Ibid.: *Coplestone v. Coplestone*, 2 Show. 307.—Note in Original Edition.

(c) *Vulteus*, (or *Vultijus*) 875. If a child died without descendants, the father took his estate. (If he had not been emancipated.) *jure patriæ potestatis*: if he was emancipated, *contracta fiducia*, the father succeeded ut agnatus; and if emancipated without such stipulation, the father was preferred by the *Prætorian Edict* "unde decem;" so that he was, in all events, preferred to all other ascendants and collaterals.—Note in Original Edition.

tinued and sanctioned by a subsequent Statute, 29th Car. 2, ch. 3. And next to him, if there were no descendants, the father, who was preferred to the mother, though in equal degree; and the mother excluded brothers and sisters. (a) But this preference of the male to the female ancestor, was strictly confined to the case of father and mother. All other ancestors in the same degree, male and female, succeeded together. (b) And in respect to the preference of the mother to brothers and sisters, and their children, the Statute of James 2, provided, "that if after the death of the father, any of the children should die intestate, without wife or children, in the life-time of the mother, the brothers and sisters, and their representatives, should take equal shares with the mother." These Statutes were introduced into our Code in 1705, and continued in force when our Statute of Descents was enacted in 1785.

These Statutes, except in the preference given by them incidentally to the husband and father, in the manner already stated, conformed in their provisions, in the main, with the 118th and 127th Novels of Justinian, which called the father, mother, brothers and sisters together; and in all cases of doubt, the English Statutes were construed according to the Civil Law. (c)

Some views which have been taken of the case under consideration, make it desirable to understand the full effect of these Statutes of Distribution, and the principles on which they are founded. And first, what principle do they prescribe as to the succession of descendants? Do

382 *they, in all cases where any, or all of the children are dead leaving descendants, take in stirpes, all the descendants of each child respectively representing him, and taking the share which he would have taken if alive? Or, if all the children are dead leaving children in unequal numbers, do these grand-children succeed per capita, taking jure proprio as next of kin? And, if some of these grand-children are dead leaving children, do the latter take in stirpes, with the grand-children, living representing the deceased grand-children as their stocks?

It is remarkable, that these questions have never occurred in England in such a form as to make them the subject of a direct judicial determination; a circumstance which, I think, can only be accounted for by the supposition, that it has been universally considered there, as a question susceptible of no doubt, and that in all cases, descendants must take as children, or as representing them. This is the precise and literal effect of the terms of the Statute: "distribution shall be made equally to the children, or such persons as represent them, if any be dead," carefully avoiding any terms which might be con-

strued to direct the distribution to be made to descendants in equal degree, and confining the claims of all descendants to children and such as represent them, that is, stand in the place, and entitle themselves to the rights, which the deceased children would have had if alive. This opinion is intimated by Chief Justice North, in *Carter v. Crawley*, T. Ray. Rep. 496, and plainly declared as his by Lord Hardwicke in *Wythe v. Blackman*, 1 Ves. sen. 196. And if there was any room for doubt upon the words of the Statute, an examination of the Civil Law upon this point, to which the Statute was intended to conform, and according to which it is construed in all doubtful cases, would remove it.

In the original frame of the Civil Law, as found in the 12 Tables, no representation was allowed in any case, either amongst descendants, or collaterals: The rule, that the nearest in degree excluded 383 the more remote, being inflexibly *enforced in all cases, and this by force of two very succinct Laws: the one "Intestatorum hereditates primo hæredum suorum, velint nolintve, sunt," by force of which, children excluded grand-children: (Vult. 374.) the other "deficientibus suis hæredibus proximus agnatus familiam habeto." (Id. 375.) This Law called the next agnate, only in case all the proper heirs (that is, descendants) failed: and the first of those heirs, that is, the nearest in degree, was preferred amongst them: so that, "Liberis primi gradus non existentibus, nepotes defuncti succedebant." (Id. 374.)

Before the time of Justinian, these Laws were variously modified, and representation amongst descendants allowed, but upon what principle, I do not find distinctly stated; but, no representation was ever allowed amongst collaterals, until Justinian allowed it, as a single exception to the general rule, in favor of brothers' and sisters' children concurring with father, mother, brothers or sisters living. By the 118th Novel he utterly abolished degrees amongst descendants, in terms, and declared, that "if any of the descendants of the deceased should die, leaving sons, or daughters, or other descendants, they shall succeed in place of their own father, and shall be entitled to the same share of the intestate's estate, which their father would have had, if he had lived;" which necessarily led up to the children as the stocks, to which representation was ultimately to be made. And there is no point in the Civil Law, in which all Civilians more unanimously agree, than in this construction of the Novel; (d) as Judge Cooper in his Justinian agrees, though at the same time he ventures an opinion, that the English Judges would determine otherwise. (e)

I think it is perfectly clear, that in the succession of descendants, the principle of representation has precisely the same effect in the Civil Law, the Statutes of Distributions, and the Common Law of Descents; that all descendants, *except children, (who alone can claim jure

(a) *Blackborough v. Davis*, 1 P. Wms. 48. by LORD HARDWICKE.

(b) *Moor v. Barham*, 1 P. Wms. 58: Grand-father on the father's side, and grand-mother on the mother's side, take equally together.—Note in Original Edition.

(c) By SIR JOSEPH Jekyll, Master of the Rolls, in *Mentney v. Petty*, cited 1 P. Wms. 27.

(d) *Domat*, 649: *Vultellus*. (or *Vultijus*), 378, 379.

(e) *Cooper's Justinian*, 394.

proprio, and take per capita,) must come into the succession, as representing their parents, through all their grades, no matter how many, up to the children of the intestate as the stocks according to which, partition or distribution is to be made.

As to the succession of ascendants and collaterals, the Statute of Distributions provides a general rule, in strict conformity with the original rule of the Civil Law, that distribution shall be made "amongst the next of kin in equal degree," in all cases, except that the father is still preferred, as he was by the Ancient Law, to the mother; and the brothers and sisters, and the children of such of them as are dead, succeed, with the mother, by force of the Statute of James 2d, the children representing the deceased brothers and sisters, and the children of brothers and sisters succeed with living brothers and sisters, the children representing their parents. In no other case, does the Statute allow of representation amongst collaterals, not even to the grand-children of brothers and sisters; (a) nor in any other case relaxes the rule, that the nearest in degree exclude the more remote. And in ascertaining the degrees, the Civil Law rule, *quot personae, tot gradus*, has been adopted, and never departed from, except in one single case, (where the brother has been allowed to exclude the grand-father, although in the same degree, upon the Common Law rule of computing degrees, by which brothers are in respect to each other in the first degree, and the descent between them, as before noticed, immediate;) (b) a decision obviously disapproved of in subsequent cases, in which it has been held, that grand-fathers and grand-mothers exclude, and great grand-fathers, and great grand-mothers, and uncles, and aunts, succeed with brothers' and sisters'

children, where no mother, brother 385 or sister is "alive; that is, where they have not the benefit of the right of representation; (c) and no distinction was made between the whole and half-blood. (d)

In the only case in which representation is allowed amongst collaterals, that of brothers' and sister's children, where there is living a mother, brother or sister, it has been held, that if there be no mother, brother or sister living, they cannot take by representation to their parents, so as to vary the proportions amongst themselves, or to exclude others in the same degree, or to avoid being excluded by others in a nearer degree. Thus, in such case, they are excluded by grand-fathers and grand-mothers, and concur, and take equally per capita, with uncles and aunts, all of whom would be excluded, and the children of brothers and sisters take, if there were a mother, brother or sister alive (e)

(a) Pett's Case, 1 P. Wms. 25; Bowers v. Littlewood, 1 P. Wms. 594.

(b) Poole v. Wilshaw, (1708:) Norbury v. Vicars, (1749:) Evelin v. Evelin, (1754:) cited in Cooper's Justitian, 397.

(c) Thomas v. Ketterliche, 1 Ves. sen. 338, where LORD HARDWICKE takes notice of Wilshaw's Case; Durant v. Prestwood, 1 Atk. 464; Stanley v. Stanley, 1 Atk. 457; Pett v. Pett, 1 Salk. 250.

(d) 1 Ventris, 816.

(e) Lloyd v. Trench, 2 Ves. sen. 218.

These seemingly inconsistent consequences, arise out of the peculiar frame of the Laws which are alike in the Civil Law, and the Statute of Distributions. The general rule is, that the next of kin amongst collaterals, shall take equally, and exclude the more remote. To this general rule, there is one exception; that if there be a mother, brother or sister, the children of brothers and sisters may come into the distribution, as representing their deceased parents, and take the shares to which they would be entitled, if alive. If this precise case does not occur, (in which alone they are entitled to the benefit of the right of representation,) their case falls within the general rule; and if they are the next of kin, they take, as such, equal shares, excluding all others, as the grand-children of brothers and sisters; (f) or, if in equal degree with others, take 386 "equally with them per capita; or are excluded by such as are nearer of kin as aforesaid.

Here let us notice the circumstances in which the Statute of Distributions, and the Common Law of Descents, so far as the principle of representation operates in the succession of collaterals, agree, and in what they differ. In the only case in which the Statute of Distributions admits of representation amongst collaterals, they agree precisely. The representation is made in that case to the children of the nearest ancestors of the intestate, as in the case of descents. In all other cases, by force of the Common Law, principle of representation in descents, the descendants, however remote in degree, of the nearest ancestors of the intestate, representing the children of such nearest ancestors, exclude the descendants, however near in degree, of more remote ancestors. But, the Statute of Distributions calls together the descendants of ancestors in different degrees, provided those descendants are in their own persons in equal degree; and the descendants of ancestors in a more remote degree, who are themselves nearer in degree, exclude those of ancestors in a nearer degree, who are themselves in a more remote degree. Thus, suppose a grand-son of a brother, the son of an uncle, and a great uncle. By the Common Law of Descents, the grand-son of the brother would exclude all the rest, but under the Statute of Distributions, all would succeed per capita together, or if there were an uncle, he would exclude the grand-son of a brother: the latter of whom would exclude the former under the principles of the Common Law of Descents. In short, so far as the principles of representation was concerned, the Common Law of Descents applied the same rule to the succession of collaterals, as to that of descendants, preferring him who was nearest in degree by representation, no matter how remote, in his proper person, in all cases, to him even if nearer degree, in his proper person, whose common ancestors was more remote than the common ancestor of the person preferred: whilst the Statute of Distributions preferred 387 all (except in "one particular case)

(f) Walsh v. Walsh, Eq. Ca. Abr. 249; Dayers v. Dewes, 8 P. Wms. 50.

according to their degrees of propinquity in their proper persons, without regard to the degree of the propinquity of the common ancestor.

Such were the principles of our Laws of Descent and Distribution, when our Statute of Descents was enacted; bearing these in mind, let us proceed to examine its provisions.

It directs that the estate of an intestate, "shall descend, and pass in parcenary to his kindred, male and female, in the following course: To his children, or their descendants, if any there be. If there be no children, nor their descendants, then to his father. If there be no father, then to his mother, brother and sisters, and their descendants, or such of them as there be. If there be no mother, brother, nor sister, nor their descendants, then the inheritance shall be divided into two moieties, one of which shall go to the paternal, the other to the maternal kindred, in the following course: That is to say; first, to the grand-father. If there be no grand-father, then to the grand-mother, uncles, and aunts on the same side, and their descendants, or such of them as there be. If there be no grand-mother, uncle, nor aunt, then to the great grand-fathers, or great grand-father, if there be but one. If there be no great grand-father, then to the great grand-mothers, or great grand-mother, if there be but one, and the brothers and sisters of the grand-fathers, and grand-mothers, and their descendants, or such of them as there be. Sec. 10. And so on, in other cases, without end, passing to the nearest lineal male ancestors, and for the want of them, to the lineal female ancestors, in the same degree, and the descendants of such male and female lineal ancestors, or to such of them as there be." The 11th, 12th, and 13th sections provide, that no person other than children of the intestate shall inherit, unless in esse, and capable in Law to take as heirs, at the time of the intestate's death; that if there be no maternal kindred, the whole shall go to

the paternal and vice versa: and if no kindred, to the wife or *husband, or to their kindred: and that the half-blood shall take half portions, and if all be of the half-blood, the ascendants (if any) shall have double portions. Then comes the 14th section, (the 16th in our present Statute,) which provides, "And when the children of the intestate, or his mother, brothers and sisters, or his grand-mother, uncles and aunts, or any of his lineal female ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree, come into the partition, they shall take per capita; that is to say, by persons; and when a part of them being dead, and a part living, the issue of those dead have right to partition, such issue shall take per stirpes, or by stocks; that is to say, the share of their deceased parent."

These are all the provisions of the Statute, which designate the persons to take, and proportions in which they are to take. None of these extends in terms to the case at bar, for here is no child, nor mother, brother, sister, grand-mother, uncle, aunt,

or female ancestor, or child of a deceased male or female ancestor, to come into the partition; in which cases only, does the Statute prescribe the mode of distribution; and the same rule which is applicable to this case of nephews and great nephews, (no mother, brother or sister being alive,) will apply to grand-children and great grand-children, (no child being alive,) and to all cases in which a female ancestor (beyond a grand-mother,) living, and her children, or their descendants, of the half-blood come into the partition, all of which are equally unprovided for by the terms of the Statute. There is extreme, and indeed insurmountable difficulty, in deducing any general rule from the terms of the Statute itself, by which to determine these pretermitted cases, without supposing that some principle of the pre-existing Laws of Descent or Distribution, modified by the Statute, still remained in force, and provided for them. The provisions of the Statute designating the persons to take, would, in

all such cases, entitle all who were so designated, to take *equal shares, unless there were something in the Statute itself, which, upon a just construction, would afford a different rule, or unless some such extraneous rule controuled this construction. This rule, that all who are designated to take, shall take equally, unless some other rule is prescribed, is dictated by common sense, is the settled and clear rule in the construction of Deeds and Wills, (a) and the rule of the Civil Law in the construction of the Laws regulating the succession to intestates' estates. (b) If the Authors of our Statute had intended to prescribe a new general rule, by which to ascertain in what case the heirs should take per capita, and in what per stirpes, and by which to determine who should be the stocks in all cases, without any regard to the Common Law principles of descent, or the former Statute of Distribution, and wholly independent of, and differing from, them both, nothing would have been easier than to announce such rule in the most concise terms, by declaring that where the children of the intestate, or any of his living female ancestors, and the children of his ancestors, male and female, in the same degree, came alone into the partition, they should take per capita; and if any or all of them were dead, their descendants coming into the partition, should take per stirpes, considering them as the stocks by which to make the partition; or, that when several in equal degree came into the partition alone, they should take per capita, but any in a more remote degree, coming into the partition with them, those should take per stirpes, as representing ultimately their ancestors, who, if alive, would have taken per capita, with those living, and in the nearest degree to the intestate. They surely never could have dreamed of establishing a general rule, by giving an example, from which it is impossible to deduce any such rule. For instance, if we suppose they intended to establish the

(a) *Northev v. Strange*, 1 P. Wms. 843; *Davenport v. Hanbury*, 3 Ves. 257; *Butler v. Stratton*, 3 Bro. C. C. 367.

(b) 1 *Domat*, 662.

390 general *rule, that the children of the intestate, or his female ancestors living, and the children of all his ancestors, male and female, in the same degree, should be the only persons entitled to take per capita in their own right, and that their descendants should in all cases claim as representing them, the example is imperfect, since it does not embrace the children of a living female ancestor, who, if of the half-blood, would not be the children of any deceased ancestor of the intestate. Nor does it serve better as an example of a case in which those in equal degree are to take per capita, merely because they are in equal degree, and all others in more remote degrees, in stirpes, as representing their ancestors, who, if alive, would be in the same degree; for, in the example, the persons directed to take per capita, may be in unequal degrees; as the female ancestor living, and the children of deceased ancestors in the same degree. The framers of the Statute must, therefore, have thought it unnecessary to prescribe any general rule upon this subject, because in the former Laws which they were engaged in re-forming, not in abrogating, there was a principle, not inconsistent with any of the provisions of the Statute, and therefore, not impaired, or abrogated, which would provide for all cases not specially provided for by the 14th section; and must have inserted the provisions of this section for some distinct purpose unconnected with the establishment of a general rule of partition, a purpose which I think I shall be able to point out distinctly. This principle of the former Laws, which remained in full force, was the Common Law principle of representation in descents, which alone, of all the principles of the Laws of Descent and Distribution then in force, could operate universally, both in lineal and collateral descents; and by providing for all possible cases, make it superfluous to prescribe any other general rule. For, by the Statute of Distributions, representation was only allowed in two cases; those of descendants, and of the children of brothers and sisters only, and the last only in a particular and excepted case; *in both of

391 which, it conformed strictly to the Common Law principle of representation, referring the representation to the children of the intestate in one case, and to the children of his nearest ancestors in the other, as the stocks beyond whom there could be no further representation. In all other cases, the principles of the Statute of Distributions, if remaining in force, would have allowed of no representation, and left, in all other cases not specially provided for by the Statute, all the persons designated, as entitled to come into the partition, to take equal shares, according to the literal effect of the clauses so designating them to take.

Notwithstanding the repeated extra-judicial suggestions, that our Statute intended to abrogate the Common Law of Descents in toto, I am persuaded that, in this, as in all other cases, the object of our Legislature was to reform what was obnoxious to natural equity, and the spirit of our insti-

tutions in the Common Law, leaving such parts of it as was not liable to those objections, in full force, and not to abrogate it entirely, and establish a new system, as if no such thing as the descent of the estates of intestates to their heirs had ever been heard of in Virginia. There are many proofs in the provisions of the Statute itself, to show that not only the Common Law principle of representation, but many other principles of the Common Law of Descents were considered as in full force, except so far as they were modified by provisions of the Statute, introduced for the purpose of so modifying, and not of abrogating them in toto. Some of the principles of the Common Law of Descents, to wit, that of *paterna paternis, materna maternis*, and the preference of male to female lines amongst collaterals, and of males to females, and of the eldest amongst males, and the exclusion of ancestors and the half-blood, were founded on Feudal Principles, the policy of which was to preserve estates entire or contrary to natural equity, and being inconsistent with the spirit of our institutions, were effectually abolished.

But the Common Law principle 392 *of representation was founded on the broad principles of natural equity, and in no degree inconsistent with the policy of our institutions, since it has no tendency to preserve estates entire, and therefore was admitted in all cases in the Common Law of Descents. Nor can I feel the force of Judge Blackstone's remark, that this mode of representation was a necessary consequence of the double preference of the males to females, and of the eldest, amongst the males; for, it existed in the Civil Law in the case of descendants, where there was no such preference, and also in the Common Law, whilst it allowed no such preference, and admitted all males and females alike, (a) and now prevails in respect to Gavelkind lands in England, to which all the male issue succeed together, and in parcenary. (*Clements v. Scudamore*, 1 P. Wms. 63; *Littleton*, sec. 265.) This principle is so familiar with us, that it is almost received as a Law of Nature, that children stand in the place of their parents, and take what they would have taken, if alive. And this was the opinion of the Civilians.

Vultei, (or Vultijus) stating the case of all the grand-children succeeding in stirpes, as representing the children, says, "*Nam quod succedunt avo suo, id fit occasione parentum suorum, et ut ita dicam, medio et beneficio ipsorum.*" (p. 379,) and noticing the introduction of this right of representation, which was unknown to the Ancient Law, and citing Ulpian, he says, "*Ex quo apparet jus representationis non veritate ipsa, sed fictione, niti quæ tamen fictio fundata sit in naturali æquitate.*" (p. 378.) This principle of natural equity was violated by the Laws of the 12 Tables, in order to preserve estates entire. This policy, however, in after times, yielded to the sense of justice, in favor of descendants, and brothers' and sisters' children only, both in the Civil Law, and the Eng-

(a) Per LORD HOLT, in *Blackborough v. Davis*. 1 P. Wms. 50.

lish Law of Distributions. Whilst in the Common Law of Descents, full effect was allowed to the operation of this principle of natural *equity, since it had no tendency to frustrate the policy of preserving estates entire, that object being most effectually secured by the sole succession of the eldest male, and the preference of male to female lines. It was upon this principle of natural equity, too, that the Common Law of Descents, instead of selecting, amongst collaterals, the kinsman of the intestate nearest in degree to him without regard to the degree of their common ancestor, according to the Civil Law and the Statute of Distributions, preferred the more remote kinsman descended from the child of the nearest common ancestor, as representing and standing in the place of that child, to a nearer kinsman, the child or other descendant of a more remote ancestor, and in this particular, our Statute pursues the principles of the Common Law, and repudiates those of the Civil Law, and Statute of Distributions. It also explicitly approves of, and adopts the Common Law principle of representation, in selecting the classes who are preferred to the inheritance. In this, it is in precise conformity to the Common Law, inasmuch that many cases might occur, in which, under our Statute, and the Common Law, all the persons who would succeed under the one, would also succeed under the other, as in every case where the principles of paterna paternis, the preference of male to female lines, and of males to females, and of eldest male, and the exclusion of ascendants and the half-blood, had no effect. Thus, if all were female descendants of the intestate, and descendants through females, all would succeed together, and take in parcenary alike, both by the Common Law and our Statute. And so of collaterals: if all the common ancestors were dead, and the estate was purchased by the intestate, and his only relations were female descendants, through females from his sisters, or aunts, or great aunts, on the part of his father, and of the whole blood, the same persons would inherit under both systems of Laws. If such a Statute as ours were enacted in England, all those principles which would otherwise prevent such a descent in any *case being thereby abolished, the same persons would take there, as here, under our Statute in all cases. And no one surely can doubt, but that such a Statute passed in England, would there leave the Common Law principle of representation untouched, then why not here: the Common Law, except so far as it is modified by our Statutes, or the circumstances of our country, being as much our Law, as the Law of England. This preference of classes of relations, bottomed upon the Common Law principle of representation alone, in which our Statute concurs with the Common Laws of Descents, is, I think, a persuasive proof, that that principle was approved of, and intended to be adopted, or rather left untouched by the Authors of our Statute.

There are other provisions in this Statute, and in others enacted very shortly after it, which, I think, decisively prove

that this principle was considered as unimpaired by our Statute. We have seen, that the bar to all his descendants, created by the disability of an intermediate ancestor, through whom the inheritance must be transmitted to them, was founded solely upon this principle of unlimited representation. In the Civil Law, where the next of kin took *jure proprio* as such, a child who would be next of kin, if his father was dead, would take as such, although his father was alive, if his father was disabled to take by alienage, or was condemned for a crime which disabled him. 1 Domat, 583. The Authors of our Statute inserted in it a provision, "that in making title by descent, it shall be no bar to a demandant, that any ancestor through whom he derives his descent, from the intestate, is, or hath been, an alien. Bastards, also, shall be capable of inheriting, and transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother." Provisions utterly superfluous, but upon the supposition that the Common Law rule of representation was in force, and every descendant of a child of the intestate, or of a child of an ancestor of the intestate, could only succeed as representing all his ancestors, intermediate *between him and the intestate. This provision, whilst it took away the disability of alienage in lineal, left it untouched in collateral descents, as it now remains, and the disability arising from the attainer of an intermediate ancestor, was not taken away until 1789. (a)

It is to these cases, and one other which will presently be mentioned, that the expression in the 14th section refers: "where the issue of those dead have a right to partition;" supposing that in some cases they might not have such right.

The provision in the Statute modifying the disability of alienage, is very remarkable. It not only took away the impediment at Common Law, to the descent to the issue of an alien, by reason of his disability in the case of a lineal descent, in case such an intermediate alien ancestor was dead, but even if he were alive. This is the clear effect of the expression, "is, or hath been an alien;" thus making, in this single instance, an exception to the principle of the Common Law of Descents, that the issue of an intermediate ancestor alive, who might by possibility have been capable of inheriting, could never inherit in the life-time of such ancestor, whether he were disabled by alienage, or otherwise, or not; and in this, conforming to the principle of the Civil Law, as before stated.

Another provision, affording an additional proof to the same effect, is that respecting advancements to be brought into hotchpot. "And when any of the children of the intestate, or their issue, shall have received from the intestate in his life-time any real estate by way of advancement, and shall choose to come into the partition with the other parceners, such advancement shall be brought into hotchpot with the estate descended." The Statute of Distributions only required advancements

made to the children of the intestate, and not such as were made to the issue of such children;(a) and the Common Law 396 only required "lands given in frank-marriage, to be brought into hotchpot. This more enlarged provision on the subject of advancements, which was intended to provide a more equitable and equal distribution of estates than had been provided by the Statute of Distributions, or the Common Law, in cases of parceners, was founded on the admission, that the Common Law principle of representation was still in force, without which it might produce the most flagrant injustice. If grandchildren, all the children being dead, could succeed per capita, jure proprio, without representing and standing in the place of their parents, (the deceased children,) and bound to take the shares only, which they would have taken if alive, then, if a man had two sons, and advanced one to the amount of half of his estate, and the one advanced died in his father's life-time, leaving four children, and the other child died in his father's life-time, leaving one child, and then the father died intestate, these five grand-children taking, jure proprio, per capita, the children of the advanced child would be entitled to claim four-fifths of the estate, without accounting for the advancement made to their father, and thus would virtually get nine-tenths of the estate, leaving only one-tenth for the only child of the unadvanced child of the intestate. It is impossible, that the Authors of our Statute should have contemplated that such consequences could arise from the accidental circumstance of both the children of the intestate dying in his life-time. In *Knight v. Yarborough*, Gilin. 27, which was a case relating to the execution of a power of appointment, to which the Court obviously applied the principles of this Statute, and I think, gave it the just construction, it was held, that appointments in the nature of advancements made to a grand-child, after his parents' death, should not only be brought into the division of the unappropriated residue, and considered as a part of his proportion in the division of his father's share between his children, but also as a part of his father's share in the grand-father's estate, and this last, whether the grand-child chose to come into the partition, or 397 not. If "the grand-child so represents his father, that advancements made to him, go to diminish his father's share in respect to his other children, surely advancements to the intestate's son must go to diminish the shares of his children under all possible circumstances. But, they would not have that effect, unless his children represented him under all possible circumstances.

Another provision of the Statute also shows, that the Common Law principles of descents were considered as still in force, except so far as they were inconsistent with the provisions of the Statute. By the Common Law of Descents, if the eldest son died, in the life-time of his father, leaving

his wife enseat of a child, and then the father died, and a younger son entered, as he had a right to do as heir, and afterwards the child of the eldest son was born, this child was the heir of the father, and displaced the title of the younger son, and so, of an elder and younger brother of the intestate, or any other collaterals.(b) The Statute provides, that "No right of inheritance shall accrue to any person whatever, other than to children of the intestate, unless they be in being, and capable in Law to take as heirs (the parent not being disabled) at the time of the intestate's death:" thus modifying, not abrogating, an acknowledged principle of the Common Law of Descents.

It seems to me, therefore, that the scheme of the Revisors, who prepared this Statute, was to modify the Common Law of Descents by abrogating all of its obnoxious principles, and modifying others, so as to adapt them to the general policy of our Laws, leaving those not abolished, to operate 398 "in full force, where not modified, and when modified, in their modified form. Accordingly, they abolished the rule paterna paternis, materna maternis; the preference of male to female lines, and of males to females, and of the eldest male, and admitted ascendants and the half-blood, partially. They adopted the Common Law principle of representation explicitly, in its most important effect, in the designation of the order in which classes of kindred should succeed, leaving it to operate as at the Common Law in all cases, with a limitation upon it, in a single case imposed by the Statute, which I shall presently advert to: they modified the Common Law principles as to the succession of posthumous children the impediments to a descent by the disability of an intermediate ancestor, and in respect to advancements; and they left untouched the Common Law principle in relation to descents in parcenary, which allowed to the eldest parcener, and in some cases to her representative, the choice of the lots in the partition,(c) a privilege shortly after abolished by Statute. (Oct. 1790, ch. 13, § 6, and 13 Hen. St. Lar. 122.)

Considering the Common Law principle of representation as not being abrogated, it might, at the first blush, seem to have been unnecessary to insert in the statute any provision in relation to the cases in which the persons coming into the partition, should take per capita, or per stirpes, and it is necessary to enquire for what purposes the provisions of the 14th section were introduced.

The Statute having admitted ancestors

(b) *Coke Litt* 11. b. If a man has issue, a son and a daughter, and the son purchase lands, and dies without issue, the daughter shall inherit the land; but, if the father has issue afterwards, (no matter how long after,) a son, this son shall enter into the land, as heir of his brother, and if he has issue, a daughter, and no son, she shall be a co-parcener with her sister.

Without considering the Common Law, in force in this respect, this could not have happened under our Statute, which only designates brothers and sisters, and their descendants, or such of them as there be at the death of the intestate.—Note in Original Edition.

(c) *Co. Litt* 166. b.

(a) In *Proud v. Turner*, 2 P. Wms. 560. The issue of a child advanced, held to be bound to bring the advancement into hotchpot.

to the inheritance, and preferred males to females in this instance only, and having directed that female ancestors should succeed with the descendants of all ancestors in the same degree with her, including those of the living female ancestors coming into the partition, the consequence would have been, (if not guarded against by the Statute,) that by force of the Common

Law principle of representation still 399 in full force, and *which requires representation in all cases to be made to the most remote ancestor of the claimant, who, if alive, might have inherited *jure proprio*, the children of the deceased ancestors of the intestate, who, if alive, would have inherited *jure proprio*, (especially of deceased female ancestors,) might have claimed not only the shares which they are entitled to take, *jure proprio*, but also the share which their deceased parent, the common ancestor, would have taken, if alive. Thus, if a woman had two children by a former, and one by a present husband, and one of the two died intestate, his surviving brother of the whole blood, and his mother, each being entitled to double portions, would take two-fifths each, and the brother of the half-blood the remaining one-fifth; but if the mother were to die first, and then one of the two first children died intestate, the question would arise, whether, as before, the brother of the whole blood should take two-fifths in his own right, and one-fifth in right of his mother, whom he with his brother represented equally, and who, if alive, would have taken two-fifths, and the brother of the half-blood one-fifth, in his own right as before, and one-fifth in right of his mother; or whether, taking altogether in their own right, the brother of the whole blood should take two-thirds, and he of the half-blood one-third. And I do not see how the claim to represent the deceased mother could be resisted. It would, at least, have been a serious question: and such questions might be multiplied amongst the descendants of remote ancestors who were of the whole blood. To obviate these consequences, was I think, the chief object of the 14th section, and this was completely effected by the declaration, that female ancestors, and the children of deceased ancestors, male and female, in the same degree, (a general description which embraces the particular cases of mother, brothers and sisters, grand-mother, uncles and aunts, provided for in the same clause,) should take *per capita*, that is, only in their own right, and not as representing a deceased common ancestor.

This also precluded the descendants 400 *of such children from claiming to represent any common ancestor; for, they claiming through all their ancestors in succession, as representing them immediately or mediately, when the representation reached the children of the deceased common ancestor, it must have stopped there, since these children were prohibited to claim any thing as representing any other. Thus the rule of representation, which would otherwise have been extended to the common ancestors as the stocks, at least in some cases, was, by this provision, effectually limited in its practical opera-

tion, according to its effect at the Common Law, making the children of the common ancestors the stocks, in which the representation terminated in all cases.

There is in the terms of this section itself, an internal, and I think, conclusive proof, that the purpose which I attribute to it was the only object of that provision, so far as it directed the female ancestor living, and the children of deceased ancestors, male and female, in the same degree, to take *per capita*. This omits the case of the children of a living female ancestor coming into the partition with her alone, or with her and the children of deceased ancestors in the same degree. If that provision had any conceivable object, other than that which I attribute to it, there was precisely the same reason for embracing the children of living, as of deceased ancestors, in the same degree, since they were related to the intestate in the same degree and manner, to all intents and purposes. If it was intended to prescribe a rule of partition for a particular case, or a general rule, by putting an example, to be applied to all analogous cases, upon the supposition, that no rule existed, independent of the Statute, in either case there was an absolute necessity, in order to avoid absurdity and confusion, to embrace the children of living, as well as of deceased ancestors, in the same degree, in that provision. This distinction between the children of living and deceased ancestors, was made designedly and *ex industria*. The Authors

of the Statute, collecting all the 401 *cases in which several might succeed together, and selecting from them particular persons, specify, in the very terms of the 2d, 4th and 7th sections, the cases of children, mother, brothers, sisters, and grand-mothers, uncles and aunts, and passing the 9th, (which designated the brothers and sisters of grand-fathers and grand-mothers,) because it fell within the general terms of the 10th section, adopt the language of the 10th, (which embraced all the former cases in its general terms, and embraced also the descendants of all ancestors in the same degree, living and dead,) with this exception, that the provision of the 14th section, whilst it embraces the children of the deceased, excludes those of the living female ancestors: which could not have been done without a motive, for otherwise it was natural, that they should have adopted the terms of the 10th section literally, as they did those of the 2d, 4th, and 7th, and embraced in the provisions of the 14th section the children of living, as well as of deceased ancestors. The weight of this observation is not implied by the circumstance, that the designation of brothers and sisters, and uncles and aunts, by those names, in fact embraced all the children of living, as well as of deceased fathers, mothers, grand-fathers and grand-mothers. The omission of the children of living female ancestors, and including in terms the children of deceased ancestors, in the more general description of the persons intended to be embraced in the 14th section, is a clear proof that, although all brothers and sisters, and uncles and aunts, (the children of living, as well as of de-

ceased ancestors,) were embraced in the terms of that section, none of them but such as were the children of deceased ancestors of the intestate, fell within the reason and objects of the provisions of the 14th section; and that to effect that object, whatever it was, it was not necessary to include the children of living ancestors. At the same time the fact, that in one part of this provision, the children of living, as well as of deceased ancestors, are included, and in another, those of living
402 ancestors are excluded, *is a decisive proof, that it was immaterial to the object of that provision, whether the children of living ancestors were excluded, or included, whilst to include the children of deceased ancestors, was indispensably necessary to the attainment of that object. This was precisely the character of the object which I attribute to that provision, and which cannot be attributed to any other conceivable object whatever.

If the children of all ancestors in the same degree, living and dead, were included in this provision, then, by force of this provision alone a representation to a common ancestor would be prohibited in all cases, without any reference to any principle of the Common Law. If the children of a living ancestor were excluded from the terms of this provision, then the Statute would prohibit a representation to a deceased common ancestor only; and in that case, the principles of the Common Law of descents would prohibit a representation to the living ancestors, since no one can represent and take the share of any one who is alive and can take it herself. This view of the provisions of the 14th section cannot be avoided by the supposition, that in no case could a child of a common ancestor come into the partition unless at least one of the common ancestors (the male) were dead. If a woman had two children by a first, and one by a second husband, and one of the two were to die intestate, the surviving brother of the whole blood, the mother and the brother of the half-blood would succeed, although the latter would not be a child of any deceased ancestor of the intestate: and although this particular case is embraced in the terms of the 14th section, yet cases might occur in which not one of those succeeding, would be the children of any deceased ancestor of the intestate, as if the only relations of the intestate were a great grand-mother, and her children, and other descendants, all of them of the half-blood; a case totally unprovided for by this section. The word deceased being introduced for no other conceivable purpose, but to prohibit any
403 claim by *representation to a deceased common ancestor, and it not being necessary to introduce that word for that purpose, it could only be introduced because that object, occupying the mind of the Author of the Statute, he naturally expressed it distinctly, by using the word appropriate to that object; or he inserted it purposely to afford an infallible clue to the true object of that provision: and this, I am strongly disposed to think, was the true reason for the use of that word.

I confess, that the necessity which I felt

to ascertain the true object of inserting this word, as well as of every other word in the Statute, led me to a course of reflection, which has changed my first opinion; for, following blindly, and without examination, the incautious and extra-judicial suggestion so often made, that our ancestors, in their extreme hostility to the Common Law of Descents, had abolished it in all its parts, root and branch, I at first thought, that the Statute not having provided in all cases for the proportions in which estates should descend, in such as were not provided for, all who came into the partition, were entitled to take equal shares, according to the rule in the construction of Deeds and Wills, and the Civil Law rule applied to the very case of the Laws regulating the succession to intestates' estates. And this would certainly be the case, unless that construction was controuled by some pre-existing principle of the Common Law of Descents, or some provision of the Statute, or by both combined, the latter of which will, I think, be found to be the fact.

If the sole object of the 14th section had been that of prohibiting any claim by representation to a deceased common ancestor, that would have been fully effected by the declaration, that the children of the deceased ancestors of the intestate, and a living female ancestor, coming into the partition, should take per capita; that is, upon the supposition, that the Common Law principle of representation was in full force, since that would have supplied the rule, in case some of them were dead,
404 and some were living, or *all dead; and that, precisely to the same effect as the rule prescribed by the Statute in particular cases. And if that object had been the only one, that part of the section which embraces the children of the intestate, and provides that if a part of those designated to take per capita be dead, and a part of them living, the issue of those dead should take per stirpes, would have been superfluous, and we are necessarily led to enquire, for what purpose those provisions were inserted: For the purpose, I think, and for that only, of prohibiting a construction of the clauses of the Statute designating the classes of persons to take (which we may term the donative clauses,) by which, all coming within the literal terms of those clauses, might be considered as entitled to take equal shares, and even children to take with their living parents; for the children of a living son or brother, are no less his descendants when he is alive, than after he is dead. The principle of the Common Law of Descents prohibited any one, whose intermediate ancestor (other than the common ancestor) was alive, from succeeding to an estate, or to claim otherwise than by representation, where any intermediate ancestor could by possibility have been capable of taking the inheritance if alive, (our Statute making one single exception even to that rule.) The literal terms of the Statute calling children and their descendants, brothers and sisters and their descendants, &c. to the succession, without distinction, might have been considered as abrogating these

principles of the Common Law, unless there were some provision in the Statute opposed to such a construction, and showing that these Common Law principles were in full force. To give a single example of a succession by representation in stirpes, in conformity with the principles of the Common Law, was sufficient for that purpose, and it was convenient to annex it to the provision declaring who should take per capita, which was accordingly done, and the example given is precisely in conformity with the effect of the Common Law principle of representation, making the children of the intestate, "or the children of his nearest ancestors, the stirpes, or stocks."

Here I think I might, and perhaps ought to cease, but the opinion of Judge Tucker, to which it is said the public opinion and practice have conformed, (although I have never heard of any case having actually occurred, except this,) has been so much urged as proper to govern our decision, that it may not be amiss to examine it. He lays it down as a general rule, as to which he does not seem to have imagined there could be any doubt, that "where several persons succeed at the same time in equal degree, they shall take per capita, but if a part be more remote than others, those more remote shall succeed in stirpes." And he puts the case of six grand-children, by different deceased children in unequal numbers, and says they would take per capita; and this he says, is in conformity to the Civil Law. And in a note to Blackstone's Commentaries, where the author states the case in the Civil Law, of nephews and nieces succeeding alone, and taking per capita, or if with brothers and sisters in stirpes, he states, that this is in conformity with the rule established by our Statute, and cites the terms of the 14th section verbatim, without comment, as if it clearly established that rule in terms. He nowhere assigns any reason for this construction, as he certainly would have done, if the question, as now presented, had occurred to his mind. It seems to me, that having satisfied himself that our Statute intended to abolish the Common Law of Descents in omnibus, which he labors to prove, by pointing out the many discrepancies between our Statute and the Common Law; and believing that the Civil Law rule was such as he states ours to be, both in lineal and collateral successions, an impression readily enough taken from the careless manner in which Blackstone states the rule of the Civil Law in both respects; and considering the words "children of his deceased ancestors," in the 14th section, as meaning all their descendants, as it sometimes does, both in the Civil and Common Law, and the words "male and female, in the same degree," as referring to those who came into the inheritance, (an impression very natural to one whose attention was not particularly excited to the examination of those phrases,) Judge Tucker, hastily and without perceiving that any question could be raised upon the subject, concluded, that the Legislature intended to substitute the Civil Law of Succession, for the Common Law of Descents.

In every one of these opinions, I think, Judge Tucker was clearly mistaken. As to the terms of the Statute: if they could be understood, as he probably understood them, they would indeed establish his rule. But, the word "children," in the 14th, was used in opposition to "descendants," in the 10th section, and mean children in the most restricted sense of the word; and the words "male and female, in the same degree," refer to the deceased ancestors, whose children might come into the partition, and not to those who came into the partition. To suggest these constructions is, to insure an assent to them.

As to the question, whether it was intended to abolish, in toto, the Common Law of Descents, enough has already been said. The construction given by Judge Tucker to our Statute, by which grand-children (all the children being dead) would succeed per capita, is clearly in opposition to the Civil Law, the Statute of Distributions, and the Common Law, all of which concur in this particular, and in principle in this particular only, although in a few cases amongst collaterals, the opposite principles of the Civil Law, and Statute of Distributions conforming to it, and the Common Law of Descents, produce the same practical effects, as lines drawn at right angles to each other meet at a single point. Nor does Judge Tucker's rule conform, either in principle, or effect, with that of the Civil Law, and Statute of Distributions, in respect to the succession of ascendants, or collaterals, as has been already sufficiently shown. Nor is there the slightest intimation to be found in the provisions, or phraseology of our Statute of Descents *indicating an intention to adopt any single principle of the Civil Law, or of the Statute of Distributions: the latter selecting the distributees according to their personal proximity, without regard to the proximity of their ancestors; the former selecting the heirs according to the Common Law rule, founded wholly upon the principle of unlimited representation, on account of the proximity of the Common ancestor, without regard to their individual proximity: the Civil Law and Statute of Distributions allowing of no representation amongst collaterals, except in a single, and very particular case, the Statute allowing it in all cases, or at least, as Judge Tucker himself admits, in all cases where persons in unequal degrees succeed; a case which could not happen in the Civil Law amongst collaterals, except in the single case alluded to; the nearest in degree in all other cases, absolutely excluding the more remote. Our Statute speaks of estates of inheritance descending in parcenary to the kindred of the intestate, heirs inheriting, and ancestors transmitting inheritance: the Statute of Distribution speaks of children, and those who legally represent them, and of a distribution equally amongst the next of kin in equal degree; than which, no two things can be more different. In short, Judge Tucker's rule does not agree with the principles of any system of laws ever existing in the world, so far as we are informed, either in respect to the distribution of personal,

or the descent of real estate. I repeat, that I cannot believe that the authors of our Statute intended to establish a new, and hitherto unheard of rule of descent and distribution, proceeding upon no uniform principle, and varying the interests of the successors to intestates' estates indefinitely, according to accidental circumstances; and especially, I cannot conceive that they could have intended to establish such a principle by the strange expedient of giving an equivocal example, from which no general rule can be possibly adduced, with any degree of confidence.

408 *The Decree should be reversed, and the estate divided in stirpes, considering the deceased brother and sister of the intestate as the ultimate stocks.

JUDGE COALTER.

The Legislature, in framing the Statute of Descents, seem to have pursued the policy of the Civil Law, in applying the same provisions to the descent of lands, and the distribution of personal property.

Our course of distributing the personal subject, and that of Great Britain, were nearly the same; both conforming, in a great degree, to the Civil Law. In England though, and in this country before the Revolution, the principles of the Feudal System, engrafted on our Laws, made it impossible that lands should go as personals. In fact, the course of descents, as regulated by Federal principles, had been established long before there was any Statute for the distribution of personal property.

The principles of our Revolution, though, required that those Feudal doctrines of primogeniture, preference of males over females, that lands should not lineally ascend, the rules as to the half-blood, and the blood of the first purchaser, &c., should be done away, and that the course of descents should conform to this new state of things. In other words, that the realty and personalty should go together to the same persons, and that both should go, not according to the former course of descents of lands, but (with some modifications,) according to the former course of distribution of personals, pursuing the supposed preference, arising from natural affection. Had the Legislature simply provided, that lands should thereafter descend to the same persons, who would have been entitled to them, if it was personal property, according to the Statute of Distributions, it would have been a Statute of Descents in all respects, perfectly suited to our new political existence, and one, in all its essential attributes, very similar to the

409 *Statute that was passed. Hence I conclude, that that Statute was drawn very much from our Statute of Distributions, the Civil Law, and the decisions of Courts on that subject, and being diametrically in conflict with almost every principle of the Common Law, founded on the Feudal System in relation to descents, it was entirely to repeal or abrogate that Law on this subject. This seems to have been Judge Tucker's opinion, in his commentary on this Statute, as well as the opinion of this Court, expressed in the case of *Browne v. Turberville*, 2 Call, 390. It seems to be admitted, that the case before

us, if not a *casus omissus*, is not expressly provided for by the Statute; and the consequence is, that we must either consider the case as one to which we cannot extend the Statute, and must, therefore, determine it according to some pre-existing Law, remaining still in force; or, we must bring it within the equity and meaning of the Statute, by extending the positive provisions therein found, in regard to like cases, to the one before us.

This is a case for the partition of real, and the distribution of personal estate of an intestate; and if it cannot be decided under the Statute, what antecedent Law is to regulate us in disposing of these two subjects?

Our Statute of Distributions is now a very short one. 1st vol. V. L. p. 382. It is to be found, originally in the Act of 1785, and now in the 29th section of the present Statute of Wills, Intestacy and Distributions, which, after providing for the wife, declares, "That the surplus shall be distributed in the same proportions, and to the same persons, as lands are directed to descend, in and by an Act of the General Assembly, entitled, 'An Act to reduce into one the several Acts, directing the Course of Descents.'" If that Act, though, does not provide for the case, either expressly, or by proper construction, and if we are to look to antecedent Laws, either as to the persons to take, or the proportions in which they are to take, to what must we

410 look? It seems to me, we cannot look to the Common Law as to the personal subject; for, that never regulated the distribution of personal estates. If that Law, therefore, is still in force, and applies to the real subject now before us, and will be the rule of decision as to it, still it seems to me, we cannot look to it as to the personality; for, it is to go with the land only, where it can go to the same persons, and in the same proportions, as lands are to go under the Act. If we cannot ascertain by the Act, as well the persons, as the proportions in which they are to take, but must look to the Common Law for either, the provision in the Law, as to the personality, seems to fail. If we should even find, by looking into the pre-existing Statutes of Distributions, and applying them to this case, that they would carry the personality to the same persons, and in the same proportions, as the Common Law would carry the realty, still it would not, I apprehend, be the Common Law that would give the rule, but the former Statutes of Distributions, if we consider them as so far unrepealed. But, should it be found, that the Statute of Distributions would carry the personality to different persons, or in different proportions, then we must sever the personality from the realty, or apply the Common Law rule to the personality. It is true, there is a very apparent intention in the Legislature, that the realty and personality should, in all cases, go together to the same persons, and in the same proportions; but, that is evidently also under the idea, that every case was provided for by the Statute. Had it been suggested to the Legislature, that possibly some cases were not provided for, and there

had been a general clause framed for the purpose of designating what pre-existing Law should give the rule in such cases, what would they have said? It seems to me, they would have said, as the Statute had broken up the whole foundation of the Common Law in this respect, and had, in all its essential features, adopted the Statutes and decisions on the subject of Distributions, that in all omitted cases, or
411 cases of doubt, the great policy *of the Statute should be pursued, and those laws and decisions adhered to, rather than the exploded Common Law rules, with their feudal origin.

But, there is no such clause expressly directing us the one way or the other. On the contrary, the Legislature believed they had provided for every case that could arise; and it seems to me, that this is so apparent, that we cannot resist the conclusion, that as well the Common Law as the Statutes of Distribution, were considered as entirely abrogated; and it therefore becomes our duty, if that can be done on any fair principle of construction, to extend the Act to the case before us.

Before going into this enquiry, however, let us attend a little more minutely to the Common Law course of Descents, as contrasted with that of the Civil Law, from which latter the Statute of Distributions, and the Act under consideration, have been drawn.

The first Common Law rule of Descents is, "That inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum, but shall never lineally ascend." 2 Bl. Com. 208. This is contrary to the Civil Law; was founded on feudal principles, and is entirely altered by our Law.

A second general Rule or Canon is, "That the male issue shall be admitted before the female." 2 Bl. Com. 212, 213. This is contrary to the Civil Law, and is absolutely put an end to by our Statute.

Thirdly, "Where there are two or more males, in equal degree, the eldest only shall inherit; but the females altogether." Ib. 214. This rule of primogeniture was also against the Roman Law, and is abrogated by our Statute.

If then, in any case, we are obliged to resort to the Common Law for the rule, we cannot decide the case still, according to the Common Law; for, we must pay no attention to these Rules or Canons, but must in fact, so far decide the case, as if no such Rules or Canons had ever existed. But,

these Rules or Canons have had a
412 most important *effect on the doctrines of the jus representationis of the Common Law, so as to make it what it never would have been, but for those Canons. And hence a great difficulty has arisen in my mind, in considering how we can decide what the Common Law rule of jus representationis is, when we are bound to strip it of those very Rules and Canons, which gave it its present form and shape. In other words, our Legislature have abrogated the Common Law, in the three particulars aforesaid, the existence of which in England had caused certain rules to be established in relation to the jus

representationis, which would not otherwise have existed, and yet we are to consider the Common Law jus representationis, as applicable to this country, and still in force in cases not expressly provided for by our Statute. On the contrary, I feel irresistibly led to conclude, that our Legislature, having abrogated the reasons why the jus representationis of the Common Law was made to differ from the jus representationis of the Civil Law, and which would have been the Law of England too, but for those reasons, the whole must be considered as abrogated. The reason of the Law is the life of the Law. It is not usual to repeal the Common Law as you do Statutes; but, where a principle is introduced in conflict with the reason on which it is founded, it must be considered as altered; otherwise, a Law must exist after its life is extinguished. Let us see how the Common Law rule of representation came to be what it is. A fourth Canon of Descents is, "That the lineal descendants, in infinitum, of any person deceased, shall represent their ancestor; that is, shall stand in the same place that the person himself would have done, had he been living." 2 Bl. Com. 216. Thus, the child, grand-child, or great grand-child, (male or female) of the eldest son succeeds before the youngest son, and so in infinitum. And these representatives take neither more nor less, but just so much as their principles would have done. As, if there be two sisters, M.

and C.; and M. dies leaving six
413 daughters; and then *John Stiles, the father of the two sisters, dies, without other issue: these six daughters will take among them exactly the same their mother would have done, had she been living; that is, a moiety of the land in coparcenary. This taking by representation, is called succession in stirpes, according to the roots, since all the branches inherit the same share that their root, whom they represent, would have done. This Blackstone says, is different from the Roman Law. In the descending line, he says, the right of representation continued in infinitum, and the inheritance still descended in stirpes: as, if one of three daughters died, leaving ten children; and then the father died, the two surviving daughters had each one third, and the ten grand-children one third between them. And so among collaterals. If any person in equal degree with the person represented, were still subsisting, (as if the deceased left one brother and two nephews, the son of another brother,) the succession was still guided by the roots; but, if both the brethren were dead, leaving issue, then (I apprehend, he says,) their representatives, in equal degree, became themselves principals, and shared per capita, they being now themselves in the next degree to their ancestor in their own right, and not by right of representation; whereas, he says, the Law of England would only divide it into two parts, giving one part to each set of children, however unequal in numbers.

This mode of representations, he says, is a necessary consequence of the double preference given by our Law, first, to the

male issue, and next, to the first born among the males; to both of which the Roman Law is a stranger. For, if all the children of three sisters were in England to claim per capita, in their own right, as next of kin, without respect to the stocks, and those children were partly male and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; whereas, by dividing the inheritance according to

414 the stocks, the rule of "descents" is kept uniform. The issue of an eldest son excludes all, as the son himself would, if living; but the issue of two daughters divide the inheritance between them, provided their mothers (if living,) would have done so, and among these several issues, or representatives, the same preference of males and of primogeniture prevails.

This preference given to males, and this Common Law rule of primogeniture, made it necessary then to vary the *jus representationis* as to real estates, from what it was by the Civil Law, and as applicable to personal estates, by the Statute of Distributions; but, as this reason for the variance is done away by our Act; and as that Act, when we come to examine it, I think will be found to provide for a succession in capita, where the parties to take are classed in the same degree, and only resorts to the right of representation where some of them are dead, leaving issue, and some living, I cannot perceive how it is, that such essential changes in our Law, affecting the very reason in which the variance in the Common Law right of representation, from the Civil Law right, is founded, shall nevertheless be considered as leaving that Common Law rule in full force.

The case before us, is one of collateral kindred, the children of a brother and sister; and if it had been a case of the distribution of personalty only, and the Act of Descents never had passed, but the case had been decided on the Statute of Distributions, either in England or here, those in equal degree would have taken equal portions. This is decided, as I understand, in the case of *Walsh v. Walsh*, Prec. in Ch. 54; that is to say, the children of brothers and sisters alive, would take the whole per capita, in exclusion of the issue of any child of a child of a brother or sister who should be dead, leaving issue. This was decided in *Pett's Case*, 1 P. Wms. 25: See also, *Carter v. Crawley*, Sir Thomas Raymond, 496; the Statute of Distributions prohibiting representation beyond brothers' and sisters' children.

Whether, or how far this is changed
415 by our Statute "of Descents, either expressly or by sound construction, is the question before us. But, in such case, had the subject been really the course of descents in England by the Common Law would have been very different, as we have before seen.

But, suppose it had been a case in the direct descending line, and a case of personalty, and decided in England, under the Statute of Distributions; and the case was one between children of children, the parents being all dead, how would it be decided?

In the Notes on Justinian, by Cooper, page 394, I find these observations on 118th Novel: "The three first chapters of this Novel," says he, "deserve the attentive consideration of the reader, not only because they contain the latest policy of the Civil Law, in regard to the disposition of the estates of intestates; but because they are the foundation of our Statute Law in this respect." He refers to *Holt's Cases*, 259, 1 P. Wms. 27; Prec. in Ch. 593, and Sir Thomas Raymond, 496. And he says, "They are still almost of continual use, by being the general guide of the Courts of England, which hold cognizance of distributions, in all those cases in which our own Laws have either been silent, or not sufficiently express." Speaking of the succession per stirpes, he says, "Nothing is more clear in the Civil Law, than that grand-children even when alone, (although they descend from various stocks, and are unequal in their numbers,) would take the estate of their deceased grand-father per stirpes, and not per capita. Suppose therefore, that Titius should die, leaving grand-children by three different sons already dead; to wit, three by one son, six by another, and twelve by another; each of these classes of grand-children would take a third of the estate, without any regard to the inequality of the numbers in each class. But, as to this point in England, the Law Reports mention no judicial determination; yet it seems probable, that the Courts, in which distributions are cognizable, would

order the division of an estate in such
416 a case to be made "per capita; and this, partly from a motive of equity, and partly from a consideration of the intent of the Statute, relating to the estates of intestates: for, the Statute directs an equal and just distribution, and, when the Act mentions representation, it must be understood to refer to it, in those cases only, where representation is necessary to prevent exclusion, but not to refer to it, in those cases, where all the claimants are in equal degree, and therefore can take *suo quisque jure*, each in his own right."

In a subsequent part of of his Notes, (page 546,) he refers to Dr. Taylor's Civil Law, and gives an extract therefrom, in which, (page 551,) it is laid down: 1st. That brothers and sisters alone, of the whole blood, succeed in capita, to the exclusion of the half-blood. 2d. Brothers' and sisters' children, concurring with brothers and sisters, succeed in stirpes. 3dly. Nephews alone succeed in capita, none in stirpes: for the succeed (now) in their own right, and not by representation. This I understand to be our Law, with the further provision to be deduced from it, that if any of them be dead, leaving issue, that issue is to come in or concur with those alive who are in equal degree, but per stirpes.

In England, there was no policy, in regard to the support of their aristocracy, requiring that the personal estate should go as the real, and so they adopted the Roman Law in distributing it; and it is believed by this able writer, that though there is no adjudged case to that effect,

that the sound construction of the Statute would lead the Courts to explode even the Civil Law doctrine of representation, except where it is necessarily resorted to, to prevent exclusion. But our Statute, so far as it expressly speaks, seems to adopt precisely that course. We have no aristocracy to support, no principle of policy which would require, that in any event the realty and personality shall go in different ways. On the contrary, the great policy of the Statute evidently is, to seek in the ascending line, and in every direction, those for whom a supposed preference, arising from natural affection, might exist, and to give the *whole estate real and personal, to them. It forms them into classes, and where a class consists of more than one, and all are alive, they take per capita; if any are dead, leaving issue, which if it were not in the class, would be excluded, the principle of representation is, in such cases, and only in such cases, resorted to.

The great and leading policy of the Statute, it seems to me, is the polar star in this enquiry, and if steadily kept in view, will lead us to a sound and consistent construction of the Act, and will cover every possible case under it.

The Statute on which I shall make my observations, is that which is found in the first volume of the Revised Code of 1819, page 355, which is the same as to the subject before us, with the Law as it stands in the Revised Code of 1794, but in which there is some transposition of sections.

1st. The first section provides that the inheritance of an intestate shall descend and pass in parcenary to his kindred, male and female, in the following course:

It shall go in parcenary, not subject to all the incidents of estates in parcenary at the Common Law; for there, if one of two or more daughters is dead, leaving sons and daughters, the eldest son of such daughter would take per stirpes with the surviving daughters. I would, therefore, construe the word parcenary to mean in equal shares, as contradistinguished for tenants in common, and joint tenants. It is to descend then in equal shares to his kindred; what kindred? Not to those in equal degree of consanguinity, though that is a very governing principle in arranging the classes, but according to the classes or course fixed by this Law. That is to say:

2d. "To his children, or their descendants, if any there be." Coupling this with the sixteenth section, the intention of the Legislature was: That if all the children were alive whether male or female, they should take equal shares, per capita; but if any child was dead, leaving descendants, those descendants are to take by 418 virtue of the *second section, and however numerous, would take per capita, and equally with the children, for they are in the same class with them, but for the operation of the sixteenth section, which provides, that where the issue of those children which are dead, come into partition with the living children, they shall take per stirpes, the share of their deceased parent.

But, suppose A. dies intestate, his chil-

dren B. and C. having died before him, B. having left three children, and C. six, and all these children are alive; how does the estate go? These are descendants of the children of the intestate. They are expressly named in the second class, and by the first section, are to take equally, unless, as in this other case, the sixteenth section provides otherwise; but there is no provision at all there, for they are all equal, and can each take in his own right, and none are excluded. But, suppose one of the children of B. is dead, leaving eight children, these are descendants of the child of the intestate, and are expressly called to the inheritance, by the second section, and they must take per capita, unless they can be brought within the influence of the sixteenth section; they cannot be excluded altogether, nor can you refer them to the rules either of the Common or Civil Law. They stand under the express words of our Statute, as inheriting equally with the eight surviving children of B. and C., and must each take one-sixteenth part of the estate, under the first and second sections, unless you can bring them within the sixteenth section, and so we may go on and suppose a thousand cases in the descending line; as if all the children of B. and C. had been dead, all leaving children, and all alive, or many of them dead, leaving children, &c. You cannot send them to the Common or Civil Law rule of representation. By the express provision of the first and second clauses, they being all descendants of children, are placed in the second class, and are to take equally, unless there is something in the Law which expressly, or by sound construction, directs otherwise.

419 *My opinion is, that we ought to apply the great principle of the 16th section to the case, to wit, that where some in equal degree are dead, leaving issue, which issue are to come into partition with those alive, they shall take per stirpes. It is true, that I do not resort to the principle of representation here, in order to prevent the exclusion of such issue, because they are expressly included in the Law, but I resort to it, in fixing the share they are to take, so as not to counteract the great principle of seeking for all those who would be supposed to be the nearest objects of affection, and to give it in proportion to such supposed predilections, and in the proportions pointed out by this Act in similar cases. This, though, is equally a case omitted, or rather not expressly provided for by our Statute, with that before us, and we have no means of applying any just rule to it, except by extending the 16th section to it.

3d. "If there be no children, or their descendants, then to the father."

4th. If there be no father, then to his mother, brothers and sisters, and their descendants, or such of them as there be." Whose descendants? Not those of the mother, by an after-marriage. They would be brothers and sisters of the half-blood, subject to the rules as to the half-blood; but descendants of brothers and sisters. There is no mother, though, nor brothers nor sisters, but there was a brother

and a sister, who are dead, the sister having left four children, and the brother one. These, say, are all alive at the death of the intestate. They are descendants of a brother and sister, they are expressly called to the inheritance by the fourth section, and, according to the first section, they are to take equal shares, unless something in the Law prevents. The sixteenth section, though, makes no provision for a succession amongst these parties, per stirpes. There was no necessity; they are all descendants, and stand under the Act by that description, and are entitled to the inheritance, and they are moreover all in

420 equal degree of consanguinity, and it is to be presumed, *equally in the affections of the intestate. They will take equally. So far, it seems to me, as to such persons, there is no omission in the Statute. But, it turns out, that two of the children of the sister are dead, leaving issue, unequal in numbers, but amounting in all to eight. These are descendants of a sister, and expressly called to the inheritance, and must take per capita, (unless we can apply the sixteenth section to them,) with the other descendants. We can no more in this case, than in the other, as it seems to me, refer them, either to the Common or Civil Law. They stand, in the words of our own Statute, and the only question is, whether a sound interpretation of the whole Law will enable us to say, that they should take per stirpes? It seems to me, for the reasons above suggested, as to the other case put, that we can and ought to do so.

This is the more desirable, if it will, as we are told it will, be consonant to the doctrines heretofore generally understood and acted on.

This will be the safe course. Nothing that has heretofore taken place, will be unsettled. We cannot act prospectively, as the Legislature can; we may unsettle many estates long since settled. The Legislature, if we err in the construction, can put us right, which, acting prospectively, can do no injury. The real and personal estate can go together under the same Law, as was intended, and this will be agreeable to the great principles of the Act above noticed.

If we do not do this, but resort to the Common Law *jus representationis*, to ascertain the proportions, what are we to do with the personal subject in this case? If we give it to the same persons directed by the Statute, still we cannot give it in the proportions directed by the Statute; for, we look not to the Statute, but to the Common Law, for these proportions. They are different in this case, from what the proportions were according to the Statute of Distributions; and we must then
421 do violence to *the Act, either by expounding it to mean, that the personal subject shall go to the same persons, and in the same proportions, to whom the land goes, whether the proportions are fixed by the Statute, or by the Common Law; or, we must consider the Statute of Distributions also, so far, as unrepealed, and vary the proportions, or we must consider it as repealed, and that the case is one not

within the present Statute, and consequently, that no distribution can be made. I think my construction most consistent with the true intention of the Legislature, and that the Decree must be affirmed.

JUDGE CABELL.

This is a controversy about the division of the estate of Anthony Gardner, who died intestate, without issue, without father, and without mother, brother, or sister, living at the time of his death. He had had a brother and a sister, but both of them had died before him, leaving issue; and it is among the descendants of his brother and sister, that his estate must be divided. The brother left an only child, E. M. Davis, the Appellant: the sister left two sons, living at the death of Anthony Gardner; two grand-children by one deceased daughter, and six grand-children by another deceased daughter. It thus appears, that the relations of the intestate, who were to inherit his estate, were one niece on the part of his brother, two nephews on the part of his sister, and the children of two deceased nieces on the part of his sister. No question can possibly be made as to the right of any of these relations to participate in the inheritance; for, being descendants of a brother and of a sister, they are called to the inheritance by the express words of the fourth section of our Act of Assembly directing the course of descents. But, the question is, as to the portions in which they are to participate. It was not pretended by any of them, that the estate was to be divided
422 among them all equally, share and share alike. It *was on the other hand contended by the Appellant, that the intestate, having had only one brother and one sister, both of whom died before him, leaving issue, the estate was to be divided into moieties; one of which she claimed for herself, as the only representative of her deceased father, the brother of the intestate; leaving the other moiety to be assigned to the descendants of the sister of the intestate, as representing her. The Chancellor, however, decided, that the estate should, in the first place, be divided into five parts, according to the original number of the nephews and nieces of the intestate, and that one of these parts should be assigned to the Appellant; one to each of the nephews on the part of the sister; one to the descendants of one of the deceased nieces; and the other to the descendants of the other deceased niece. And the question is, as to the propriety of this decision.

This is a very important question; and this is the first occasion on which the Courts have been called on to decide it. Such a question could hardly have arisen before the first of January, 1787; for, until that time, the Common Law, regulating the descent of real estate, and the Statute of Distributions regulating the distribution of personal, were too plain to admit of doubt. But, the Common Law paid but little regard to the supposed preference of the intestate, founded on natural affection, and was influenced, almost exclusively, by certain political considerations, which, although well suited to the Government of

England, were unnecessary to, or inconsistent with, the Republican Institutions which we had established. A change in the course of descents took place, as a necessary consequence of our change of Government. This change was effected by the Act of 1785, ch. 60, which went into operation on the first of January, 1787. This Act paid a due regard to the dictates of natural affection, and avoided the aristocratical tendencies of the former system. It accordingly abolished the preference which had been given to males over females.

It abolished all preference on account *of primogeniture or seniority.

It paid no regard to the blood of the first purchaser; and it called to the inheritance relations in the ascending line, and relations of the half-blood. But, the most important of these changes were effected not so much by laying down general principles or Canons of Descent, as by stating particular classes of persons who should inherit. Thus the Act directs:

1. That henceforth, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend, and pass in parcenary to his kindred, male and female, in the following course; that is to say:

2. To his children, or their descendants, if any there be:

3. If there be no children, nor their descendants, then to his father:

4. If there be no father, then to his mother, brothers and sisters and their descendants, or such of them as there be:

5. If there be no mother, nor brother, nor sister, nor their descendants, then the inheritance shall be divided into two moieties; one of which shall go to the paternal, the other to the maternal kindred, in the following course, that is to say:

6. First to the grand-father:

7. If there be no grand-father, then to the grand-mother, uncles and aunts, on the same side, and their descendants, or such of them as there be:

8. If there be no grand-mother, uncle nor aunt, nor their descendants, then to the great grand-fathers, or great grand-father, if there be but one:

9. If there be no great grand-father, then to the great grand-mothers, or great grand-mother, if there be but one, and the brothers and sisters of the grand-fathers and grand-mothers, and their descendants, or such of them as there be:

10. And so on in other cases, without end; passing to the nearest lineal male ancestors, and for want of them, to the lineal female ancestors, in the same
424 degree, and the *descendants of such male and female lineal ancestors, or to such of them as there be:

Then follows a section, declaring that none shall inherit, except children of the intestate, unless in being at the intestate's death.

The next section provides, that if there be no paternal kindred, the whole shall go to the maternal; if no maternal, the whole shall go to the paternal: if none of either, the whole to go to the wife or husband; and if the wife or husband be dead, it shall go to her or his kindred, in like course as

if such wife or husband had survived the intestate, and then died entitled to the estate.

The next section designates the manner in which the whole and half-blood shall take.

There are some other provisions, which will be hereafter noticed for a special purpose.

These details are so minute, and at the same time so comprehensive, that it is believed to be impossible to conceive a case of intestacy, that is not expressly provided for by the Act, so far as relates to the persons, or classes of persons, who are to inherit. As to the persons, or classes of persons, therefore, who are to inherit, it may be justly inferred that the Legislature intended to provide by the Act of 1785, a complete and perfect system, so as to render unnecessary and improper, a reference to any other Code or System of Laws whatever. And as there was no longer any good reason why the distribution of personal, should be different from the descent of real estate, the same Legislature, by a subsequent Act, declared that the personal estate, after payment of debts, and provision for the wife, shall be distributed in the same proportions, and to the same persons, as lands are directed to descend in and by the Act directing the course of descents.

But, although the course of descents of real, and the distribution of personal estate, is rendered thus full, complete and perfect, as to those persons who shall be

the distributees of the one, and the
425 heirs of the other, yet it is "manifest that the provisions of the Act are not

equally full, complete and perfect, as to the proportions in which the estate is to be divided among those who are called to its participation. The express provisions of the Act, so far as relates to this subject, are far from embracing all the cases which may occur. The only part of the Act which expressly relates to this subject, is the 14th section of the Act of 1785, answering to the 16th section of our present Law. It is in these words: "And, where the children of the intestate, or his mother, brothers and sisters, or his grand-mother, uncles and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female in the same degree, come into the partition, they shall take per capita; that is to say, by persons; and where, a part of them being dead, and a part living, the issue of those dead have right to partition, such issue shall take per stirpes, or by stocks, that is to say, the shares of their deceased parent." It is perfectly clear, that this section does not provide expressly for the case now before us; nor does it provide expressly for any case where all the persons of any particular class designated in any of the previous sections, are dead, and the estate is claimed by their descendants. It does not provide, for example, for the case where all the children of the intestate are dead, some of them leaving descendants; nor where the mother, brothers and sisters are all dead, some of them leaving descend-

ants; nor where the grand-mother, uncles and aunts, are all dead, some of them leaving descendants; nor to the case where any other female lineal ancestors, and the children of deceased lineal ancestors, male and female, in the same degree, are all dead, some of them leaving descendants: and it leaves such cases unprovided for, whether the descendants stand in equal or in unequal degrees of kindred to the intestate. There is not only a failure in the Statute to provide expressly for such cases; but there is no principle laid down, which will give a general rule. It cannot be maintained, I think, that equality, 426 or *sameness of degree of kindred to the intestate, is to be the ruling principle; for, in the first place, there is nothing said in the Statute, about the degree of kindred of those who are to take, in relation to the intestate; and in the next place, all the cases of equal division specified in the Statute, save one, are cases where the persons taking the estate, do not stand in equal degree of kindred to the intestate. Thus, the mother, brothers and sisters, the grand-mother, uncles and aunts, &c. &c., when all alive, divide the inheritance equally, although they do not all stand in equal degrees of kindred to the intestate.

If the great and wise men who framed our Statute of Descents, had intended to lay down in the Statute itself, a general rule, or a principle furnishing a general rule, for regulating the proportions in which an estate is to be divided among the different heirs, they would have effected their object in terms precise, yet comprehensive so as to admit of no question; as they had done in other parts of the same Statute, in relation to the persons, or classes of persons, who are to inherit. But, are we to suppose that they intended to leave us without any general rule on this important subject, because none is laid down in the Statute. Such a supposition is too disparaging to them, to be entertained even for a moment. On the contrary, the absence of a general rule, in the Statute, is proof conclusive to my mind, that the cases not provided for in the Statute, were considered as being provided for by the Common Law; a law, which all must admit to be in force, unless it has been abrogated by some Statute.

If the Common Law be in force, it contains a principle, familiar to us all, that will remove every difficulty, and solve every question that can possibly arise concerning the question in controversy. That principle is, "that the lineal descendants, in infinitum, of any person deceased, shall represent their ancestor: that is, shall stand in the same place as the person himself would have done, had he been living."

2 Bl. Com. 216. Let us apply this 427 principle *to this case, in order to test its operation. If the brother and sister of Anthony Gardner had survived him, they would have shared his estate equally, by the 4th section of the Act. But both to them being dead, leaving descendants, those descendants will represent their respective parents; that is, will stand in the same place as they would have done,

had they been living. One half of the estate, therefore, would be assigned to the descendants of the brother, and one half to the descendants of the sister. And in making the subdivision among the descendants of the brother and of the sister, if it should happen that any of them shall have died, leaving descendants, these last will also represent their parent, by standing in the same place as he would have done had he been living; for, the principle of representation, extends in infinitum. Thus the Appellant, E. M. Davis, the sole descendant of the brother, and representing him, would be entitled to the full moiety which her father would have taken, had he been living. The descendants of the sisters representing her, would take among them, the moiety that the sister herself would have taken, had she been living. But, as some of these descendants of the sister were dead, leaving children, who would represent their parents, the moiety which would have gone to the sister, had she been living, would be divided into four parts, according to the original number of her children, one of which would go to each of her two surviving children, and as to the other two parts, one of them would be divided equally among the children of one of her deceased daughters, and the other among the children of her other deceased daughter.

But the question still recurs, has this Common Law principle of representation been repealed? I have admitted that the Legislature intended to provide, by the Statute, a full, complete, and perfect system, so far as relates to the designation of the persons who were to inherit: and I believe that there never was any human intention carried into more complete and perfect execution. But, while they intended to abrogate the Common Law

428 entirely, as *to the persons who are to inherit, where is the evidence of any intention that these persons shall inherit on principles of descent different from those which prevailed at the Common Law. If this last intention had been entertained by the Legislature, why did they not give unequivocal evidence of it, as they did in relation to the other intention? If they had intended to do away the ancient and well established Common Law principles of descent, upon points other than those relating to the designation of the persons who are to inherit, they would have declared the new principles which they intended to substitute for the old. But there is no such declaration, except in a few instances, which I will hereafter notice. Whilst there is the utmost possible minuteness in designating the persons, or classes of persons, who are to inherit, the principles on which these persons are to inherit, are only to be gathered from the general expressions in the first section of the Act, that the estate shall descend and pass in parcenary, to his kindred, male and female. These expressions do not give the principles directly, but they do it indirectly, by necessarily referring us to the Common Law, to which they belong, and to which they are familiar, for an explanation of the principles of descent, and of

the nature, qualities, and incidents of an estate in parcenary. That this was the intention of the Legislature, seems obvious from other parts of the Act; for wherever they intended to change any of the Common Law principles of descent, provisions precisely commensurate to the object, are expressly introduced. As proof of this, I refer to the clause declaring that, "no right in the inheritance shall accrue to any person whatever, other than to children of the intestate, unless they be in being, and capable in Law to take as heirs, at the time of the intestate's death;" and to the clause declaring that "bastards shall be capable of inheriting or of transmitting inheritance on the part of their mothers." These two clauses relate to well known Common Law principles of descent, which

it was not intended to change entirely, *but only to modify; and these principles are still left to their Common Law operation, except so far as they are modified by these clauses. Where it was intended entirely to reverse a Common Law principle of descent, the Legislature have done it in terms well calculated to produce that effect: as, in the clause declaring that "in making title by descent, it shall be no bar to a defendant, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien." Had it not been for this clause, the alienage of an intermediate ancestor would still have remained a bar, as at the Common Law. And this proves that the Act of 1785, was not intended to abrogate the whole Common Law on the subject of descents; for, if a total abrogation was intended, where was the necessity of negating particular parts only?

Judge Pendleton's opinion in *Browne v. Turberville*, 2 Call, 390, is strongly relied on by those who advocate the total abrogation of the Common Law. No man is more disposed than I am, to respect the opinion of that great Judge. But his opinions, like the opinions of all other Judges, must be considered in reference to the questions that are presented to them judicially. When they go beyond the very point that is presented by the case they are called on to decide, they are extra-judicial, and cease to be authority. The question in *Browne v. Turberville*, had no reference whatever to the Common Law principle of representation. It was a question as to the persons who should inherit; and it was contended in that case, that it was the Common Law, and not the Act of Assembly that should determine the person who should be the heir. In deciding this question, he said, that "the Act of 1785, has totally done away the Common Law, as to the course of descents;" and that under that Act "no possible case, not provided for, can happen, so as to let in the rule of the Common Law." He also says, "the rights of primogeniture are wholly abolished, and wherever there are more persons than one, of equal degree of kindred 430 to the intestate, *they share equally in the succession." But this last observation of Judge Pendleton, so far as it would seem to establish a rule, that equality of degree of kindred, shall produce

equality of partition, is liable to the general remark made above, that going beyond the point before the Court, it is not to be regarded as authority. There was no question in that case, as to the proportions in which those clearly entitled to the estate, should divide it. And I think it perfectly clear, that in making the observation about equality of partition, Mr. Pendleton had no reference to the difference between a succession per capita, and a succession per stirpes; but was merely alluding to the division of estates among the many persons who are made heirs by our Law, as contrasted with the sole succession by primogeniture in England. His mind was bent upon the question, who was to be heir, and not upon the question, whether, of many persons admitted to be heirs, some should take per capita, and some per stirpes.

Judge Tucker also, in *Templeman and Steptoe*, 1 Munford, 339, uses very strong expressions as to the Act of 1785, having entirely rescinded "all former Rules and Canons of inheritance, and succession to estates, real and personal, within this Commonwealth, whether established by the Common Law, or by Statute." But, this opinion of Judge Tucker, if it was intended to extend farther than to those Canons and Rules of inheritance, for ascertaining the persons entitled to inherit, was extra-judicial, and not authority; for, in *Templeman and Steptoe*, as in *Browne v. Turberville*, the question before the Court was, as to the persons who should inherit, and not whether the heirs were to take per capita, or per stirpes.

The present is the first case in which the question has been judicially presented, whether the Common Law principle of representation, or succession per stirpes, is still to be looked to as providing for the cases not specified and provided for by the Act of 1785; or, whether that part of the Common Law has been abrogated 431 by the Act of 1785: "And in the absence of authority, we must decide it on principle.

I have already endeavoured to prove, by the positive enactments of the Act of 1785, an intention in the Legislature to leave the Common Law, as to this principle, unrepealed. But, the subject is susceptible of another, and perhaps a stronger, aspect.

A former Law, whether Common or Statute, can be repealed or abrogated, only by express terms, or by necessary implication. It is not pretended, that the Act of 1785 abrogated the Common Law principle now under discussion, by express terms. If it has been abrogated at all, that effect has been produced by necessary implication only, on the well known principle, that *leges posteriores priores contrarias abrogant*. But, the repugnance between two Laws, that is to produce that effect, must be such, that the two Laws cannot stand together. And as it is the repugnance that works the repeal, the repeal will be limited to the extent of the repugnance. Those parts of the former Law, not repugnant to the new Law, remain as much in force, as if the new Law had never been adopted. Let us apply these principles to the case

before us, and see how far, and how far only, they will carry us. The preference given by the Common Law, to males over females; the respect paid to primogeniture, and to the blood of the first purchaser; the exclusion of the ascending line, and of all collateral relations of the half-blood: all these parts of the Common Law are clearly repugnant to the provisions of the Act of 1785, and are admitted by all to have been consequently done away. But, the Common Law principle of representation is repugnant to no principle of the Act of 1785. On the contrary, it is recognized by that Act, and expressly applied by it to several cases therein specified. It is applied expressly to every case where "part of" any particular class of persons (provided for by previous sections of the Act,) "being dead,

and a part living, the issue of those
432 dead have right to the partition." *It

is applied to all such cases, by directing that "such issue shall take per stirpes, or by stocks; that is to say, the share of their deceased parent." But, the Act fails, altogether, to state how the partition shall be made, when all the persons in any class shall be dead, some or all of them leaving issue entitled to the inheritance. What greater repugnance would there be in applying the Common Law principle of representation to these last cases, than there is in applying it to those cases, to which it is expressly applied by the Act, where some of the class are living, and some dead, leaving issue? The issue who come into the partition, in the cases specified in the Act, "have right to partition," not in their own right, nor as issue of the intestate, but as issue of the deceased persons of the given class; and they take per stirpes, or by stocks; that is to say, the share of their deceased parent. The persons who would confessedly take the estate, in the cases not specified in the Act, would "have right to partition" on the same ground, viz: as issue of their parents, and not as issue of the intestate, nor in their own right. Why then should not they also "take per stirpes, or by stocks; that is to say, the share of their deceased parents?" I am clearly of opinion, that the objection as to repugnances has no foundation, so far as relates to the principle in controversy; and that, therefore, the Common Law, as to that principle, remains in full force, and is decisive of all the questions made in this case.

If it be asked where then was the necessity for the fourteenth section of the Act of 1785, (the sixteenth in our present Act concerning Descents,) the answer appears to me to be obvious. The second, fourth, seventh, ninth and tenth sections of the Act of 1785, (corresponding to the same sections in the present Law,) had directed that the estate should descend to certain classes of persons, "and to their descendants." The Legislature foresaw, that if some of the persons of a class were dead,

leaving descendants, a question might
433 arise whether, under the *broad terms of these sections, the descendants, of those persons might not claim to come into the partition per capita, with those persons of the class who were still living. And

the sole object of the fourteenth section was to prevent such a question being made. It therefore declared, in substance, that when none but persons of a given class come into the partition, they shall take per capita; but, that when some of the persons of a class are dead leaving issue who have right to come into the partition with other persons of the class who are still living, that then such issue shall not take per capita, but per stirpes, or by stocks.

I have, as yet, said nothing as to the provisions of our former Statute of Distribution, or as to the Civil Law, from which it was, in its most important features, confessedly taken. And, with due deference to my brethren, I think it necessary to say but little as to either of them. We do not know, and probably never shall know, the sources from which our Act of Descents was drawn. It is certain, however, that so far as relates to the descending line of kindred, the same principle of representation prevailed, in infinitum, in the Civil Law, that prevails in the same line, in the Common Law. And although there is no decision on the point, yet I have no doubt that the same principle, in infinitum, prevailed, in the descending line, under our former Statute of Distributions; for that Statute was nearly an exact transcript from the British Statute, which was formed from the previous practice of the Ecclesiastical Judges in England, who made the Civil Law, a guide from which they rarely differed. To suppose, therefore, that the framers of our present Statute of Descents, intended to abolish the principle of representation in the descending line, in all cases where the claimants of the estate stood in equal degree of kindred to the intestate, would be to erect a new principle, which, so far as relates to the descending line, was unknown to the Statute of Distributions, the Ecclesiastical Courts, and to the Civil Law.

434 *As to the collateral line, however, neither the Statute of Distributions, nor the Civil Law, tolerated the principle of representation, except in a single case, and that was where the children of a brother, or sister of the intestate come into partition with a surviving brother or sister of the intestate. In all cases, among collaterals, a different principle prevailed, viz: the principle of equality of distribution among "every of the next of kindred to the intestate, who are in equal degree;" a principle introduced into our Statute of Distributions, by an express and positive enactment. Act of 1705, ch. 7. This principle as to "the next of kindred," is unknown to the Common Law course of descents, and also to the Act of 1785. Both at Common Law, and according to the Act of 1785, concerning descents, the principle of representation prevailed in infinitum, even among collaterals. And this is evident from the fact, that the descendants of a brother of the intestate, however far such descendants may be removed from the intestate, will be preferred to the grandfathers; and the descendants of uncles and aunts, however remote, will be preferred to the great grand-fathers. If it had been

intended to adopt the principle of equality of partition wherever there was equality of degree of kindred, surely those who drew our Statute of Descents, would have introduced some provision to that effect. But, it is very remarkable, that there is not in all the Act of 1785, a single expression alluding to the propinquity, equality or sameness of degree of kindred, as among those who are to inherit. The expressions "same degree," occurs twice in that Act; once in the 10th, and once in the 14th section. In the former, they were used merely to show what particular female ancestors were intended; and in the latter, they were used to designate the particular ancestors whose descendants were to be entitled to partition. Upon what ground, therefore, can it be supposed that our Legislature, in framing our Act of Descents, had reference either to the Civil Law, or to the Statute of Distribution! If they

435 *had intended that the Act of Descents should conform to the Act of Distributions, it is passing strange, that instead of saying so, they should say, as they have said, that the Act of Distribution shall conform to the Act of Descents.

Upon the whole, I am of opinion, to reverse the Decree of the Chancellor, with costs, and to remand the cause, with directions that the estate of Anthony Gardner be divided into two moieties, one of which shall be assigned to the appellant, as representing her father, the brother of the intestate, and the other to be assigned to the descendants of the sister of the intestate, as representing her.

The PRESIDENT.

Great research has been employed, and some refinement indulged in, to come to very opposite conclusions on the question before the Court; nor is it for me to decide on the merits of a controversy which I am unable to perceive to belong to the decision to be pronounced. Our Statute of Descents, on which it must depend, appears to my understanding, to have enacted a course of descents, independent both of the Common and Civil Law. Its having conformed either in some particulars, does not change this character of it. A revolution, on principles derogatory both to the Common and Civil Law, was to be provided for by the enactment of a course of descents, in the general, foreign to both; and when we are called upon to decide a case, not expressly noticed by the Statute, the better rule for its construction may be extracted from the principles and analogies that may be found in it, than either from the Common or Civil Law. The cardinal Canons of the Common Law of Descents are expressly abrogated by our Statute, as inconsistent with, and repugnant to, our institutions. The *jus representationis* of the Common Law, which, it is said, is now to be resorted to for the purpose of expounding our Statute, followed as a consequence of those Canons of the Common

436 *Law. It was a necessary rule to preserve the principles of those Canons. It was, as is said by Blackstone, a necessary consequence of the double preference given by the Common Law, first to the male issue, and next to

the first born among the males, and he might have added, of that Canon of the Common Law, which invariably provides, that inheritances shall lineally descend to the issue of the person last actually seized in infinitum: a principle to which our Statute is more repugnant than to the opposite rule of the Civil Law, which looks for the next of kindred to the intestate, as the person entitled to take the estate in *suo jure proprio*, having more regard to the latter than to the former; for, though our Statute has expressly pointed to the next degree of kindred (as those who are to take the estate,) but in two provisions of it, as has been noticed, and has also disregarded the rule of the Civil Law, which prefers the next of kin among collaterals; yet it is sufficiently evident, from other provisions, that its main scope is to regard natural affection, and, where those who are to take the estate stand in equal degree of kindred to the intestate, distributes it equally among them: nor is its adoption of the *jus representationis* where some of the stocks are dead, who, if alive, would take an equal share of the estate, an exception to that preference for the next of kin, which is so manifest in every part of it. In every point of view, if we are compelled to resort to the Common Law, or Civil Law, for a rule, by which to decide the case before us, the latter ought to be preferred, especially as the first would furnish no rule for the distribution of that part of the estate, which is personal, and would be more in conflict with our Statute, as to that portion of it which is real, than the Civil Law. It ought to be preferred, also, because, though the Act of Distribution refers to the Act of Descents for the rule for the distribution of personal estate, yet, as that Act conformed infinitely more to the Act of Distributions, which in most cases follows the rule of the Civil Law, than to the Common Law, to which its im-

437 portant provisions are utterly repugnant, the Civil Law has higher claims to furnish a rule of construction than the Common Law. But, whatever might be my impressions on this point, derived from what I might consider a more thorough examination of the relationship of our Act of Descents to the Common or Civil Law than has been made by the Judges who preceded me. I should hesitate, at least, before I unsettled what appears to me to have been decided in the cases of *Browne v. Turberville*, 2 Call, and *Templeman v. Steptoe*, 1 Munf. by all the Judges. If these decisions are not Law, it is for the Legislature, and not for this Court to review them. It is impossible to read the opinions of the Judges in the first case, and to say that they did not deem it necessary to decide the question argued by the Bar, viz: Whether the omission of the words (in case of infants) in the 7th section of the Act of Descents, was to be supplied by the Common Law, or by a construction of the section in connection with other sections of the Act, the provisions of which would be defeated by a literal construction of that Statute, and the rule of the Common Law be let in. The question was deliberately considered by all

the Judges, and the President, who concurred with the other Judges, as preliminary to the decision he was about to pronounce, said "that the Act of 1785, has totally done away the Common Law as to the course of descents, has not been and cannot be doubted." This cannot be said to have been an obiter opinion, for though the Court might, upon the principles of construction resorted to by it, have interpolated the words, "in case of infants," in the 7th section, to avoid the consequence of defeating many provisions in the Act, yet it was an alternative to which it could not have been driven, if the Common Law was at hand to remedy the mischiefs which would have arisen from a literal construction of the section. All the Judges held, as may be seen in their opinions, that a recourse to the Common Law was impossible, and that the mischief could only be remedied by the construction of the whole of the Statute, taken together, or by the Legislature.

438 *In the case of *Templeman v. Steptoe*, the question whether he supposed omission in the Statute to provide for the case before the Court, was to be remedied by a recurrence to the Common Law, was obviously before the Court; that the Judges so considered it, cannot be doubted, or the expressions used by them would have been entirely irrelevant. Judge Tucker said, that by the Act of 1785, all former Rules and Canons of inheritance and succession to estates real and personal, within this Commonwealth, whether established by Common Law or by Statute, were entirely rescinded, abrogated, and annulled, and that they cannot be revived in any manner, but by some express legislative provision for the purpose. So decidedly did he hold this opinion, that he preferred to leave the estate in abeyance during the life of the mother of the intestate to a resort to the Common Law. Judge Roane, to support the construction he gave to the Statute, said, "that implication may be so strong and necessary, as to be equivalent to an express declaration of the Legislature, and this the rather as the 1st section of the Act of Descents purports to provide a rule of inheritance as to all cases, which idea is entirely supported by the opinion of the Court in the case of *Browne v. Turberville*." He considered that case as a full authority to overrule even the idea that the inheritance was in abeyance in the case before the Court. Judge Fleming said, "let me premise that in my conception the Legislature intended to provide, and has provided, for every possible case that could happen, and such was the sense of all the Judges in giving their opinions in the case of *Browne v. Turberville*." How it is possible now to resort to any rule of the Common Law to provide for the case before us, without resisting the authority of these cases, I am at a loss to conjecture. If the Common Law is to be looked to in the case before us, it might with some propriety have been resorted to in these cases. If so much of it only is abrogated by our Statute, as expressly provides for cases that have occurred, or may occur, then *indeed, all the Judges

who have gone before us, were in profound error. That their opinions were mere dicta on points not before them, cannot be insisted on, if the cases are well examined.

Nor will the distinction which is taken between the persons who are to take the inheritance, and the amount of the portion to which they are entitled, obviate the force of these decisions, or weaken the reasons on which they are founded. If you are not to look to the Common Law for the persons who are to take the inheritance, because it is abrogated by the Statute, you cannot look to it for the portions of the inheritance to which they are entitled, for the same reason. The Statute would be truly imperfect, if it has not provided for both. If the Common Law is to be resorted to for the latter, and thereby to fix the amount of the portion, the principle is to be let in, that the lineal descendants, in infinitum, of any person deceased, shall represent their ancestor. The character of the Statute would be essentially changed, its regard to natural affection, and preference for the next of kin to the intestate, would be overruled by the Common Law, to which its essential provisions are repugnant. That the eighteenth section of our Act, which declares that it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is, or hath been an alien, is a recognition of the existence of the Common Law of Descents, I think, is equally unfounded. The Common Law in regard to aliens, was no part of the Common Law of Descents. It was founded on an entirely different policy, a policy repugnant to the spirit of our institutions, and to our Act of Descents, which regards natural affection, wherever the object of it may be, and was required to be abrogated by our Statute, as being in conflict with its spirit and principles. In every point of view, both upon reason and authority, I think the Common Law of Descents has been abrogated by our Statute, and that it cannot be resorted to, to supply any supposed defects in

440 it. But, if it were not, *I think it will be found, on an examination of the Statute, that there will be as little difficulty in finding a provision for the case before us, by a sound construction of it, as in the cases referred to. Its first section professes to provide a course of descents in all cases to arise in future. It enacts, that henceforth, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend, and pass in parcenary to his kindred, male and female, in the following course, &c. The fourth section, explained by the sixteenth section, provides for the case before us. Anthony Gardner, whose estate is to be distributed, died intestate, leaving neither children, nor their descendants, nor father, nor mother, nor brother, nor sister, but leaving descendants of a brother and sister. The fourth section declares, that if there be no father, (to whom the third section gives the estate, where there are no children, or their descendants,) then to his mother, brothers and sisters, and their descendants, or such of

them as there be. The descendants of the brother and sister of Anthony Gardner, at the time of his death, were, one niece on the part of his brother, two nephews on the part of his sister, and the children of two deceased nieces on the part of the sister. These are called to the inheritance by the fourth section, it must be admitted. A due regard is paid by it to natural affection; for they, the niece and nephews, were the next of kin to Anthony Gardner, at the time of his death, and next to them, the children of his two nieces, who have died. Standing on the fourth section alone, it might be insisted, (on a literal construction of it,) that, as the children of the deceased nieces were descendants of the sister of the intestate, they would be entitled to an equal portion of the inheritance with the living niece, and nephews, though they are not in the same degree of kindred with them to the intestate. In such case, the preference for the next of kin would be lost sight of: but, giving due weight to that preference, it might be plausibly insisted on, that, though

441 they are descendants *of the sister of the intestate, they are by one degree not so near of kin to the intestate as his niece and two nephews, and though entitled to take a portion of the inheritance by the words of the fourth section, are entitled only to the shares of their mothers, who were in the same degree of kindred to the intestate, with the living niece and nephews, not jure representationis, but in suo proprio jure, by force of the principle alluded to. But, the sixteenth section, I think, clears up this difficulty. Taking it in reference to the four first sections of the Act, and it impliedly provides for the case before us. The first section, as was said by Judge Tucker, in the case of *Templeman v. Steptoe*, professes to provide for every case. The words of it are: "Be it enacted by the General Assembly, That henceforth, where any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course," &c. The second section gives the estate to his children, or their descendants, if any there be: the third section, if there be no children nor their descendants, gives it to the father: the fourth section, if there be no father, then to his mother, brothers, and sisters, and their descendants, or such of them as there be. All these sections follow the current of natural affection, and strongly indicate the preference for the next of kin to the intestate. The sixteenth section fixes the portion of all, by specific examples, which contain the principle to be applied. It begins with the copulative. "And where the children of the intestate," (the first class; plainly referring to the second section, in which provision is made for children,) "or his mother, brothers, and sisters," (the second class; provided for in the fourth section, passing the third, in which the father is provided for) "or his grand-mother, uncles and aunts," (third class,) &c. come into the partition, they shall take per capita; that is to say, by persons, and where a part of them

442 being dead, and a part living, *the issue of those dead having right to partition, such issue shall take per stirpes, or by stocks; that is to say, the shares of their deceased parents. If, then, in the case before us, either the brother or sister of Anthony Gardner had been alive at his death, and the other dead, leaving children, it is clear, the children would have taken the share of their deceased parent, equally to be divided among them; because, according to common intent, which is common sense, where an estate devolves on more persons than one, and the portions are not designated, they take equal shares, as is said by Mr. Pendleton in *Browne v. Turberville*, not by the Common Law, the jure representationis, but by force of the Statute in jure suo proprio. In all of the examples put by this section, whenever one of the stocks of the nearest kindred is alive, and some dead, the descendants of those dead take per stirpes, that is, the shares of their parents by force of the Statute, and not jure representationis by the Common Law; for, if they did, in the cases of remote kindred, if you mount up to the stock by that principle of the Common Law, you defeat the preference for the next of kin, which is to be found in the Statute: as in the case before us, if you look to the brother and sister of the intestate (where both were dead at the time of his death) and consider them as alive, you would defeat the principle of preference for the next of kin, by dividing the inheritance equally among their descendants where some of them are one degree more remote than the others, by giving one-half of the inheritance to the Appellant, the niece of the intestate, to the injury of the two nephews, in equal degree of kindred to the intestate, and that for the purpose of giving larger portions to the children of the dead nieces (who are one degree more remote) than they would otherwise be entitled to. If in the cases expressly provided for by the sixteenth section, as where some of the children of the intestate are dead, and some living, or where some of his brothers and sisters are dead, and some living, the children of those dead are

443 to take *per stirpes, the shares of the deceased parents, why should not the children of deceased nieces, in the case before us, be confined to the shares of their deceased parents according to the principle applicable to children, and brothers and sisters when some are alive, and some dead, leaving children? No possible reason can be assigned for it, but that they are not expressly provided for in the sixteenth section. But this was unnecessary, if it were possible to provide for every case. It was enough, that while the Statute professes to provide for every case in its first section, it furnishes a principle applicable to all which are not expressly provided for. When all of a class are alive, they take per capita, by persons; and when some are alive, and some dead, leaving children, the latter take per stirpes, the shares of their deceased parents: in relation to each other, they take equal shares, being in equal degree of kindred to the intestate; but, in relation to those of the

class who are alive, and stand in one degree of kindred nearer to the intestate, they take unequal share, where the deceased parent leaves more than one child, as in the case before us, the niece and nephew alive at the death of the intestate, and standing in equal degree of kindred to him, take equal shares of the inheritance, and the children of the deceased nieces, representing their dead parents, take their shares equally among them per stirpes, but standing in one degree more remote from the intestate, take unequal shares in relation to the shares of the living niece (the Appellant) and of the two nephews.

This construction of the Statute is not so violent as in the cases cited. If in any of the cases not expressly provided for by the Statute, we can get a principle applicable to the cases expressly provided for, we are at liberty to apply it to cases not expressly provided for.

On this construction of the Statute, I think the Decree is correct, and ought to be affirmed.

444 *Myers and Others v. Wade and Others.

May, 1828.

Administrator—Release of Sureties—Retention of Property by Administrator in Another Capacity.—If an Administratrix settles her accounts as such, in which a balance is found due to the estate of the intestate, and then she qualifies as guardian of the infant children of the intestate, and receives their distributive shares into her hands, the sureties in the Administration Bond are absolved from

***Administrators—Release of Surety—Retention of Property in Another Capacity—Election.**—The law is well settled that, where an executor or administrator having assets in his hands, becomes the guardian of the legatee or distributee, he may elect to hold the share of such legatee or distributee in his character as guardian; and thus while he charges his sureties in the guardian bond, he exonerates those in the administration bond. And it is equally well settled, that in order thus to shift the responsibility from one class of sureties to the other, some distinct act or declaration is necessary on the part of the executor or administrator, indicative of his intention to hold the fund in his character of guardian. *Smith v. Gregory*, 26 Gratt. 257, citing the principal case to sustain the point. In *Harvey v. Steptoe*, 17 Gratt. 300, it is said: "When the same person is the representative of two estates, one of which is debtor to the other, or when the same person is representative of an estate and guardian of a legatee, the time at which the transfer of assets should be made will depend upon the condition of the debtor estate, and the state of the administration. Accordingly, in such a case, the court will not shift the responsibility from one set of sureties to the other, without some act or declaration on the part of the representative indicating an intention to transfer the assets." *Morrow v. Peyton*, 8 Leigh 54; *Myers v. Wade*, 6 Rand. 444."

To the same effect, the principal case is cited in *note* to *Alston v. Munford*, 1 Fed. Cas. 592; *Morrow v. Peyton*, 8 Leigh 75; *Smith v. Gregory*, 26 Gratt. 259; *Perry v. Campbell*, 10 W. Va. 228. And in *Board v. Cain*, 28 W. Va. 770, it is said: "A fiduciary cannot transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his securities in the one and throw the burden upon his securities in the other. To make the transfer valid, it must consist of something more than a naked liability: it must be substantial assets. If made by an insolvent fiduciary. (*Smith v. Gregory*, 26 Gratt. 218; *Phillips v. Manning*, 14 Eng. Ch'y R. 309, 315). But if the fiduciary is solvent and able to pay over the funds, all that is necessary is for him, when he is ordered to pay it over, or when the law would authorize him to pay it over to a third person holding the other fiduciary character, to make his election and manifest it by some act, direction or admission." (*Swope v. Chambers*, 2 Gratt. 319; *Myers v. Wade*, 6 Rand. 444; *Broadus v. Rosson*, 3 Leigh 12; *Morrow v. Peyton*, 8 Leigh 54; *Pifer's Estate*, 15 Pa. St. 533; *Gottsberger*

the claim of the distributees and the sureties in the guardian's Bond are bound to them.

Guardian and Ward—Education of Ward—Application of Principal of Estate to.—A Guardian cannot apply any part of the principal of the infant's estate to his education or maintenance, without the previous consent of the Court appointing the Guardian, according to the provisions of the 26th section of the Act concerning Guardians.

Same—Same—Parent as Guardian.—A parent who is guardian of his children, is more bound than others to a strict observance of this rule; for there is a natural, if not a legal obligation on all parents to support their children, if of ability to do so. By *GREEN, J.*

Same—Same—Deficit during First Years Set-Off by Surplus in Later Years.—If the expense of maintaining and educating infant wards, exceeds their annual income, until they become of an age to render service, (say fourteen, fifteen, or sixteen years,) and if, when they arrive to that age, their services are equal to their support: the surplus of expenditure during the former period, ought to be set-off against the income of their estates during the latter period, till they arrive to the age of twenty-one years.

This was an appeal from a Decree from the Chancery Court of Winchester. The Complainants were John Wade, and Hannah his wife, who was Hannah Myers, Joseph Purcell, and Susan his wife, who was Susan Myers, and Thomas Myers, and John Myers. They state in their Bill, that Benjamin Myers, late of Loudoun, died intestate, leaving considerable personal estate, and leaving as his representatives, his widow, Elizabeth Myers, and eight children, viz: Elizabeth, a daughter who attained her age, and died intestate, Benjamin, a son who died an infant intestate, Thomas and John, two of the Plaintiffs, Hannah and Susan, two other Plaintiffs, Isaac, who lives out of the State, and Sarah, now the wife of Joseph Hansborough: That Elizabeth, the widow, administered on the estate, and Israel Janney, and James Moore, were her securities: that in 1798, an ex parte settlement of her Administration account took place, which is annexed to the Bill, and the Plaintiffs say, that al-

though there are inaccuracies in it to their detriment, they are willing to receive their respective distributary shares of it, adding thereto the parts of the deceased brother and sister, Elizabeth and Benjamin. The Administration account shows a balance due from the Administratrix of 1130l. 10 9/4, which, after deducting one-third for the widow's share, leaves 753l. 16 10 1/2, to be distributed amongst the eight children.

The Plaintiffs further show, that at the time of the settlement they were infants, and the widow then became their Guardian, and Joseph Lewis, jr. and Samuel Hough were her securities.

They say, that no part of their father's estate has been paid to them by the widow, either as Administratrix, or Guardian; they claim their respective shares, and make

v. Taylor, 19 N. Y. 150; *Pratt v. Northum*, 5 Mason 108.)"

See further, monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

Guardian and Ward—Support of Ward—Application of Principal of Estate to.—This subject is discussed at some length in monographic *note* on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398, which see.

The principal case is cited to the point in *Broadus v. Rosson*, 3 Leigh 35; *Garrett v. Carr*, 1 Rob. 309; *Harcum v. Hudnall*, 14 Gratt. 578; *foot-note* to *Rinker v. Strett*, 33 Gratt. 663; *Brown v. Grant*, 29 W. Va. 118, 11 S. E. Rep. 900.

the widow, in both characters, and the two sets of sureties, and the two surviving children, Sarah and Isaac, parties to their Bill.

The widow answered, relying on the settlement of her Administration account, and admits that she then became the Guardian, and gave the bond and security mentioned in the Bill. She denies, that she owes a penny to either of the Plaintiffs, and avers that she laid out on them, for their support, dress, education, and genteel living, a great deal more than their respective shares of their father's estate amounted to: thus, she furnished to Hannah board, clothing, and tuition, from Sept. 1795, when her father died, to May, 1804, which was worth at least \$100 per annum; and board and clothing from 1804, to 1809, when she married, which were worth, after making her a liberal allowance for her services, at least \$60 a year, and on her marriage, supplied her with furniture worth \$50, making an aggregate of \$1,216 66, which she claims with interest: in the same way, she charges to Susan \$1,159 50, with interest from 1808, when she married: to Thomas \$1,000, for ten years board, clothing, and tuition, with interest from 1805, when he left her, at the age of seventeen: and to John \$960 with interest.

446 *As to the Plaintiffs' share of the deceased children, Benjamin and Elizabeth, the whole of their shares were laid out on them; and that at Elizabeth's death, certain monies were left in the hands of Mr. S. Carr, which the Plaintiffs themselves agreed might be put out on interest for the support of the Defendant; if the Plaintiffs thought themselves entitled to it, they would have claimed it at that time.

The Defendant described, in feeling terms, her present impoverished and afflicted condition, and the ingratitude of her four children, who, in return for her kindness, and the sacrifices she had made to promote their welfare and happiness, were now endeavoring to bring her grey hairs with sorrow to the grave.

The Defendants Janney and Moore, the sureties in the Administration Bond, demurred to the Bill, but on that being overruled by the Court, Moore answered, relying on their being released when on the settlement, the widow was appointed Guardian, and gave security, as such.

The Defendants Lewis and Hough, the sureties in the Guardian's Bond, in their Answers, relied on the fact, that the widow had brought up her children in a genteel manner, and had in so doing, necessarily expended greatly more than their respective distributive shares of their father's estate.

The accounts between the parties were referred to Commissioners several times. They were stated in both ways. In the account in which the widow was credited by the education, clothing, and board of the children, these latter were brought largely in debt: but, in the account in which these credits were not allowed, the widow, as Guardian, was brought considerably in debt.

The Chancellor dismissed the Bill as to the Defendants Janney and Moore, the se-

curities in the Administration Bond, but disallowing the claim of the Guardian to expend any part of the principal of her Wards' estate towards their education, clothing and maintenance, decreed that the Guardian and her securities, Lewis and Hough, should pay to the Plaintiffs the sum reported to be due to them, with 447 interest *to the daughters, from the time they arrived to the age of eighteen years, and to the sons from the time they arrived to the age of twenty-one years. Adopting this rule, he decreed to Purcell and wife, \$375 26, with interest from 8th December, 1802; to Wade and Wife, \$379 76, with interest from 18th May, 1804; to Thomas Myers, \$403 76, with interest from 15th April, 1809; and to John Myers, \$403 76, with interest from 27th March, 1811. From which Decree, the Guardian and her securities appealed.

Wickham, Briggs and Stanard, for the Appellants.

Leigh, for the Appellees.

May 15. The Judges delivered their opinions.*

JUDGE GREEN.

The Chancellor properly held in this case, that the sureties for the Guardianship, and not those for the Administration, were responsible. Mrs. Myers' admission, in her Answer, that upon qualifying as Guardian, she received the estates of the infants into her hands, though not conclusive, is prima facie evidence against her sureties, and is not contradicted. She was not Guardian for John, and consequently, her sureties are not responsible for his share of his father's estate in her hands, and as to this part of the subject, the Bill should have been dismissed; but, if there were no other objection to the Decree, it should not be reversed on that account, since nothing is decreed to him.

A Guardian cannot, under any circumstances, justify the application of any part of the principal of an infant's estate to his education or maintenance, without the previous sanction of the proper Court.

448 This is the spirit of our *Statute, and indeed its express letter. If there is any difference in this respect, between a stranger and a parent acting as Guardian, the rule should be enforced with more rigor against the latter than the former; for there is a natural, if not a legal obligation, on all parents to support their children, if of ability to do so. The case of Johnson and Wife v. Holiday, in this Court, not reported, is a very strong case to this point. Although after the children grew up, their services appear to have been equal to their support, yet the expense of maintaining and educating them up to that time, far exceeded the annual income of their estates. And, I think the surplus of expenditure during that period, ought to be set-off against the income of their estates after their services were equivalent to their support, until they came to the age of twenty-one years. Our Statute allows the excess of expenditure in one year, to be set-off against the income of the next.

*Absent, JUDGES CABELL and CARR, the latter of whom had rendered the Decree of the Court below, and therefore did not sit in the case.

This rule has been applied by the Decree to the two sons who are Plaintiffs, but not to the daughters who are Plaintiffs, although there were much stronger reasons for applying it to the latter than to the former, they having lived with their mother until their ages of twenty-three, whilst the sons left her at their ages of seventeen. The Administrator of Elizabeth is a party in another character, and as he will be barred by the Decree from claiming hereafter as Administrator, there is no occasion to have him made a party in form in that character. Nor is it necessary that there should be an Administration on the estate of Benjamin, or that any security should be demanded of the Plaintiffs, for refunding in any event what they receive on account of his share of the estate, since he died an infant, and an apprentice, and could owe no debts. The Decree should be reversed.

JUDGE COALTER.

The intestate, Benjamin Myers, died in 1795, leaving a widow and eight children; the eldest child about seventeen
449 *years of age, and the youngest about three. In September, 1795, his widow took administration, and gave bond and security.

At some period or other, but when does not appear, she settled her Administration and counts; the latest date in which account is in July 1798.

In April, 1799, she became Guardian of seven of the children, the eldest son, Isaac, having attained his age of twenty-one about that time. The next eldest child, Elizabeth, was then about nineteen years of age, and the next one to her, Benjamin, about sixteen or seventeen. It is stated in the Bill, and not denied, that Elizabeth attained her age and died, and that Benjamin died under age. Susannah, now the wife of Joseph Purcell, was about eleven years of age when her father died, and about fifteen when her mother became Guardian. Hannah, now the wife of John Wade, was about nine years old at the death of her father, and about thirteen when her mother undertook as her Guardian. Thomas was about seven at the death of his father, and about eleven when she became Guardian. John was about five when his father died, and about nine when his mother became Guardian, and Sarah, now the wife of Joseph Hansborough, was about three at the death of her father, and about seven when her mother became Guardian.

The dividend of the estate coming to each child, was about three hundred and fourteen dollars.

Joseph Purcell took administration on the estate of Elizabeth, and gave bond in December, 1812; she was born in 1780, so that she was probably about thirty-two years of age when she died. It is not alleged in the answer that she had received her share of the estate; the allegation being, that all had been expended in maintaining and educating. It seems, however, that she asserted no claim during her life against her mother. On the contrary, it is in proof, that when on her death-bed, she said she had some money out in the hands

of S. Carr, of which, she intended the
450 *landlord of the house then leased by her mother should be paid his rent, and after payment of her debts, she intended the residue for her mother. She made no Will though, and Carr paid the money, about \$270, after payment of debts, to Purcell, as her Administrator, about which time Joseph Purcell, Thomas Myers, and Sarah, now Mrs. Hansborough, stated that Purcell and Wade talked of claiming the estate of Elizabeth. But Thomas and Sarah proposed to give it up to their mother, if Purcell and Wade would agree to it; but they said, as they had got nothing, or expected nothing from the estate of Benjamin Myers, they considered it but right to receive what was coming from Elizabeth's estate.

It seems that Myers, the mother, kept the family together, raised and educated them reputably; that she was industrious and careful, keeping a tavern and boarding-house, devoted herself to her children, and but for the misfortune of losing her house by fire, would probably have been now solvent, and able to give them something. From age and misfortune, however, she ultimately became paralytic and insolvent; after which, to wit, in 1815, this suit is instituted by Purcell and wife, Wade and wife, and Thomas and John, against the widow and her securities, as Administratrix and Guardian, claiming in settlement of the Administration and Guardian's accounts, or rather, of the latter as they are willing to abide by the settlement that had been made of the Administration account, stating her insolvency, and claiming to have from the securities, their shares of the estate, and of the portions of Elizabeth and Benjamin, Decreed to them. Isaac Myers, the eldest son, had removed from the State. He is made a Defendant, but is not regularly before the Court. He was about thirty-seven years of age though, when the suit was brought, and has never made any claim. Sarah, the wife of Hansborough, was about twenty-three years old when the suit was brought; she would not join in it, and in the Answer of herself and husband, they disclaim
451 any interest in it. *Susannah married Purcell at about twenty-four years of age, having resided with her mother until that time, and was about thirty-one years of age when the suit was instituted. Hannah married Wade at about the age of twenty-three, having also resided with her mother, and was about twenty-nine years of age when the suit was brought. Thomas was about twenty-seven years old when the suit was brought, and John about twenty-five. When the widow became Administratrix, many of the children were of tender years, three of them females, one of fifteen, one of eleven, and one of nine. They were kept together, and of course supported by their mother, until she became Guardian, a space of about four years. Their interest in the estate would not yield more than about \$19 per annum, a sum entirely inadequate to their support and education. Had the widowed mother possessed an estate suffi-

cient for their maintenance and education, although I am not prepared to say that she would have been bound to expend it in that way, yet had she thought proper to do so, it would have been a voluntary donation, in no wise a bar to their future claim to their own estate. This though, was not her condition, and the only alternative was, by an industrious and frugal application of the whole fund to their general support, and the education of the young, to keep the family together; or, to throw them on the parish, and have them hired out by the Overseers of the Poor. In obedience to the promptings of the maternal bosom, or, as she says in her Answer, to the request of her husband, she pursued the former course. She administered the estate, and settled up the accounts in the course of the first four years, and then became Guardian, without having received any allowance in the account so settled, for her expenditures on the family, although two of the female children had then only arrived at an age barely fit to be bound out, a third being only about seven, and her son John about nine, both of course without education, and entirely unfit to leave the maternal home, if that could possibly be
452 avoided. *She then became Guardian; and in strict Law, ought to have reported the condition of her children to the Court, and had them all bound out by the Overseers of the Poor, except Isaac, who had just attained his age of twenty-one years. Her eldest daughter, Elizabeth, was then about nineteen. She continued to enjoy the protection of the maternal roof, until her death, at the age of about thirty-two years. She might, when she came of age, have received her portion, had her mother been able, as probably she then was, to pay it, and sought her fortune elsewhere. It was inadequate though, to her support, and she must have hired herself out for that purpose. She elected to remain with her mother, and doubtless to apply much of her labor to her own earnings, and to acquire some little property, leaving it to her mother to expend her little portion of the common stock, to keep her little sisters and brothers at school, until the latter were fit to be bound out, and to keep the former from the possible pollution of common servitude until they arrived at age, and were finally married. This she must have seen and known was the manner in which her portion of the estate was used, and this she approved of. She never made any claim on her mother therefor, but the reverse. She wished her even to get the profits of her own earnings. She could make, and had a right to make, a proper estimate of her own security, ease and comfort, in her mother's house, in the society of those dear to her, and she did make that proper estimate. She had the care and watchfulness of a mother during her whole life, and during her last illness; whether that was long or short, does not appear, but she was grateful for it, and I think we are bound to believe, that had she survived until this suit was brought, she never would have joined in it, to disturb the last days of that afflicted mother. She would have been at that time thirty-

five years of age, fourteen years beyond her minority. Her Administrator, if he is to be considered before the Court, never made any claim on this score, until
453 three years after *her death. I think she has made a good and wise distribution of her portion of the estate, which neither she, if she was alive, nor any person claiming under her, ought to be permitted to disturb. The other daughters too, had the protection and tender care of a mother, the decent apparel and upraising in a reputable boarding-house, and continued to enjoy these advantages until they were settled in life, several years after they were of full age, without complaint or demand. When they attained their age, had they asked for that pittance, which had thus been expended on them, they might possibly have received it, and gone to some kind of service elsewhere. This they wisely forebore to do; and not until ten years thereafter in the one case, and eight in the other, is this claim made by their husbands, of a mother borne down by the visitations of Providence, when, as she says in her Answer, they may suppose her incapable of defending herself.

Surely, it seems to me, they had a right to sanction these proceedings in their mother towards them, evidently so beneficial to them. This, they and their husbands have done, as it seems to me, not only by their long silence and acquiescence, but by their express declarations, except in the case of John, who does not seem to have been present on the consultation, whether their mother should have Elizabeth's property, agreeably to her dying wish. Thomas was about twenty-four years of age when he made these declarations. He and John were probably bound out at their age of seventeen, but John was quite young when his father died, and for a long time not in a condition to be bound out. But, even he acquiesces for four years after he came of age. They all knew the meritorious exertions of their mother in their favor, and that there was no possible way of keeping the family together, and raising them in the credit in which they were raised, except the one adopted; and no doubt these considerations operated on their consciences to produce the acquiescence and abandonment of their claim, at least so long as their mother was in health and in some degree of prosperity.

454 *Although, therefore, I approve of the Law as, in general, an excellent provision in the case of infants not having estate sufficient to support them; yet, as the estate was not wasted, but probably applied as their father intended, I can see nothing in that Law to prevent those interested, when they come of age, to approve and sanction a departure from it, which must have tended, as in this case it seems to me it did, especially in the case of the females, so much to the general advantage of the whole family. This, too, in the view very properly taken of it by the youngest daughter. On these grounds, I think, the Bill ought to have been dismissed. But, there can be no pretext, as it seems to me, to give them the share of

Elizabeth, or to charge interest in the case of the daughters, from their age of eighteen, instead of twenty-one. The interest of their estate, until that age, had they then sued for it, would surely have been allowed for their maintenance and education. If the Bill is not to be dismissed, the Account and Decree ought to be reformed in these particulars. It is not a case in which the Court ought to go to one cent beyond what the Law imperiously demanded. Had the suit been brought in due time, these securities might have had some indemnity from the estate of the mother. It is delayed until that fails, and that the Appellees are entitled to no more than sheer Law.

The PRESIDENT.

If the application for relief was to the equity of the Court, I should not incline to afford it upon the facts in this case, but the Plaintiffs rely on their legal rights, which they have never relinquished, and come into the Court of Chancery, because, in the state of the parties, the whole controversy could not be settled in a Court of Law, and for the settlement of the accounts of the Defendant, Elizabeth Myers, both as Administratrix and Guardian. As to the former, there is now no controversy, it having been admitted by the parties to have been correctly settled. As to

455 *the latter, her account as Guardian, she admits, in her Answer, that when she qualified as such, she received the estate into her hands in that capacity, but she insists, that the Plaintiffs have no claim against her, as the whole of it was expended on their maintenance, and some small advancements. For the latter, she has credit. By the 26th section of the Act concerning Guardians, her defence as to the former is forbidden. Under that section, whatever might be her motives, she could expend no part of the principal of the estate on the maintenance of her Wards, without the approbation of the Court. Such a defence could not be made at Law, and to allow it in a Court of Equity, would be to repeal the Statute. Beyond the interest upon the principal estate, she was not at liberty to go. The Decree was therefore correct in disallowing any credit for the principal so expended; but, as she might expend the interest on the maintenance of her Wards, it is erroneous is not allowing her a credit to that amount, until her Wards respectively attained the age of twenty-one years. It is, therefore, to be reversed, and the Decree agreed upon by a majority of the Court entered.

Decree of the Court.

The Court is of opinion, that the said Decree is correct in disallowing any credit for the principal expended by the Appellant, Elizabeth Myers, in the maintenance of her Wards; but the same is erroneous in charging her with any interest before her Wards attained the age of twenty-one years; therefore, it is Decreed and Ordered, that the said Decree be reversed and annulled, and that the Appellees do pay unto the Appellants, their costs by them expended in the prosecution of their Appeal aforesaid, here. And this Court proceed-

ing to pronounce such Decree as the said Chancery Court ought to have pronounced, it is further Decreed and Ordered, that the Appellant, Elizabeth Myers, who was Guardian of the Appellees, Hannah 456 Wade, *Susan Purcell, Thomas Myers and John Myers, and the Appellants, Lewis and Hough, her securities, do pay unto the Appellee, John Wade, in right of his wife Hannah, the sum of three hundred and seventy-nine dollars and seventy-six and a half cents, with interest thereon at the rate of six per centum per annum, from the eighteenth day of May, eighteen hundred and seven, (when she arrived at the age of twenty-one years,) till paid; to the Appellee, Joseph Purcell, in right of his wife, Susan, the sum of three hundred and seventy-five dollars, and twenty-six and a half cents, with like interest thereon from the eighth day of December, eighteen hundred and five, (when she arrived at the age of twenty-one years,) till paid; to the Appellee, Thomas Myers, the sum of four hundred and three dollars and seventy-six and a half cents, with like interest thereon from the fifteenth day of April, eighteen hundred and nine, (when he arrived at the age of twenty-one years,) till paid; to the Appellee, John Myers, the sum of four hundred and three dollars and seventy-six and a half cents, with like interest thereon from the twenty-seventh day of March, eighteen hundred and eleven, (when he arrived at the age of twenty-one years,) till paid: And also, that the Appellants do pay unto the Appellees, their costs by them in the said Chancery Court expended.

457 *Isaac Hite v. James Long.
May, 1823.

Trover*—Action of—Waiver of Trespass.—If a plaintiff bring Trover or Detinue, to recover a horse, and Trespass, for taking the same horse, a Judgment for the Defendant in the Action of Trover or Detinue, is a good bar to the Action of Trespass; for, by bringing Trover or Detinue, he waives the Trespass.

Same—Trespass—Damages Recoverable in Each.—In Trespass, he might have recovered damages, not only for the force and violence, but for the value of the horse; but, having elected to sue for the horse only, or its value, he is bound by his election.

Pleading and Practice—One Cause of Action—Two Suits.—Case at Bar.—A Plaintiff cannot be allowed to sever one cause of action, and carve two suits out of it; therefore, if the Trespass consists in the Defendant's stopping the Plaintiff's wagon and team, and taking by force from the team a horse claimed by the Defendant, the Plaintiff might in Trespass recover damages for the injury in stopping his team, delaying him &c., as well as the value of the horse taken; but, if he elects to bring Trover for the horse taken, he cannot maintain Trespass for stopping the team &c. for it was one act.

Trespass†—Declaration—Allegations.—A Declaration

*Trover.—See monographic note on "Trover and Conversion" appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

†Pleading and Practice—Judgment for Part of Entire Cause of Action—Effect.—It is a general rule that a judgment in an action for any part of an entire cause of action is a bar to another action founded on any other part of the same entire cause of action. Zetelle v. Myers, 19 Gratt. 71, citing the principal case as its authority.

The principal case is also cited in Wilson v. Bank of Mt. Pleasant, 6 Leigh 576; Sangster v. Com., 17 Gratt. 183.

‡Trespass.—See generally, monographic note on "Trespass" appended to Quarles v. Lacy, 4 Munf. 251.

in Trespass, which does not allege that the plaintiff has property in the thing taken, is bad on demurrer.

Same Case at Bar.—If a Declaration in Trespass charges the Defendant with taking a horse from the Plaintiff's possession, but not his property, and with stopping his waggon and team, the residue of the horses being the Plaintiff's property, a plea, which avers that this horse was geared with the others, that the Plaintiff's waggoner (the Plaintiff not being present) endeavoured to carry off the Defendant's said horse, by driving his team violently, and that the Defendant stopped the team to retake his horse, using no more force than was necessary for that purpose, is a good plea, the Defendant being justifiable in thus stopping the team for that purpose.

The statement of the case, as exhibited by the Record, is so fully set forth by the Judge who delivered the opinion of the Court, that it is unnecessary to present it here.

The case was argued by Stanard for the Appellant. There was no Counsel for the Appellee.

May 28. JUDGE COALTER.*

This is an action of Trespass, instituted by James Long, against Isaac Hite, in the Superior Court of Law for Frederick County, on the 31st July, 1818.

458 *The first Declaration filed in the cause (at October Rules, 1818,) is for this: that the said Hite, with force and arms, stopped, in the highway, a waggon and team belonging to the Plaintiff, and then in his possession, and took therefrom one of the horses belonging to the team of the Plaintiff, in possession of the Plaintiff, and the property of the Plaintiff, of the value of \$200, and converted him to his own use, and other wrongs, &c. to the Plaintiff did, against the peace of the Commonwealth.

At May Term, 1819, the office Judgment was set aside, and the Defendant pleaded not guilty, and issue was taken thereon, and leave was given him to file additional pleas, and the cause was continued.

The Record then proceeds to state, that the Defendant filed the following pleas, to wit: First, that the horse in the Declaration alleged to have been taken from the team of the Plaintiff, was the property of the Defendant, wherefore he took him peaceably, and without force from the said team, which is the same trespass in the Declaration supposed, and traverses that he committed any other trespass, or used any force in taking the horse. Secondly, that on the day, &c., a waggoner, whose name then was, and yet is unknown to the Defendant, was then and there driving the supposed waggon of the Plaintiff, and had the horse in the Declaration mentioned, of the property of the Defendant, without his consent, and against his will, geared and harnessed to the waggon, and driving him therein, whereupon the Defendant demanded the horse, he the Defendant having the right of property, and the right of possession, which was refused, and the waggoner forcibly and with great speed, drove the said waggon, in order to prevent the Defendant from re-taking the said horse, and to prevent his being carried off, and to re-gain his horse, the Defendant gently laid his hands upon the horses in the waggon, and peaceably took

the said horse, being his own property, &c.

Then follows this plea: And the said Defendant, to the original Declaration in this cause, and for plea since the 459 *last continuance, says, that heretofore, to wit, on the 31st July, 1818, the Plaintiff sued out his Capias in Trover for a certain horse, against the Defendant in the Superior Court, &c., wherein it was so proceeded, that at the last Term, &c., there was a Judgment for the Defendant, and that the horse in the said action of Trover claimed, and the horse in the said original Declaration, are one and the same, and not different, &c. To this plea the Plaintiff demurred, alleging for cause, that the action of Trover was different for the subject matter of this suit: there the Plaintiff sought to recover the value of the horse; in this suit he seeks to recover damages for a trespass.

All this seems to have been done at the May Term, 1819. The other pleas (except that of not guilty,) seem to have stood without issue, either in fact, or law, being taken on them.

At May Term, 1820, the cause came on, upon the demurrer to the Plea, and Judgment on it was given for the Plaintiff. Whereupon, the Plaintiff moved the Court for leave to amend his Declaration, by adding a new count. This was objected to by the Defendant, because if the Declaration was defective, Judgment on the demurrer ought to be against the Plaintiff, and if not defective, leave to amend ought not to be given, as he had no right to make out a new case: also, because the Defendant did not ask leave to amend his plea, and because a Judgment stood against him on one plea, and there was an issue made up on another plea to the Declaration in its original form. But the Court permitted the Plaintiff to amend, because the amendment sought by the Plaintiff was not to make out a new case; not because the present Declaration was defective in point of Law, but because the Plaintiff wished to state the same cause of action more fully, distinctly, and at large, to enable the Jury more clearly, and correctly to understand the nature of the injury complained of. The amended Declaration was then filed.

It is a complete Declaration, though possibly is only to be considered a second count to the first Declaration, as 460 *neither that Declaration, nor the pleadings thereon, were withdrawn. This Count, or Declaration, charges that the Defendant, with force and arms, seized, and took from the waggon of the Plaintiff, a horse, then and there in possession of the Plaintiff, of great value, say \$300, and converted and disposed of him to his own use, and also for this, that the Defendant, with force and arms, &c., and aided by a troop of his negroes, &c., whilst the Plaintiff's waggon and team were peaceably travelling on the highway, &c., did forcibly take from the team of the Plaintiff, a bay horse, then and there in the use and possession of the Plaintiff, and employed in drawing his waggon, &c., whereby the waggon and team of the Plaintiff, were detained in the public highway, and interrupted in the prosecution of their trip, &c.,

*Absent. JUDGE GREEN.

and the Plaintiff subjected to great trouble and expense, and loss.

At October Term, 1820, the cause was continued; at May Term, 1821, it appearing to the Court that the amended Declaration was filed before the last Term, and the Defendant not having entered any plea, it was ordered, that he plead on or before the tenth day of the Term. During this Term, the following proceedings were had. On motion of the Defendant, he has leave to withdraw his plea of not guilty, and by permission of the Court, filed a special plea, which is said to be in the words following: That on the day when the alleged trespass is supposed to have been committed, and for a long time before and after, the said horse in the Declaration set forth to have been taken by the Defendant, was, and continued to be the property of the Defendant, and was then, at &c., in the possession of a certain waggoner, whose name was, and yet is unknown to the Defendant, who had before that time, without the consent, and against the will of the Defendant, and against right, obtained and held the possession of the said horse, and refused to deliver him to the Defendant, though he lawfully and peaceably demanded him; and then and there violently drove the said waggon and horses, of purpose to eloin the said horse, wherefore
461 the Defendant, of "purpose to regain possession, then and there did lay his hands upon the horses in the said waggon, then and there being in possession of said waggoner, and did take him out of the said waggon, as he might lawfully do, &c., which is the same trespass, &c., without that, that he had no farther, or other force than was necessary to regain the possession of his property aforesaid, wherefore he prays Judgment, &c., without that, that the Plaintiff was in possession of said waggon, or said horse, or that the Defendant used force, as in the said count is supposed.

And for further plea, he says nearly as last above, except after alleging the horse to be his property, and in possession of the waggoner who was driving the team, he says, (the said Plaintiff then and there not being present,) and when he alleges that the horse was the property of the Defendant, he says, (and not the property of the said Plaintiff,) and so going on as in the other plea, and concludes, that in order to regain his said horse, he did lay his hands upon the horses in said waggon, without using any other or further force than was necessary, &c.

The Defendant also demurred to the Plaintiff's Declaration, for that it is double, and wants form.

The Plaintiff demurred to the first plea: 1. Because the matter therein stated, if true, is no justification of the trespass: 2. Because it might be given in evidence under the general issue, in mitigation of damages: 3. Because it is double, relying on the right of property, and the use only of such means as were necessary to recover possession. He also demurred to the second plea, for the same reasons.

The Plaintiff joined in the demurrer to

the Declaration, but no joinders are stated in demurrer to the pleas.

At October Term, 1821, the Court overruled the demurrer to the Declaration, and sustained the demurrers to the pleas. The Defendant then pleaded not guilty, and the cause was continued.

At October Term, 1824, a Jury was sworn, well and truly to enquire of damages, who assessed damages to \$500, but a motion being made for a new trial, the Plaintiff released one half of that sum, and Judgment was rendered for \$250.

There was a Bill of Exceptions to two opinions of the Court, but which I consider unnecessary to notice, as it seems to me the case must be decided on other grounds; but, were it necessary, as at present advised, I think they were both erroneous.

The Judgment in the Action of Trover, decided the question as to the right of property in the horse, which was the main subject to controversy; but the Plaintiff seems to be of opinion, in which he was sustained by the Court, that although he brought his action of Trover to recover the value of the horse taken away, that he had a right also to bring Trespass to recover damages, as well for any violence, or breach of the peace, in taking that horse, as for the trespass in stopping the Plaintiff's team, in order to take him. These questions were decided on the demurrer first filed, and therefore the first question is, what Judgment ought to have been given on that demurrer?

The Declaration in this case, first filed, as above stated, covered the whole ground of complaint. Under it, the Plaintiff could recover as well the value of the horse taken away, as the damages sustained by stopping his team, &c. He elected though, also, to bring Trover, and the question is, whether that was not in Law a waiver of the whole trespass, as well that alleged to be committed in taking the horse, as in stopping the team, all being one act? A party is not precluded from bringing Trover, or Detinue, because the taking was violent. He may waive the trespass, and admit, as these actions do, that the property came lawfully into the possession of the Defendant, and this the Defendant cannot deny or traverse, so as to defeat the action, by showing that he took tortious possession. As to the horse taken away, I cannot perceive how the Plaintiff is to waive this trespass, so as to recover the value in

Trover, and maintain another action
463 for the trespass "so waived. If he can, the Defendant ought to be at liberty to plead, that he took it tortiously, in order that he may not be vexed by two suits for the same thing. It is laid down in 20 Vin. Abr. 540, tit. Trespass, and the cases there referred to, that the pendency of an action of Detinue, or Replevin for the same property, is a good plea to an action of Trespass. This would close the question, it seems to me, so far as to the trespass in taking away the horse, but, he also stopped the team of the plaintiff, of which this horse was one. It is all one act, though, and one cause of action. The party can go for the whole in Trespass, or

he may elect to sue in Trover, or Detinue. I do not see how he can sever one cause of action, and carve two suits out of it. In his amended Declaration, he seeks to present this question more plainly and distinctly, by dropping his claim to property in the horse; but still goes for the violence and force in taking him, as well as for the trespass in stopping the team. Had the original Declaration been filed in this form, it would perhaps have shown a disclaimer of any property in the horse sued for in Trover; and therefore, I presume it was, that the Declaration retained its original form, until after that suit was decided. This, it seems to me, is a pretty apt commentary on this effort to split one cause of action into two: but, if the Declaration had been originally so filed, claiming merely to recover damages for a trespass supposed not to be waived by the other action, it seems to me that the plea would have been equally good. If it would not, it must be because the new count presented a different cause of action, and to which the former pleadings would be no answer, which would be contrary to the leave asked.

If the Plaintiff, instead of having Judgment entered on his demurrer, had moved to withdraw it, and to amend his Declaration, or to withdraw that Declaration and file a new one, and had filed the one now in the Record, the Defendant could have pleaded the action of Trover, and the other matters specially pleaded by him, and then there could have been no doubt, but that all these matters, if proper in defence, *would have availed him. The Plaintiff not having done this, (concerning the regularity of which I give no opinion,) but leaving the Judgment of the Court on the first demurrer to stand in force against the Defendant, we are necessarily to enquire, whether that Judgment was correct, or not. Thinking it was not, we must then do what that Court ought to have done, and no doubt would have done, (unless there had been a motion to withdraw the demurrer on the part of the Plaintiff,) that is, we must enter Judgment for the Defendant. But, if in this I am wrong, and if the case must be considered as standing on the new Declaration, and the pleadings to it, still I think Judgment must be given for the Defendant.

The first count in that Declaration, is for a trespass in taking a horse, not claimed in the Declaration to be the property of the Plaintiff. This is bad on the demurrer filed. 6 Bac. Abr. 600, tit. Trespass, I.

The second is trespass in stopping his team, and taking this horse, not claimed as the Plaintiff's property, from it, there being no dispute about the residue of the team, but that it belonged to the Plaintiff. The Defendant justifies by averring this horse to be his property; that he was geared in the team with the Plaintiff's horses, and that the waggoner, the Plaintiff not being present, endeavoured to carry him off by violently driving the team, &c.; and that he stopped the team, in order to re-take his horse, using no more force than was necessary for this purpose.

If he was justifiable in thus stopping the team for this purpose, (Bac. Abr. tit. Trespass, I.) as I think he was, it was a proper matter for a plea; and the matter so pleaded being confessed by the demurrer, Judgment must be for the Defendant.

The Judgment is therefore erroneous, and must be reversed, and entered for the Appellant, and that the Appellee take nothing by his Bill, &c.

JUDGES CARR, CABELL, and the PRESIDENT concurring, the Judgment was reversed.

465 *Cary Selden v. Benjamin James, Executor of R. Buchan.

May, 1828.

Sale of Land—Interest on Purchase Money—Excuse for Not Paying—Case at Bar.—The vendee of land, on a credit, to whom a Deed is made, and possession given, is not excused from paying interest on the purchase money, the payment of the principal having been delayed by a third party, who set up an adverse claim, (and commence a course of litigation, which continued for ten years, but which terminated in favor of the vendee's title,) the vendee having continued all that time in possession, and enjoyed the issues and profits.

Same—Same—Same—Same.—The vendor only covenanted to sell and convey a perfect title, (which was so conveyed, as proved by the result of the trial,) not that there should be no claimants, who would sue for it: he therefore committed no breach of his covenant, and this is no ground to excuse the vendee from paying interest.

Same—Same—Same—Same.—The trouble and expense of defending the suit, is what every one, who is sued, is exposed to, and the vendee's costs cannot be set off against the interest.

Same—Same—Same—Same.—To excuse the vendee from paying interest during the time that the adverse claim is in suit, it is not sufficient that he should be ready and willing to pay the principal: it ought also to appear clearly, that he did in fact keep the money useless and unproductive by him, and that he gave the vendee notice that it was so unproductive.

Same—Same—Same—Same.—Although the adverse claim in this case was by the Commonwealth, who proceeded to escheat the land by Inquisition, (which was opposed by the vendee by a Monstrans de Droit, who defeated the claim) the supposed seizin in Law into the hands of the Commonwealth by the office found, and the supposed liability of the vendee, to the Commonwealth, for the rents and profits, did not prevail over the actual seizin of the vendee, and as he actually enjoyed the issues and profits during the whole time, and by the result, became exempted from all liability for them to the Commonwealth, that supposed legal seizin of the Commonwealth, forms no excuse to the vendee for not paying the interest to the vendor.

Benjamin James, surviving Executor of Robert Buchan, filed his Bill in the Chancery Court of Fredericksburg, against Cary Selden, setting forth, that the said Buchan, by his Will, dated 1803, directed that his land should be sold, and that his Executors might sell on credit, if they could sell it on better terms, and that the money arising from the sale should be re-mitted to his two brothers: that the Testator died seised and possessed of a tract of land in Stafford; that the Plaintiff and J. M. Daniel proved the Will, qualified as Executors, and entered into the possession

466 *of the land: that they sold it at public auction, on the 20th March, 1804, on a credit of one and two years, to bear interest from the date, if not punctually paid, and Selden became the purchaser of 236 acres of it, at four pounds five shilling per acre, and immediately thereafter, paid \$100 of the purchase money, entered into the possession of the land, and

has retained possession of it ever since; that the Plaintiff and his Co-Executor executed a Deed to the said Selden, acknowledged it, and had it recorded: that Selden did not know of this at the time it was done, but being afterwards informed of it, approved of it, and claimed title to the land so conveyed: that shortly afterwards, an attempt was made, on behalf of the Commonwealth, to escheat the land, and an Inquisition of Escheat was returned to the District Court of Fredericksburg, and Selden filed a Monstrans de Droit, and Judgment was rendered in his favor by the District Court, which was affirmed by the Court of Appeals in 1816: that the Attorney General afterwards exhibited a Bill to the Chancery Court, claiming the purchase money in behalf of the Commonwealth, but the Bill was dismissed: that during these proceedings, Selden refused to pay the purchase money, or to give his bonds, but promised and agreed to pay the same when the case should be decided, and his title declared good: that after the decision in his favor, the Plaintiff applied to him to pay the purchase money with interest, and to execute the agreement; but he refuses to pay the interest, although the title has been decided in his favor, and he has constantly had the possession, and enjoyed the profits of the land. He therefore prays, that the Defendant may be compelled to execute the contract, and pay the balance of the purchase money, with interest on the instalments, as they become due, and that on failure thereof, before a short day, the land may be sold.

The Defendant, by his Answer, admitted the sale and purchase, as set out by the Bill: that before the sale, the Executors declared, that the lands were unincumbered, and *that a good and indefeasible title to them would be made: that he became the purchaser under the expectation that there would be no difficulty as to the title, and shortly afterwards entered into the possession of the land, and has retained it ever since: that he paid a part of the purchase money: that he knew nothing of the Deed till after it was executed and recorded: admits the proceedings on the part of the Commonwealth: he says, that pending those proceedings, he was advised it was not safe for him to pay the purchase money: that he was subjected, by the controversy, to considerable costs and expenses: that he was prevented, by the uncertainty of the title, from making such improvements in buildings, on the soil as he would have done, had the title been clear, as he believed it was, when he purchased: that he commenced building a barn and threshing machine, which he was obliged to abandon for the same cause; the materials rotted, and the labor was lost: that the Executors removed to distant parts in 1808, and although they left an agent, yet, if he had paid the money to him and had lost the land, he could not have recovered it back, without great trouble and costs: that he was at all times ready and willing to pay the purchase money after it became due, even pending the suit, upon being properly indemnified against the loss of the

land: that he had every reason to believe, that if he had paid the money, the Executors would immediately remit the money to Scotland to the devisees, so that he would have been without indemnity: that there was no warranty in the Deed, nor any stipulation by the Executors to make any, and therefore, he thought himself not bound to pay the purchase money: that a few acres of the land conveyed to him are in the adverse possession of another person, and was so at the time of the sale and conveyance: for these reasons, he is advised that he is not bound to pay interest on the purchase money pending the controversy: that at all events, he is not bound to pay the interest from the day of sale, in default

of paying the principal punctually: 468 that if he is decreed to pay any interest, he is entitled to a set-off for the costs and expenses incurred in defending the title; and that he ought only to pay for such part of the land as was in possession of the Testator, and to which he had a clear title.

The Chancellor, being of opinion that the Defendant was not responsible for the land in the adverse possession of another, nor for interest on the purchase money from the time of the sale, but that he is responsible for the interest from the respective periods when the instalments became due, decreed accordingly. The Defendant appealed.

Stanard, for the Appellant.

Daniel, and Leigh, for the Appellee.

May 28. JUDGE CARR.*

In the year 1803, Robert Buchan made his Will, by which he directed (among other things) that his Executors should sell his lands, &c. and remit the proceeds of sale to his brothers, David and James, residents of Scotland, to be equally divided between them.

This Will was admitted to Record in February, 1804, and in May following, the Executors sold the land, at public outcry, to the Appellant Selden. On the 10th July, 1805, they executed a Deed for the land, which was recorded on the 9th December, 1805. On the 10th December, 1805, an Inquest was held by the Escheator, and a Jury, and this land was escheated to the Commonwealth, for defect of heirs of Buchan. In May, 1806, Selden filed a Monstrans de Droit in the Fredericksburg District Court, claiming the land under the Will, the sale, and the Deed of the Executors, and praying Judgment. An issue was made up, a trial had, a special verdict found, and in October, 1806, a Judgment 469 on the verdict entered in *favor of Selden: from this Judgment an appeal was taken, and in April, 1816, the Judgment was affirmed by this Court. Selden took possession of the land in 1804, immediately after his purchase, and has not been removed from it for a moment, by these proceedings. The Bill now before us is filed by the surviving Executor, to compel a payment of the purchase money remaining due with interest, and in default

*The PRESIDENT did not sit in this cause, being connected with the Appellant: nor did JUDGE GREEN, he having decided the cause in the Court below.

of payment, to have a Decree for the sale of the land. The Answer admits the justice of the claim generally, but insists that under the particular circumstances, no interest ought to be paid. The Chancellor decreed that interest be paid from the dates when the different instalments became due, and ordered an account, and also a survey, the Answer having stated that a few acres within the bounds of the Deed, were at the time of the sale, and still continued in the adverse possession of another. The appeal is from this order.

The whole argument turned on the question of interest. In his Answer, Selden resists the payment of interest: 1st. Because he was assured by the Executors, that he should have an unincumbered, indefeasible title, without which he would not have purchased. 2dly. That for ten years after he took possession, the title was in litigation, the defence of which cost him much trouble and money, and he was advised that he could not safely pay the purchase money while the title was in suspense. 3dly. That he was always ready and willing, after the money became due, to have paid it, if he could have been indemnified for the loss of the land. To these reasons, the Counsel, in the argument here, added another, to wit, that before Selden had notice of the Deed, the inquisition had been found, the land escheated, and seized in law, (though not in fact,) into the hands of the Commonwealth, and if Selden continued in possession, he was an intruder, liable to the suit of the Commonwealth, and therefore could not be liable at the same time for interest on the purchase money.

470 *With respect to the two first grounds, that the Appellant was to have an unincumbered and perfect title, and that he has been ten years in litigation about it, it does not seem to me that this furnishes any ground for withholding interest. The Executors have not broken their covenant: they sold the land to the Appellant, put him in possession, and made him a Deed. The Commonwealth then advanced a claim to the land, and commenced proceedings to recover it, but this was no breach of the covenant of the Executors. They undertook to sell and convey a perfect title to the land, but not that there should be no claimants who would suit for it. What they undertook they have made good, for their title has thus far proved a perfect one. The trouble and expense of defending the suit, are what all must encounter, who are sued, and raises no claim either in Law, or in Equity, against the Executors. The event has proved that there was no ground for the suit.

Thirdly. The Appellant was always ready and willing to pay the money, if he could have gotten indemnity. Without stopping to enquire whether he had a right to require such indemnity in an executed contract like this, it is obvious to remark that, according to the best settled rules, the statement that he was ready and willing to pay, is wholly insufficient to protect him from the payment of interest. He was then in possession of the land, receiving the issues and profits; he was also in

possession of the money, the price of the land, and it must be a strong and clear case which could protect him, under these circumstances, from paying interest; a case, showing that he had a right to retain the money, that he did in fact keep it useless and unproductive by him, and that he gave the other party notice that it was thus unproductive. This is settled in many cases. Thus, in *Powell v. Martyr*, 8 Ves. 146, during the delay which took place in discussing the title, the purchaser had the money deposited in the hands of his Solicitor, to be paid so soon as the objections to the title were cleared, and he proved

this, and also that his Solicitor
471 *told the Solicitor on the other side, that the money was ready; but the purchaser was in possession of the land, and because he did not give notice that the money was lying unproductive, Sir William Grant lays it down as settled, that he must pay interest. This was a case, too, where the delay proceeded from the vendor. See *Sugden*, 319-20-21. There are many other cases. In the case before us, the vendors were in no default: they had put the vendee in possession, and made a Deed conveying him a perfect title; and though he states that he was ready and willing to pay, if he could get security for the title, he does not state that he gave the vendors notice of this; nor does he state, nor does it appear in evidence, that in fact the money was ever for a moment lying idle. It must then be taken that he was in the enjoyment both of the land and the money, and in all conscience he ought to pay interest, unless he be protected by the objection taken at the Bar, that by the finding of the Inquest, the land (in Law) was seized into the hands of the Commonwealth, and Selden became an intruder upon her possession, and liable to her for the rents and profits.

With respect to the Common Law doctrine of offices, the office of instruction, and the office of entitling, and whether the finding of the office of entitling carries the seizin and possession to the Commonwealth in all cases, or in those only where the possession is vacant; these points were discussed at the bar with learning and ability, but I shall not enter into an examination of them, as I think the point before us can be well settled by the Act of Assembly. The 7th section of our Law of Escheats, 1 Rev. Co. 295, says, "And if the Inquisition be found for the Commonwealth, and there shall be any man that will make claim to the lands, he shall be heard without delay, on a traverse to the office, *Monstrans de Droit*, or *Petition of Right*; and the said lands, &c. shall be committed to him, if he show good evidence of his right and title to hold, until the right shall be found and discussed for the Commonwealth, or, for the

472 *party, finding sufficient surety to prosecute his suit with effect, and to render and pay to the Commonwealth the yearly value of the lands, if the right be discussed for the Commonwealth." When the office in the case at bar was found, Selden was in actual possession of the land, and he did make claim to it, as his

Monstrans de Droit, filed in the District Court, at their next Term, shows. Being in possession of the land, he would of course continue to hold, until some attempt was made, under the office, to dispossess him. When such attempt was made, it would be time enough for him to avail himself of the terms on which the Act permitted him to retain possession; or, if no attempt were made to turn him out, the District Court perhaps might have required the security mentioned by the Law as a pre-requisite to his filing the Monstrans de Droit, and contesting the title of the Commonwealth. If this requisition had been made, it would have been time enough then, for him to have given the proper security; but no attempt to oust him was made; no security was required of him; the case went on, and he sustained his claim, and proved that the Commonwealth had no pretence of title. Suppose he had been required, and had given the security directed by the Act; it would, in the event which has happened, have been of no effect, for the bond (as directed by the Law,) must have been on condition "to prosecute his suit with effect, and pay the Commonwealth the yearly value of the land, if the right be discussed for the Commonwealth." Now, he did prosecute his suit with effect, and the right, so far from being discussed for the Commonwealth, was discussed for him. Thus, if he had given a bond with surety, in any amount, he would completely have discharged it, by a compliance with the condition, and not a cent could have been recovered on it; and can it possibly be supposed that the Commonwealth, in the event which has happened, would be better off than if bond with security had been given? That after the right had been discussed against

473 her, she could have recovered *from Selden the yearly value of the lands? Surely not: and if not, the argument falls to the ground. He was never liable to the Commonwealth for the yearly profits; he received them, and held the money, and I am most clear that he ought, on every principle, to pay the interest; and that the Decree be affirmed.

JUDGES COALTER, and CABELL, concurred, and the Decree was affirmed.

Archibald Pleasants v. William G. Pendleton.*
June, 1828.

Sale of Chattels—Right of Property—Delivery Necessary to.—In contracts of sale of chattels, a constructive delivery is sufficient to pass the right of

*For monographic note on Sales, see end of case.
†**Sale of Chattels—Right of Property—Delivery Necessary to.**—In contracts of sale of chattels, a constructive or symbolical delivery is sufficient to pass the right to the chattel sold, and put it at the risk of the vendee: the cases cited in *Pleasants v. Pendleton* prove this. Elam v. Keen, 4 Leigh 335.

It is the admitted principle of the common law, that the title to personal property passes by the actual delivery or by a constructive delivery of it, as in the case of *Pleasants v. Pendleton*, 6 Rand. 478, and many like cases. Mortgages and deeds of trust of personal property which are directed by statute to be recorded, (by which the title passes without actual delivery) do not impair this principle of the common law. A bill of sale of personal property absolute on its face, is not within the statute, and need not be recorded to give any greater validity to it; and if recorded, it does not effect this

property: an actual delivery either in fact, or law, not necessary.

Same—When Title Passes;—Case at Bar.—One merchant sells to another one hundred and nineteen barrels of fine flour, lying in a certain ware-house: the barrels have on them the brands of eight different mills: the price is agreed on; the vendee gives a check on the Bank for the agreed price of the whole quantity: the vendor gives at the same time to the vendee a bill of parcels, specifying the number of barrels of each particular brand, and an order on the warehouse-man for the flour, and a receipt in full for the price of the flour.—This is a complete, and execut d contract, and the property in the flour was passed to the vendee. The warehouse, and all its contents, including the flour and the check, with other papers of the vendor, being burnt the next morning, before the actual delivery of the flour, the loss is the vendee's, and the vendor may recover the price.

Same—Same—Same.—It having been proved to be the usage, when barrels of flour are delivered by a warehouse-man to a purchaser, to charge the cooperage, if any is needed, to the storer, and also the storage, (waiving any lien on the flour for such storage) and to deliver the flour to the order of the storer when called for, such a sale as that above mentioned, does not come within the class of cases where something remains to be done by the vendor to complete the contract.

Same—Same—Same.—In this case there were in the same warehouse at the time of the sale, a great many other barrels of fine, and superfine flour, belonging to other persons, but none of them had the same brands as those the subject of this sale: and the vendor, instead of one hundred and nineteen, had in fact one hundred and twenty-three barrels of fine flour: that is, two more of one of the brands, and two more of another of the brands, than he had actually sold: but it was proved that between barrels of the same brand and quality, there is no difference in price. The one hundred and twenty-three were easily distinguishable from the whole mass in the warehouse: and although the one hundred and nineteen were never separated from the other four, yet the former number belonged to the vendee, and the latter to the vendor, and it was of no consequence, which were the individual barrels which should be subducted as unsold, all the barrels of the same brand being exactly of the same value. The property in the one hundred and nineteen barrels passed to the vendee, notwithstanding the want of separation.

Trover's—When It Lies—Case Approved.—The case of Jackson v. Anderson, 4 Taunt. 24 (in which it was held that Trover would lie for 1960 Spanish dollars, intermixed in a barrel which contained 4718,) much approved of.

Contracts—Interpretation—Resort to Usage.—An established usage, constitutes the common understanding of parties, and ought to be resorted to, as the interpreter of the contract. An usage, that flour in store is sold by order, and passes by the transfer of the order from hand to hand, without actual delivery of the flour, is a reasonable usage, and ought to be enforced as part of the contract.

Instruction—Law.—An instruction of the Court to the Jury, that if they believe the evidence (reciting it) in which there is no contrariety (except in a matter in which the Court takes that which was given for the Defendant to be true,) the Plaintiff had a right to recover in the action, not speaking of the amount of the damages, is not erroneous. It is an instruction on the law, not on the fact.

common-law principle. Bird v. Wilkinson, 4 Leigh 272. On the same subject the principal case is cited in Daniels v. Conrad, 4 Leigh 408.

†**Same—When Title Passes.**—The principal case is cited with approval on this subject in Harall v. Willis, 15 Gratt. 447; State v. Hughes, 23 W. Va. 722; Hansbrough v. Thom, 8 Leigh 154; Bloyd v. Pollock, 27 W. Va. 180; Morgan v. King, 23 W. Va. 6.

†**Trover.**—See monographic note on "Trover and Conversion" appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

†**Contracts—Interpretation—Resort to Usage.**—As holding that an established usage constitutes the common understanding of parties and ought to be resorted to as an interpreter of the contract the principal case is cited in Connolly v. Bruner, 48 W. Va. 71, 35 S. E. Rep. 934.

†**Instructions—Law.**—See monographic note on "Instructions" appended to Womack v. Circle, 29 Gratt. 193.

The principal case is cited in Davis v. Miller, 14 Gratt. 22.

This was an action on the Case, brought by William G. Pendleton, in the Superior Court of Law for Henrico County, against Ralston & Pleasants. The Declaration contained various counts. The first count demanded 416 dollars 50 cents, on account of one hundred and nineteen barrels of fine flour, sold Defendants at that price, and alleged an assumpsit to pay that sum for the flour. The second count was for the same quantity of flour, and charged an assumpsit to pay so much money as the flour was reasonably worth, with an averment that it was reasonably worth the said sum of 416 dollars 50 cents. The third count was for money had and received by Defendants, to Plaintiff's use. The fourth count charged that the Defendants were indebted to the Plaintiff, in the sum of 416 dollars 50 cents, by a certain check drawn by them, on the Bank of Virginia, and delivered by them to the Plaintiff, in consideration of one hundred and nineteen barrels of fine flour, before that time sold and delivered to them, by Plaintiff, at their special instance and request, which said check so by them drawn and delivered to the Plaintiff, was in fact before presentation for payment, destroyed by accidental fire, and the amount thereof, nor any part of it, has been received by Plaintiff, nor have the said Defendants renewed the said check to Plaintiff, and avers notice of the destruction of said check, on the part of said Defendants. To this Declaration, the Defendant Archibald Pleasants, pleaded non-assumpsit, (the other partner, Ralston, having been returned no inhabitant, and the suit abated as to him,) to which Plaintiff replied generally. The Jury found a verdict for Plaintiff, and assessed his damages to 416 dollars 50 cents, with interest from 20th March, 1820, until paid; and Judgment was entered accordingly, against Archibald Pleasants.

The questions in this case, arise out of a Bill of Exceptions taken at the trial, by the Defendants, to certain opinions delivered by the Court.

That Bill of Exceptions is as follows, viz:

"Memorandum. That on the trial of the issue joined in this cause, evidence was introduced for the purpose of proving that on the 20th of March, 1820, the Plaintiff sold to the Defendant, one of the mercantile firm of Ralston & Pleasants, one hundred and forty-one barrels of fine flour, of the Richmond inspection, with certain specific mill brands on them, agreeably to a list containing the number of each brand, exhibited to the Defendant, at \$3 50 per barrel, then stored in the warehouse of J. & J. Fisher, jr., in said city, which list is in the hand-writing of the Plaintiff, in the words and figures following, to wit: 'Pedlar, 62, very good; Rose's, 26; Bent Creek, 7; Fredonian, 10; Rocky Creek, 18; D. S. Garland, 13; Rockford, 5; 141 barrels, \$3 50, \$493 50 cents.'" That the Plaintiff at the same time received from the Defendant, a check on the Virginia Bank, for \$493 50 cents, the whole amount of the price of the said one hundred and 476 forty-one barrels of fine flour, and

gave the Defendant an order on the warehouse-keepers for the flour; that this sale was effected before two o'clock of the said day, though on this point there was a variance in the evidence; a witness stating that he believed that it was at a later period: that in the course of the same day, and in the evening, the Plaintiff finding that he had mistaken the number of barrels of the fine flour which he had stored in the said warehouse, sent to the Defendants a corrected list, reducing the number of barrels of fine flour to one hundred and nineteen; which list, as corrected, is in the words and figures following, to wit: 'Pedlar, 62, very good; Rose's, 2 only; Bent Creek, 7; Fredonian, 10; Rocky Mills, 20, (instead of 18;) D. S. Garland, 13; Rocky Ford, 5:' That thereupon the former order was given up by the Defendant, and the check by the Plaintiff: that a new bargain was then made, by which the one hundred and nineteen barrels of fine flour, of certain specified mill brands, then stored in the warehouse of the said J. & J. Fisher, jr., were sold by the Plaintiff, to the Defendant, as one of the firm of Ralston & Pleasants, merchants in Richmond: that the Plaintiff gave the Defendant an order on the said J. & J. Fisher, jr., for the delivery of the said one hundred and nineteen barrels of fine flour, by specific numbers and brands, which order is in the words and figures following, to wit: 'Messrs. John & J. Fisher, jr., Gentlemen, Deliver to Messrs. Ralston & Pleasants, one hundred and nineteen barrels of Richmond fine flour, which are stored with you, of the following brands, viz: Pedlar, 62 barrels; Rose, 2 barrels; Bent Creek, 7 barrels; Fredonian, 10 barrels; Rocky Creek, 20 barrels; D. S. Garland, 13 barrels; Rockford, 5 barrels. Yr. mo. Wm. G. Pendleton. Richmond, 20th March, 1820:' That the Plaintiff rendered to the Defendant a bill for the same, amounting to 416 dollars 50 cents, passed his receipt for the amount thereof, and received from the Defendant a check on the Bank of Virginia, for the said sum of 416 dollars 50 cents, being the stipulated price for 477 the said one hundred and nineteen barrels of fine flour: that it is the usage of the Banks in the said city, well known to all the merchants and dealers with the said Banks, in said city, and elsewhere, not to pay any check after three o'clock in the evening: that this last bargain was closed between two and four o'clock in the evening of that day, though there was a variance in the evidence on that point; one witness stating that to be the time, according to his belief, and another that he thought it was between three and five: that at the time of the said sale, the said Plaintiff had also in store in the said warehouse, about three hundred barrels of superfine flour, and that there was also stored therein, belonging to other persons, a number of other barrels of flour, (between two and three thousand,) of different brands, and of different qualities, though there was no flour there other than the Plaintiff's, of the same mill brands with the said one hundred and nineteen: that at the time the said order was given, there

was a considerable fall of rain, and that the rain continued from thence till night: that in fact, as the store-keeper testified, the Plaintiff had at the time of the sale aforesaid, one hundred and twenty-three barrels of fine flour, of the brands specified, stored as above mentioned, viz: two more of Rose's, and two more of Pedlar's brand, than were specified in the said corrected list, and that with this exception, the fine flour of the Plaintiff on hand, and that sold by him, corresponded in respect to the brands on them, and the number of barrels of each brand: that although there is less difference in the market as to price, between the different mill brands of fine, than of superfine flour, yet there is a difference; but that between barrels of fine flour, of the same mill brand, there is no difference whatever: that the said one hundred and nineteen barrels had not, at the time of the said sale, nor at the time of the fire hereafter mentioned, been separated from the said one hundred and twenty-three barrels, nor from the larger parcels stored in the said warehouse:

478 that on the morning of the 21st of March, 1820, before day-break, the said warehouse accidentally caught fire, and it, together with the said flour, was entirely consumed, and that the check aforesaid, for 416 dollars 50 cents, owned by said Plaintiff, and being in his counting room, which was a part of the same building, was consumed also: that the Defendant, about eight o'clock of the morning of the 21st of March, whilst the fire was yet raging, demanded of the said J. & J. Fisher, jr., a delivery of the said one hundred and nineteen barrels of flour, according to the order therefor, which he then produced, but the order was not complied with, it having become by the act of God, impossible: that the Defendant, on the same morning of the 21st of March, directed the Cashier of the said Bank of Virginia not to pay the said check for 416 dollars 50 cents.

"That it was, and is, the usage of the store-house-keepers in the city of Richmond, well known to the merchants thereof, (when the transaction aforesaid took place, and the said flour was stored,) to charge the vendor of the flour with the storage, and to deliver it to his order when called for: that it was not usual for the store-keepers to deliver flour during a rain, nor in the evening after dark, and that the practice was well known to the merchants: But the warehouse-keeper said, in giving his evidence that if the flour had been called for, on that evening, he would have delivered it, notwithstanding the rain, and that he thought it could have been delivered in an hour: that the storage due on said flour, had not, at the time of said fire, been paid: but the warehouse-keeper said, in his evidence, that he would have delivered any flour of the Plaintiff's to his order, on demand, notwithstanding the storage had not been paid, holding him responsible for it, and charging him with it: That it sometimes happens, that the flour, when about to be delivered out, requires cooping, in which case, according to usage in said city, well known to the

merchants thereof, the cooping is done by the storer, at the expense of the vendor; that sometimes out of a 479 *hundred barrels, no cooping is required; sometimes forty out of a hundred barrels require it, and that the average expense of cooping is two cents a barrel, or \$2 for every hundred barrels.

"That it was, and is, in the common course of trade in the said city of Richmond, for flour to be sold by draft or order on the store-keeper, and to pass by that mode of transfer, through many different hands, without actual delivery.

"The evidence on both sides, having been closed, the Defendant by his Counsel, moved the Court to instruct the Jury, that if, in their opinion, the engagement of the Plaintiff was to sell and deliver to the Defendant one hundred and nineteen barrels of fine flour, (as contradistinguished from superfine flour or cross-middlings) of which so many barrels were to be of one mill brand, and so many of others, (as in the corrected list above mentioned,) that this constituted a special contract, and that the Plaintiff on such contract could not recover under the Declaration filed in this cause. But, the Court overruled the motion, refusing to give such instruction. To which opinion of the Court the said Defendant excepted.

"And thereupon the Counsel for the Plaintiff and for the Defendant, argued the law, as well as the facts of the case, before the Jury, and concurred in asking the Court to instruct the Jury on the Law; wherefore the Court did instruct the Jury, that if they were of opinion that the evidence aforesaid, adduced by Plaintiff and Defendant, is true, and proves every fact which it purports to prove, and that the only fact of said evidence, in which there is a variance, (viz: that respecting the time of the evening in which the sale aforesaid was made,) was in favor of the Defendant, (that is to say, if they should be of opinion that the sale was made as late in the evening as five o'clock,) that the Plaintiff had a right to recover in this action; (and in support of this instruction the Court assigned its reason at large, but

480 it is deemed unnecessary, and improper, to place *that argument on this paper;) to which instruction of the Court, the Defendant by his Counsel excepted. The Defendant's Counsel then moved the Court to instruct the Jury, that if, in their opinion, the usage of trade in the city aforesaid, or the contract between the parties, required that the flour, the subject of the said contract, should be, when delivered, in merchantable order, it was incumbent on said Plaintiff to prove to their satisfaction, that the flour aforesaid was merchantable; but the Court declined giving such instructions, 1st. Because the said proposition is partly abstract, not growing out of the evidence, the whole of which is herein before set down, and because, so far as it is relevant to the case, the Court has already given its opinion upon it. 2d. Because after the Court had given its opinion, on the whole Law of the case, upon motion of the Plaintiff's Counsel, with the concurrence of the Defendant's Counsel,

and after an argument from both sides, before the Jury, on the law and the evidence, it is deemed inadmissible and irregular, to receive detailed motions, for instructions to the Jury. And therefore overruled the motion. To which several opinions of the Court, the Defendant by his Counsel excepted."

From the Judgment in this case, the Defendant in the Superior Court, appealed to the Court of Appeals.

The Attorney General and Stanard for the Appellant.

Leigh, and Nicholas, for the Appellee.

June 4. The Judges delivered their opinions.*

JUDGE CARR.

The Appellee sued the Appellant in Assumpsit, on a contract for so much flour sold. The Declaration had several

481 *counts, some special, some general.

The Jury found a general verdict for the Plaintiff for \$416 50, on which Judgment was rendered. On a subsequent day of the Term, the Counsel for the Defendant, with the consent of the opposing Counsel, tendered a Bill of Exceptions to sundry opinions of the Court, given on the trial. The Bill sets out at large what the evidence was intended to prove, and on this statement, several motions for instruction to the Jury are predicated. But one of them was the subject of discussion at the Bar, and to that I shall confine my remarks. The Court instructed the Jury, "that if they believed that the evidence adduced was true, and proved every fact which it purported to prove, and that the sale took place at five o'clock in the evening, (the only fact as to which there was any variance,) the Plaintiff had a right to recover in this action." To enable us to judge of the correctness of this instruction, we must look into the evidence first, and then to the law of the case.

On the 20th March, 1820, the Appellee sold to the Appellant one hundred and forty-one barrels of fine flour, with certain mill brands on them, according to a list stating the number of barrels of each brand. The price was \$3 50 cents per barrel. The flour was stored in the warehouse of J. & J. Fisher. The Plaintiff received from the Defendant a check on the Virginia Bank for the full amount of the price, and executed and delivered to the Defendant an order for the flour on the warehouse man. In the evening of the same day, the Plaintiff finding that he had mistaken the number of barrels, sent a corrected list to the Defendant, reducing the number to one hundred and nineteen barrels. Upon this, the order and check were given up, and a new contract made, by which the one hundred and nineteen barrels of flour, according to the list, were sold by the Plaintiff to the Defendant for the same price, amounting to \$416 50 cents. For this sum the Defendant gave the Plaintiff a check on the Virginia Bank, and the Plaintiff gave a receipt in full, and an order for the flour. The

482 *bill of parcels, (describing the flour very minutely,) and the receipt, are

set out at large. This last agreement was made, (to say the latest,) about five o'clock in the evening. It is the usage of the Banks of Richmond, well known to merchants and others dealing with them, not to pay checks after 3 o'clock, P. M. At the time of the sale, the Plaintiff had in the same store-house about three hundred barrels superfine flour, and there were there also between two and three thousand barrels, belonging to others, of different qualities and brands, but none other but the Plaintiff's with the same brands as the one hundred and nineteen barrels. At the time of giving the order for the flour, there was a considerable fall of rain, which continued till night. At the time of the sale the Plaintiff had in fact four more barrels of fine flour than he sold to the Defendant in the same house, and of the same brands, to wit: two of Rose's and two of Fedlar's brand. Except this, the list corresponded exactly with the fine flour which the Plaintiff had in Fishers' store-house, both in number and brands. Between barrels of fine flour of the same brand, there is no difference in price. On the morning of the 21st March, the warehouse accidentally took fire, and was burnt, together with the check for the price of the flour, and the flour itself; the one hundred and nineteen barrels having never been separated from the four barrels of the Plaintiff, nor the larger parcels belonging to others. The Defendant, on the same morning directed the Cashier not to pay the \$416 50 cents. It is not the practice in Richmond for the keepers of storehouses to deliver flour in the rain, nor after dark; but, this flour, if it had been called for on that evening, would have been delivered, and it could have been done, the store-keeper said, in an hour. It sometimes happens that flour, about to be delivered, wants cooorage, in which case the usage, well known to merchants is, that the cooorage is done by the storer, at the expense of the vendor: sometimes forty barrels in one hundred will want coooring; sometimes not one. It has been, and

483 is the usage of storers* in Richmond, well known to the merchants, to charge the vendor of the flour with the storage, and to deliver it to his order whenever called for. The storer in this case would have delivered any flour of the Plaintiff's to his order, on demand, though the storage was not paid, holding him responsible, and charging him with it. It has been, and is the common course of trade in Richmond, for flour in store to be sold by draft or order on the store-keeper, and to pass, by the transfer of the order through many different hands, without actual delivery of the flour to any.

We are to consider whether, taking all these facts as proved to the satisfaction of the Jury, the Court properly instructed them, that the Plaintiff ought to recover in this action, remarking by the way, that the instruction touches no matter of fact, but matter of law solely; that it does not speak of the recovery, as to amount, or quantity, but merely as to the right: "that the Plaintiff, (if they believed the evidence) had a right to recover," so that if he have a right to recover any part of his

*JUDGES COALTER and GREEN, absent.

demand, the Court was right, and it remained for the Jury to settle the amount.

The great question is, to whom did the flour belong when burnt, for the owner must bear the loss. Was the contract so complete as to pass the property? We will consider this, first, upon the general principles which regulate contracts of sale; secondly, upon the usage found, that flour passes from hand to hand, by the transfer of the order, without the actual delivery of possession.

1st. To charge on a contract of sale, and put at the risk of the vendee, a constructive delivery is enough. An actual delivery, neither in law, nor in fact, is required. It is only necessary that it be such as to pass the entire right of property. A symbolical delivery, as the key of a warehouse where the goods are deposited, will pass them to the vendee. 1 Atk. 171; 1 East. 195; 3 John. Rep. 395. So, if the contract

of sale be complete, though the goods
484 continue *in the warehouse where stored at the time of sale, under an agreement to be free of storage for a certain number of days, and during that time they be burnt, the vendee must bear the loss. *Phillimore v. Barry*, 1 Camp. 513. So, where the vendor has no further act to do, to ascertain the quantity, quality, or price of the article sold, the vendee must bear every loss by fire, &c. though he could not withdraw the goods from the place of deposit, because the duties were not paid, the fact that they were not paid being proclaimed at the sale, and vendor being in no default for the non-payment between the sale and burning. *Hinde v. Whitehouse*, 7 East. 558. But if by the terms of sale, there remains anything to be done by the vendor in order to render the goods deliverable, a loss subsequent to the sale, and prior to the doing of that act, must be borne by the vendor. If, therefore, weighing be necessary to ascertain the quantity, *Hansom v. Meyer*, 6 East. 614; or some casks remained to be filled up, to make them of one weight, *Ragg v. Minett*, 11 East. 210; or the contents of bales are to be counted, *Zagury v. Firnelli*, 2 Camp. 240; or it be the duty of the vendor to do any other act, for ascertaining the quantity, quality, or price of the article, it is for such part as is not ascertained, at his risk, though the remainder will be at that of the purchaser. See *Shepley v. Davis*, 5 Taunt. 617; *Busk v. Davis*, 2 Mau. & Selw. 397, and many other cases. All these go upon the ground, that by the contract some essential act remained to be done by the vendor, as between vendor and vendee, to the completion of the contract, and whenever this is the case, the property does not pass, but remains in the vendor, and at his risk.

The doctrine of stoppage in transitu, must be cautiously applied to the case before us. It is established Law in England, that if goods be consigned to a merchant, and when they reach him he has become bankrupt, they go to his assignees, though the consignor should remain wholly unpaid, and though when he consigned them,
485 he considered *his correspondents to be in good credit. The harshness

and injustice of this principle is felt, and lamented by the Judges, and they go as far as they can in favor of an unpaid vendor. Thus, in *Hammond v. Anderson*, 4 Bos. & Pull. 70, Sir J. Mansfield, Ch. J. says, "the right of stopping in transitu is a favourable right, which the Courts of Law are always disposed to assist." In *Scott v. Pettit*, 3 Bos. & Pull. 469, Lord Alvanley, who had tried the cause at N. P. says, "At the trial I could not help forming the wish, that the question, how far the bankruptcy of Beckley had operated as a countermand of his previous orders to Messrs. Wallers, should be considered by the Court. But in looking into the cases, I find that question to be completely closed in Westminster Hall, and that we therefore are bound to hold, that though a bankrupt has altogether ceased to be a trader, his warehouse continues open, for the purpose of receiving goods, and that the assignees have a right to take possession of every thing that may come into their hands, without paying a single farthing, even though the consignors of the goods are not entitled to come in under the commission." And Heath, J. says, "It is much to be lamented, that goods consigned to a bankrupt, which arrive after the act of bankruptcy, as in this case, should ever be considered a part of the bankrupt's effects. The hardship to which this rule of Law had given rise to, in particular cases, was the occasion of introducing the doctrine of stoppage in transitu." It is not strange, that in their wish to restrict, and mitigate this harsh doctrine, the Judges should sometimes decide that goods are still in transitu, when, if the question were between two equally innocent, which should bear the loss, they would, under the same circumstances, have decided that the possession was changed, and the vendee the owner. When the question of transit is decided against the unpaid vendor, we may safely take such a case as applying a
fortiori to a question of mere risk.

486 *Let us now see how these general doctrines apply to our case. Two merchants in the City of Richmond come together; the one is a seller of flour, the other a buyer. The seller exposes his bill of parcels: here I have one hundred and nineteen barrels of fine flour, lying in Fishers' warehouse: these are the particular brands, and number of each brand: my price is \$3 50 per barrel, cash. The buyer says, I will take it. The amount is calculated, for which he gives a check on the Bank. The seller at the same time gives him a bill of parcels, an order on the warehouse man, and a receipt in full for the price of the flour. Is not this a complete, and executed contract? The money paid, and the flour delivered. That the check was made, and understood as a cash payment, none will doubt, who recollects that, since the institution of Banks, the merchants have used them as a place of deposit for their funds, and make all their money payments by checks on them. The receipt in full, too, shows that the seller at least thought that he had gotten his money. It would seem strange, if in return he did not give the flour. An actual, manual delivery

of it, was, from the nature of the article, not to be expected; but fair dealing required that something equivalent should be done, and the vendee would hardly have paid his money, without getting what he considered equal to an actual delivery: he got the order, directing the warehouse man to deliver him one hundred and nineteen barrels of fine flour of specified brands. Excluding all subsequent events from our view, and looking at this contract as the parties did at the moment of making it, can we doubt for an instant, that they considered it complete; that each party had done all that he had to do with it? And the intention of the parties, we know, is of the essence of contracts. This seems to me, the common sense, practical view of the subject, and it is fully supported by the Law. A bargain struck, and payment of the purchase money, vests the property

of the chattel in the vendee. 2 487 Black. Com. 448. This was "admitted in the case of a specific chattel, as a horse; but, the principle is applicable to every case where the subject of the bargain is so designated as to be clearly distinguishable. Thus, in *Hinde v. Whitehouse*, Lord Ellenborough applies it to a sale of sugars at auction, which were afterwards burnt. In support of his opinion, he cites with approbation, a passage from Noy's Maxims, 88, where it is said, that "if I sell my horse for money, and the horse die in my stable between the bargain and delivery, I may have an action of debt for my money, because by the bargain, the property was in the buyer." And it will be observed, that in this case, Lord Ellenborough lays great stress on the meaning of the parties, and "what was considered between them."

Phillimore v. Barry, 1 Camp. 513. This was a sale of rum, forming part of the cargo of a Danish prize, which was lodged in the warehouse of Fector & Minet, of Dover. The terms of sale, were a deposit of 25 per cent. to be paid immediately, and the remainder in thirty day; at the end of that time, purchasers to take away the goods, or afterwards to pay warehouse rent. Thirteen puncheons of this rum, consisting of several lots, were bid for, and knocked down to an agent of the Defendants, for them. Before the thirty days elapsed, the warehouse caught fire, and by means of a quantity of gunpowder lodged in them, were blown into the air. There was no evidence of the deposit being paid. The action was brought by the seller, to recover the price of the rum. The first question was upon their Statute of Frauds, the 17th section of which requires a memorandum in writing, in certain cases, in the sale of personal chattels, in this, differing from ours. Having discussed that point, Lord Ellenborough held, that the property vested absolutely in the purchasers, from the moment of the sale, and there was a verdict for the Plaintiff.

But it was contended, that the case before us falls within that class of cases, where something still remained to be done by the vendor to complete the contract, and 488 therefore "that the property in the flour did not pass, and this some-

thing, it is said, was the cooerage, and the warehouse rent, both of which were chargeable to the vendor. But it must be remembered, that that which remains to be done, must be something essential to put the articles sold, in a deliverable state, and something, too, between vendor and vendee. As to the cooerage it does not appear that any was wanting in this case; and if it was, the usage proved is, that it was done by the storer, at the vendor's expense. As to the warehouse rent, that formed no lien on the flour, for it is proved to be the usage, to charge it, (not upon the flour, but) to the vendor, and "to deliver the flour to his order when called for." Neither of these things, then, show any thing farther to be done by the vendor, nor any obstacle existing to the delivery of the flour. The vendee had only to present his order to the warehouse-man, and the flour would have been rolled out to him, without a moment's delay. The case of *Austin v. Craven*, 4 Taunt. 643, is not like this. That was *Trover* for fifty hogsheds of sugar, of a particular description, to be delivered on board a British ship. The action failed, because the Plaintiff could not prove that the Defendants (who were sugar refiners) ever had on hand the specified quantity and description of sugars sold: here it is in proof that every barrel of flour called for by the order was at the warehouse. Nor is this case like that of *Busk v. Davis*, 2 Mau. & Selw. 397. That was a sale of ten tons of Riga flax, lying at the Defendant's wharf, at 118l. per ton: the flax was in mats, varying in quantity from three to five or six hundred weight. The quantity sold was to be ascertained by weighing by the wharfinger, and to make up ten tons might require the breaking of the flax mats. Before payment for the flax, the vendee became bankrupt, and the vendor sent an order to the Defendant, at whose wharf the flax still remained, not to deliver it. The assignees of the bankrupt brought *Trover*. Lord Ellenborough says, "The question in this case is, whether the property has been so ascertained

489 "as to be considered in law as effectually delivered, the order to deliver having been given to the wharfingers, and entered on their books. That would not, of itself, be sufficient, unless the flax were in a deliverable state, and if farther acts were necessary to be done by the seller to make it so. Here it appears that farther acts were necessary; for, the flax was to be weighed, and the portion of the entire bulk to be delivered, was to be ascertained; and if the weight of any number of unbroken mats was insufficient to satisfy the quantity agreed upon, it would have been necessary to break open some mats in order to make up that quantity. Therefore, it was impossible for the purchaser to say that any precise number of mats exclusively belonged to him." Observe the striking difference between that case and ours. There, the flax was put up in mats, and sold by the ton: to make up the number of tons sold, it might be necessary to break up some of the mats. Here, the flour was put up in barrels, and sold by the barrel: no further process necessary, no weighing,

no barrel to be broken to make up the quantity. There, it was impossible for the buyer to say that any precise number of mats belonged to him. If he could have said so, the argument of the Chief Justice leads directly to the conclusion, that the decision would have been different. Here, the vendee could say what precise number of barrels belonged to him; his order designated number and brand, precisely.

But, I will now cite a case, which (if I mistake not strangely,) will remove the objection, that there was no such separation here, as would enable the vendee to designate any particular barrels as his property; an objection founded on the fact, that there were in the warehouse, and belonging to Pendleton, two barrels of the Rose, and two of the Pedlar brand, which were not sold with the one hundred and nineteen. The case is *Jackson v. Anderson*, 4 Taunt. 24. Saddler, Jackson & Co. consigned to Fielding, residing at Buenos Ayres, goods to be sold for them. He sold the goods,

and sent them an account of
490 *the proceeds, calculated in dollars, and annexed to the following letter.

"Gent: Annexed, I hand you an account of sales of four trunks, nett proceeds, 1,969 Spanish dollars, which amount I shall ship per the *Cheerly*, gun brig, Lieutenant Fularton, who will sail direct for England, in ten or fourteen days," &c. Sometime afterwards, the Plaintiff received the following letter, brought by the ship *Cheerly*. "Gent: I have by this conveyance, sent to my friends, Messrs. Laycock & Co. a bill of lading for a barrel

J. F.

of dollars, marked — 100, in which are
P.

included for you, and on your account, \$1,969, which sum will be rendered to you by said gentlemen," &c. On the receipt of this letter, the Plaintiffs applied to Laycock & Co., and after being put off several times, were at length told, that they had transferred the bill of lading to a friend. On further enquiry, they found that the barrel of dollars, on its arrival, had been deposited in the Bank of England, and that the bill of lading, endorsed severally by Fielding, Laycock & Co., and the Defendants, had been transmitted to the Bullion Office by the Defendants, of whom the Bank had purchased the dollars, and paid them the sum of 1,098l. 13s, being the value of \$4,718, contained in the barrel, which sum the Defendants carried to the credit of Laycock & Co., with whom they had an account as Bankers. Upon this, the Plaintiffs demanded the \$1,969 of the Defendants, who refused to deliver them up, and thereupon they brought Trover for them. A verdict and Judgment at Nisi Prius, were taken for the Plaintiffs for 418l. 18s, with leave to the Defendants to move to enter a nonsuit. In support of the motion, it was urged by Shepherd and Vaughan, Sergeants, that admitting the barrel, consigned to Laycock & Co., to be the same from which the \$1,969 were intended to be appropriated to the Plaintiffs, still there has not been any such appropriation of them, as will entitle the Plaintiffs to this form of action. The objection,

491 *they said is, that there has not been any act done in respect to the \$1,969, claimed by the Plaintiffs to separate them from the rest, so as to enable the Plaintiffs to designate them as their own property; and when a demand was made, by the Plaintiffs, of the dollars, if the Defendant had desired them to point out which dollars were their property, they could not possibly have ascertained them, which shows that neither Trover nor Detinue will lie. This was the argument of eminent Counsel, and it will be admitted that it was put in its most imposing form. What said the Court? Its opinion was delivered by Mansfield, Ch. J. After disposing of the other objection, he remarks, "Another question has arisen from the intermixture of property. It appears that no separation was ever made from the whole quantity of \$1,969, belonging to the Plaintiff; and an objection has been taken on that ground against the form of the action. But, we think there is no difficulty in that point. The Defendant has disposed of all the dollars: consequently, he has disposed of those which belong to the Plaintiffs; and as all are of the same value, it cannot be a question, what particular dollars were his. It is not like the case of tenants in common, who have a right to a part of every grain of corn, &c. Here, one has a right to a certain number, and the other to the rest. If a man keeps all, and has no right to a part, the action lies for that part, which he wrongfully detains." Now I ask, where is the difference with respect to separation between that case and this? If Trover could be maintained for \$1,969, out of an undivided mass of \$4,718, would not Trover equally lie for one hundred and nineteen barrels of flour out of one hundred and twenty-three? The dollars were not more alike than barrels of the same quality and brand. The dollars in the one case were consigned to Laycock & Co., and the bill of lading endorsed, and delivered to them: in the other case, the barrels of flour were stored with the warehouse-man. In the one case, a letter is written to the
492 Plaintiff, which is *considered as an order on the consignee for \$1,969, out of a barrel containing \$4,718: in the other, an order is given on the warehouse-man for one hundred and nineteen barrels of flour, of particular marks and brands, out of one hundred and twenty-three. If Trover could be maintained for the dollars, could it not equally for the flour. It was asked, suppose a part of the flour had been burnt, how would you have decided whose it was? I ask, suppose a part of the dollars had been stolen out of the barrel, whose loss would it have been? The very same difficulty is presented, yet we see that in the case of the dollars, the Court did not perplex themselves with it, but going on the great principles of justice, sustained the claim of property. Observe, too, the ground taken: "As all (the dollars) are of the same value, it cannot be a question, what particular dollars were his." In our case it is expressly in evidence, that between barrels of the same brand and quality, there is no difference in price. May we not say here then, "As all the barrels

were of the same value, it cannot be a question, what particular barrels were his?" Again, the Chief Justice says, "Here, one has a right to a particular number, and the other to the rest." Did not the order in this case give the vendee a right to a particular number, one hundred and nineteen barrels? Yes; and the rest belonged to the vendor. Thus, I think I may fairly say, that leaving the custom out of the question, the case is with the Plaintiff.

But, surely, the custom puts it beyond all question. "An established usage (says Chief Justice Gibbs, in *Lucas v. Dorrien*, 2 Com. L. Rep. 105,) constitutes the common understanding of parties in their dealings, and on the foot of that common understanding, they are supposed to contract." See also *Doug. 513*, what Lord Mansfield says of a custom, even one year old; and see *Starkie's Evid. pt. 4th, 452-3-4-5*. The custom found is, that flour in store is sold by order, and passes by the transfer of the order, from hand to hand, without actual delivery of the 493 "flour to any." Now, engraft this into the contract of the parties before us, and the question must be decided, unless you say that the parties could not make such a contract; that such an usage cannot stand. And why should we say so? There is nothing illegal in it. The principal foundation of Mercantile Law is usage: and it has become Law, because the Courts, finding it established in practice, have respected it, and made it the rule of their decisions in mercantile cases. That this usage is convenient, is proved both by its existence, and the nature of the article. It saves the trouble to the merchant, of going twenty times a day to the different warehouses, to examine the different parcels of flour he had bought; for, under the usage, the order is a negotiable paper: the traders in flour look to the order only, and the flour passes by it from hand to hand: but, the character of the paper is changed at once, and the usage destroyed, if you say that however exactly it describes the flour, that flour shall not pass, if there be any other like it in the warehouse: the paper will no longer pass by its face, but before any buyer will pay his money, he will go to the warehouse with the bill of parcels, in his hand, and examine, not only to ascertain whether the flour described is there, but whether there may not be in the warehouse other flour of the same brand and quality. And why should we break up this usage, and impose this heavy clog on the commerce of the place? Especially, when in the case before us, it would have an ex post facto operation on the contract of the parties. It cannot be denied that, under the usage, they intended an immediate change of ownership as to the flour, and consequently, that from the moment of such change, it should be at the risk of the vendee; but, after the flour is burnt, we say that the usage is a bad one, and shall not stand, and giving this decision a retrospective action, throw the loss upon the vendor.

To show the weight which the Courts give to mercantile usage, I will refer to the sub-

ject of dock warrants, treated of in the following cases: *Spear v. Travers*, 494 4 Camp. 251; **Zwinger v. Samuda*, 2 Com. Law Rep. 98; *Lucas v. Dorrien*, 2 Com. Law Rep. 105; and *Keyser v. Suse*, 5 Com. Law Rep. 461.

But, suppose that in the teeth of the contract, the usage and the cases cited, we say that no flour of *Rose* and *Pedlar* brands passed, because there were two barrels of each more than were sold. Still as regards the flour of the *Bent Creek*, *Fredonian*, *Rocky Creek*, *D. S. Garland*, and *Rockford* brands, we must say that passed by the order, because all in the warehouse, of those brands and quality, were contained in the order: (as in *Rugg v. Minet*, the Court decided that the property passed to the vendee, in all the casks that were filled up.) And if the property in any of the flour passed to the vendee, the vendor had a right to recover for so much, however small the quantity; and the instruction of the Court which we are discussing, and upon which the whole turns, was not wrong, for, the Court instruct the Jury, that if they believe the evidence, the Plaintiff had a right to recover in this action, not pretending to speak as to the amount of the recovery, but as to the form of the action; as to the law, not as to the facts.

Upon general principles, then, and also upon the usage, I am of opinion, that all the flour in the order passed by it to the vendee, and that he must bear the loss; but if only a part passed, it is clear to me that the Court did not err in its instruction to the Jury. The Judgment must be affirmed.

JUDGE CABELL.

This was an action of *Assumpsit*, brought in the Superior Court Court of Law for the County of *Henrico*, by *William G. Pendleton*, against *Gabriel Ralston* and *Archibald Pleasants*, merchants and partners, trading under the firm of *Ralston & Pleasants* for \$416 50, the price of one hundred and nineteen barrels of fine flour sold and delivered by *Pendleton* to *Ralston & Pleasants*. The suit "abated as to 495 *Ralston*, by the return of the Sheriff, and was afterwards prosecuted against *Pleasants* only. The contract of sale was not denied by *Pleasants*; but his defence was that it was an executory contract only, and not a sale executed by delivery.

That a delivery of the flour was necessary to make it an executed sale, is not denied. Nor is it pretended that there was an actual delivery. But a constructive delivery is as effectual as an actual delivery: And the question is, whether there has been such delivery in this case.

The contract was for the sale of one hundred and nineteen barrels of fine flour, of certain specified mill brands, which *Pendleton* then had stored in the warehouse of *J. & J. Fisher*, in the City of *Richmond*. The price was fixed at \$3 50 per barrel, to be paid in hand, amounting in the whole to \$416 50. *Ralston & Pleasants*, as soon as the contract was entered into, gave to *Pendleton* their check on the Bank of *Virginia*, for the amount of the purchase money, and received from him a bill for the

flour, and an order on J. & J. Fisher, to deliver the flour to them. The order was in the following terms: "Messrs. John & James Fisher, junr., Gentlemen, Deliver to Messrs. Ralston & Pleasants, one hundred and nineteen barrels Richmond fine flour, which are stored with you, of the following brands, viz: Pedlar, 62 barrels; Rose, 2 barrels; Bent Creek, 7 barrels; Fredonian, 10 barrels; Rocky Creek, 20 barrels; David S. Garland, 13 barrels; Rockford, 5 barrels. Yr. mo. Wm. G. Pendleton. Richmond, March 20, 1820." Pendleton actually had, at the time of the contract, in the warehouse of the Fishers, fine flour with which the order might have been strictly complied with. There was not, at that time, in the said warehouse, any fine flour of the specified brands, other than that which belonged to Pendleton; nor had he there any fine flour of the specified brands, beyond what the order called for, except that he had two more of "Pedlar" brand, and two more of

"Rose" brand, than the order required. But there is no difference whatever between barrels of fine flour of the same mill brand. "It is the common usage of trade in the City of Richmond, well known to the merchants thereof, for flour in store to be sold by draft or order on the storekeeper, and to pass by that mode of transfer, through many different hands, without actual delivery." The storage due for the flour in this case, was not paid by Pendleton, but "it is the usage of the store-housekeepers in the City of Richmond, well known to the merchants, to charge the vendor with the storage, and to deliver the flour to his order, when called for;" and it is proved in this case, that the flour would have been delivered, on the day of sale, had it been called for, notwithstanding the storage had not been paid. It sometimes happens that flour, when about to be delivered, is found to require coopering; but in such cases, it is the usage in the City of Richmond, well known to the merchants, for the cooperage to be done by the store, at the expense of the vendor.

It was insisted, by the Counsel for the Appellant, that there can be no constructive delivery, where any thing remains to be done, as between the vendor and vendee, to put the property into a deliverable condition. And it must be conceded that the cases referred to by him, fully established the principle. I will, however, take a hasty view of them, in order to show that the circumstances of those cases, are materially different from this case.

In *Hanson v. Meyer*, 6 East. 614, there was a sale of all a man's starch, at a certain warehouse, at so much per cent., and it was held that the same was not complete to pass the property, because the starch remained to be weighed, before even the price could be ascertained.

In *Wallace v. Breeds*, 13 East 522, there was a sale of fifty out of ninety tons of Greenland oil, which was in casks. It was held, that the property did not pass, because, according to the constant custom of the trade, the casks were to be searched by a cooper employed by the vendor; a broker, also, on behalf of both the vendor and

497 *vendee, was to attend and make a minute of the foot-dirt and water in each cask; and the casks were then to be filled up by the seller's cooper, and at his expense, so that they might be delivered in a complete state, containing the quantity sold.

In *Austen v. Craven*, 4 Taunt. 644, there was a sale of fifty hogsheads of sugar, of a certain quality, at so much per cwt. There were no hogsheads of such sugar in existence at the time of the contract. The hogsheads were to be filled and then weighed, before even the price could be ascertained. Held that the sale was not complete.

In *Busk v. Davis*, 2 Mau. & Selw. 397, there was a sale of ten tons out of eighteen tons of Riga flax, then lying at a certain wharf. The flax was in mats of different weights. It remained to weigh the flax, before it could be in a situation to be delivered; and it would be necessary to break some of the mats to make up the precise quantity sold. I say nothing at present, as to the right of the vendor to select the mats to be delivered. It was held that the sale was not complete, so as to pass the property.

In *Shepley v. Davis*, 5 Taunt. 617; 1 Com. Law Rep. 211, there was a sale of ten tons out of thirty tons of hemp, at a war-finger's. It remained to weigh the ten tons from the general mass, before they could be delivered. Held, that the sale was not complete, so as to pass the property.

In *White v. Wilks*, 5 Taunt. 176; 1 Com. Law Rep. 64, there was a sale of twenty tons of oil, out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns, and in divers places. It remained to measure from the larger masses, the twenty tons sold, before they could be in a situation to be delivered. Here, also, I say nothing at present, as to what cisterns the twenty tons should be taken from. This sale was held not to be complete, to pass the property.

Thus, in some of these cases, it remained to ascertain even the price of the things sold; and in all of them, it remained to measure or to weigh the thing sold, before it could be delivered. In the case at Bar, nothing remained to be done for ascertaining the price or amount of purchase money; that was fixed by the terms of the contract itself; and the thing sold required neither to be weighed nor measured.

But, it is contended, that this case resembles *Wallace v. Breeds*, and comes within the influence of the general principle as to the thing sold not being in a deliverable situation, because the flour might require some coopering. But, in *Wallace v. Breeds*, it was certain at the time of the sale, that the thing sold was not then in a situation to be delivered; it was certain that it required the agency of a cooper to put it into that state; and the cooper was to be selected by the vendor. In this case, no agency of a cooper may have been necessary. It is only sometimes, that flour in store, requires any coopering; and when it does, the cooper is not then to be selected by the vendor; for, the usage

of the trade, and consequently the implied contract of the parties, provides that the cooping, when any is necessary, shall be done by the warehouse-man, without any farther act to be done as between vendor and vendee. The cooping, under this usage, ought not to be considered as an act necessary to complete the sale, but merely as an act to be done, at the convenience and at the future request of the vendee. It is to the interest of the vendees that it should never be done till the flour is actually called for. And the acts of the parties in this case would seem to show that they so considered it. Ralston & Pleasants gave their check for the purchase money, (intending it as full payment,) in the same manner as if the sale were complete; and Pendleton insisted on no stipulation, fixing the time for delivering the flour, which he probably would have done, had it been considered that the flour was yet to be delivered, and that, in the mean time, it was at his risk.

But it is contended, that the property did not pass by the sale in this case, because the specific flour sold was not
499 *ascertained as to identity and individuality, by an actual separation of

it from the other flour with which it was mixed in the warehouse. This objection cannot, I presume, be intended to apply to any of the flour sold, except to that of the Pedlar and Rose brands. As to all the flour of the other brands, there was no other flour of those kinds in the warehouse, except the precise numbers mentioned in the order. Consequently, their identity and individuality were as fully ascertained as if they had been actually delivered. The objection, however, does apply to the flour of the Pedlar and Rose brands, there being two barrels of each of those brands more than the numbers called for in the order. And the question is, whether that circumstance shall prevent the sale from passing the property in the flour of those brands. It is true, that Chief Justice Mansfield said in *Austen v. Craven*, and in *White v. Wilks*, that the actions could not be supported, because the contracts of sale under which the property was claimed, attached to no specific quantity of oil in the one case, or of sugar in the other. And in *Busk v. Davis*, Lord Ellenborough, and some of the other Judges, spoke of the necessity of ascertaining the identity and individuality of the property. But it should always be borne in mind, that the expressions of Judges must be construed in reference to the circumstances of the cases to which they are applied. *Austen v. Craven*, was the sale of fifty hogsheads of sugar, of a particular quality, which were not in existence at the time of the contract; and if they had been in existence, yet as hogsheads of sugar are of no prescribed weight, it would have been necessary to weigh them, before the sale would be complete. *White v. Wilks*, was the sale of a smaller portion of oil, out of divers larger quantities. It was not only uncertain from which of the larger quantities the portion sold was to be taken, but if they had been ascertained, still the part sold was to be separated by measuring it from the larger quantity with

which it was mixed. *Busk v. Davis*, was the sale of a quantity of flax, out of a 500 much *larger quantity, lying in mats, at a certain wharf. The sale was for so many tons, not so many mats; besides, the mats were of unequal weights. It was necessary to weigh the quantity sold, and to break some of the mats, to get the precise quantity sold, before the article sold could be delivered. In cases like these, where portions of a larger mass, liquid or solid, are sold, and where the portions sold must be weighed or measured, (which, of necessity, includes the idea of separating them from the general mass,) it may be said that the identity and individuality of the part sold, must be ascertained by actual separation from its kindred residue, before the sale will be complete to pass the property; or, in other words, before there can be a constructive delivery. But it by no means follows, that the same principle applies to cases where the things sold are not portions of a larger mass, to be separated by weighing or measuring, but consist of divers separate and individual things, all precisely of the same kind and value, mixed with divers other separate and individual things, which are also of the same kind and value, and between which and the things sold, there is no manner of difference whatever. There is no case of this kind to which the principle has been applied. On the contrary, it has been decided, that in such cases, no actual separation is necessary, even to support the action of Trover. Thus, in *Jackson*, and another v. *Anderson*, 4 Taunt. 24, J. Fielding, in *Buenos Ayres*, put 4,718 Spanish milled dollars into a barrel, and consigned them to Laycock & Co., of London, with directions to deliver 1,969 of them to Jackson & Co., that being the sum in which Fielding was indebted to them for goods consigned by them to him, and sold on their account. Laycock & Co. did not deliver the 1,969 dollars to Jackson & Co., but assigned the bill of lading for the barrel of dollars to Anderson, who sold all the dollars to the Bank of England. Jackson & Co. brought Trover against Anderson, for the 1,969 dollars. The defence was precisely the same that was made
501 in *Austen v. Craven*, **White v.*

Wilks, and *Busk v. Davis*, viz: that the action of Trover would lie only for specific property, and that the identity and individuality of the dollars sued for, had never been ascertained by actual separation from the others with which they were mixed. The defence, however, was overruled, and the Plaintiff obtained Judgment, on the ground expressly stated by Chief Justice Mansfield, "that as all the dollars were of the same value, it could not be a question which particular dollars were his." This remark applies to, and is decisive of, the case before us; for, it is expressly stated in the Record, that between barrels of fine flour, of the same mill brand, there is no difference whatever. Nor is it material that the property, in the case of *Jackson v. Craven*, was claimed under a bill of lading, and in the other cases, under a contract of sale. The action was Trover in all the cases, and there was no greater

necessity for showing the identity and individuality of the property in the one set of cases, than in the other; yet the action was supported in the case where the things sued for were individual things of the same value, mixed with others of the same kind and value; and was not supported, where the action was not for individual things of the same kind, but for a portion of a larger mass, liquid or compound, which requires to be weighed or measured.

It is farther contended for the Appellant, that it was necessary to count the barrels before they could be delivered, and that the sale could not be complete to pass the property, until they were counted. But, I have not found any adjudication which countenances the idea, that the necessity to count the things sold, will produce that effect, in cases where the things sold are individual things, of the same value with each other, and with those with which they are mixed, and where the counting is not necessary for ascertaining the amount of the purchase money. In the case before us, the things sold were individual things, of the same value, so far at least as relates to the flour of the same brand; and no

counting was necessary for ascertaining *the amount of the purchase money: that was fixed by the terms of the contract itself. The barrels, it is true, were to be counted. But so they must be in cases where a certain number is sold, at an agreed price, and where there are no more in the warehouse than the number sold. But, in such cases they are counted, merely to see that they are in the warehouse. And it would not be contended, I presume, that the necessity for counting in such cases, would prevent the property from passing. I admit, that if the sale had not specified the number of barrels, but had been of all the flour in the warehouse, or of all the flour of any particular brand, at so much per barrel, such a sale would not pass the property, until the barrels were counted; because, the counting would be necessary in that case for ascertaining the amount of the purchase money; and no sale can be complete till that is ascertained.

I am of opinion, that the usage of trade, stated in the Record, for flour in store to be sold by mere draft or order on the warehouse man, and to pass through many hands before it is called for, is entitled to great consideration. For, Commercial Law rests principally on usage; and the usages of trade are presumed to enter into the contemplation of the parties to a contract, and they are supposed to contract on their basis.

Upon the whole, I am of opinion, that there was a constructive delivery of the flour, which completed and executed the sale, and passed the right of property to Ralston & Pleasants. The flour therefore being theirs, was at their risk, and the loss of it by the accidental burning of the warehouse, must fall on them, and not on Pendleton. And as the check was given on the Bank of Virginia for the purchase money, did not avail Pendleton as a payment, (the check itself having been consumed by fire, and the payment of it countermanded by Ral-

ston & Pleasants,) I think Pendleton is entitled to recover the purchase money in this action, and that the Judgment should be affirmed.

503 *THE PRESIDENT.

In considering this case, I have examined all the cases cited at the Bar, and also some others that were not noticed. It is a settled rule of the Common Law, that property in personal chattels passes only by actual delivery of the thing, except in cases in which some equivalent delivery is agreed upon by the parties, or is established by custom or usage, in which a virtual delivery is substituted for actual delivery of the thing. But, in these cases, unless the thing was in a condition to be delivered without more to be done by the vendor, either as regarded the price, or the quantity, as there could be no actual delivery until that was done by the vendor, so there can be no virtual delivery equivalent to it. And all the cases on the subject appear to me to have turned on the enquiry, whether, from the nature of the subject, it was, or was not, in a deliverable condition, that is, without more to be done by the vendor affecting the price or the quantity of the thing to be delivered. From some of the cases, it might be inferred, that identity of the thing was a pre-requisite to a virtual delivery of it; and I think there can be no doubt it is so, in every case in which the price or quantity is to be affected by what remains to be done to ascertain it. But, in a case in which identity is a matter of total indifference, both to the vendor and vendee, either as regards price or quantity, it is certainly of no importance. It is impossible to suppose, upon the facts stated in the Bill of Exceptions, that if Pendleton, the vendor, had separated the one hundred and nineteen barrels of flour from the one hundred and twenty-three, in pursuance of the terms of the order; that when he came to those of Pedlar's brand, or Rose's, it was of the slightest importance to him, or to the vendors, which two barrels of each brand were left out, as exceeding the number stated in the order. All of the same brand being of equal value, and being integral quantities, they were in a deliverable condition, without more to be done by the

504 vendor, *which could affect either price or quantity. Every thing necessary to be done, to give to the vendees the actual possession of the flour, could be done by the keeper of the warehouse as well as by Pendleton, and the order under the custom, which is stated in the Bill of Exceptions, I think, virtually passed the possession of the one hundred and nineteen barrels to the vendees. The case of *Whitehouse v. Frost*, 12 East. 614. went a step farther than this. In that case, ten tons of oil were sold, and an order given to deliver it to the purchasers, out of forty tons then lying in one cistern in the oil-house in Liverpool; there was nothing to distinguish the ten tons from any other ten tons of the forty in the cistern; there was nothing like identity; quantity and price were alone ascertained; all the particles of the oil were mingled together in one mass; there were no integral quanti-

ties of equal value, distinct and separate from the whole mass, of which actual or virtual delivery might be made; until the oil was measured out, and the ten tons separated from the mass, this could not be predicated of it, and yet the Court held that the property passed to the vendees. I know that this case was condemned by many of the Judges afterwards, as having gone too far; but it is clearly distinguishable from the one before us. When that case was pressed upon the Court in the case of *Craven v. Austin*, 4 Taunt., Heth, Justice, asked, if ten tons had leaked out of the cistern, to whom would they be deemed to belong: and Mansfield, Chief Justice, in delivering the opinion of the Court, said it was unlike other cases, and must stand on its own bottom.

In the case of *Busk v. Davis*, 2 Mau. & Selw. ten tons of flax were sold, to be taken out of eighteen tons put up in mats; the order for it had been accepted and entered in the wharfinger's books, but that, Lord Ellenborough said, was not sufficient: further acts were necessary, for the flax was to be weighed, and the portion of the entire bulk to be delivered, was to be ascertained, and it might be necessary to break

open some mats to make up the
505 quantity *agreed upon. If in that case the flax had been in mats of equal quantity, and value, the first ascertained by the inspection of a public officer, and the latter by the facts in the case, as in the case of the flour, it is not to be inferred from the language of Lord Ellenborough, or any other Judge, that it would have been held that the property did not pass; but the contrary. The case of *Jackson and another v. Anderson* and another, 4 Taunt. is a case, in which identity of the thing, in which property was claimed by the Plaintiffs, was not pretended. The 1,969 dollars consigned to Jackson & Co. by Fielding, the shipper, were never separated from, nor counted out from the 4,718 dollars shipped to Laycock & Co. and transferred by them to Anderson, and yet it was held that the property in the 1,969 dollars passed to Jackson & Co. the Plaintiffs, and that they could maintain *Trover* for them. They were separate quantities of the same value, and were as little distinguishable from other dollars in the same barrel, as the sixty-two barrels of flour of Pedlar's brand, and the two barrels of Rose's brand, from what would remain if those brands, in the case before us. In that case, they held that the property passed, though the bill of lading would have been satisfied by the delivery of any dollars to the amount of 1,969. and property in any specific 1,969 dollars could not be said to be vested in the Plaintiffs. The order for the flour, in our case, could not have been satisfied by the delivery of any flour, even of the same inspections, and brands, except that which was in the warehouse when that order was given; from that moment, the one hundred and nineteen barrels of fine flour, of the marks and brands specified in the order, became the property of the vendees: all that was material to them was, that the flour described in the order was in the warehouse, to be

counted out to them when called for. If the vendor had not owned another barrel there except the one hundred and nineteen barrels specified in the order, it could not be doubted that his property in the one hundred and nineteen barrels passed
506 *to the vendees though it might be to be counted out of flour of the same description, belonging to others. As it had not been questioned that the flour of all the brands described in the order, except Pedlar's and Rose's, passed to the vendees, that sixty-two barrels of the first, and two of the latter were to be counted out of sixty-four in the one case, and four in the other, cannot vary the case: whether it was to be counted out of flour belonging to others or to the vendor, was not material. The rule, I know, has been laid down, that where any thing remains to be done to ascertain the price, the quantity, or the thing, the property does not pass. In the case before us, price and quantity were ascertained; and as to the thing, nothing more is meant than the kind of thing, wherever from the nature of it, it cannot be identified, and distinguished from things of the same kind and value, as in the case of the dollars in *Jackson v. Anderson*, and of the flour in the case before us.

With regard to the cooperage, which might not be necessary, and the price of storage, as it was the custom to charge both to the vendor, neither can affect the question.

I think, therefore, that the instruction of the Judge to the Jury was correct, and that the Judgment must be affirmed.

SALES.

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5. Recordation of Conditional Sales.

Cross-References to Monographic Notes.

Contracts, appended to *Enders v. The Board of Public Works*, 1 Gratt. 364.

Bills of Sale, appended to *Givens v. Manns*, 6 Munf. 191.

Fraudulent and Voluntary Conveyances, appended to *Cochran v. Paris*, 11 Gratt. 348.

Liens, appended to *West v. Belches*, 5 Munf. 187.

Warranty, appended to *Wilson v. Shackleford*, 4 Rand. 5.

I. SALES DISTINGUISHED FROM OTHER TRANSACTIONS.

1. FROM BAILMENTS.—The distinction between a bailment and a sale is that when the identical thing delivered is to be returned, though in an altered form, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to return the specific article either in kind or identity, and the receiver is at liberty to return another thing of equal value, he becomes debtor to make the return, the title to the property is changed, and the transaction is a sale. *Reherd v. Clem*, 86 Va. 374, 10 S. E. Rep. 504.

But in an early case it was held that where wheat is delivered at a mill to be ground, upon an agreement that the miller shall return to the farmer a given quantity of flour for so many bushels of wheat, the miller is a bailee and not a purchaser, notwithstanding the fact that the miller is not bound to return flour made from that identical wheat, but flour of a certain quality made from any wheat in the mill. *Slaughter v. Green*, 1 Rand. 3, 10 Am. Dec. 488, and *note*, where this decision is reviewed and criticised. In *Smith v. Clark*, 2 Wend. 85, the court said that *Slaughter v. Green*, 1 Rand. 3, was a hard case, and has made a bad precedent.

2. FROM HIRING.—The principal difference between a sale and a hiring is that in the former case

the owner parts with the whole proprietary interest in the thing, while in the latter he parts with it only for a temporary use and purpose. In a sale the thing itself is the object of the contract; in a hiring, the use alone is its object. *Baldwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. Rep. 716.

3. FROM GIFTS.—A gift is a contract without consideration. But a sale is a contract for a valuable consideration paid or stipulated; though sales may be inferred from the circumstances without express proof of any consideration. Monographic *note* on "Gifts," appended to *Barker v. Barker*, 2 Gratt. 344; *Hansbrough v. Thom*, 3 Leigh 147.

4. FROM CONSIGNMENTS.—In determining whether the agreement between the parties constitutes the relation of consignor and consignee, or that of seller and buyer, the court looks beyond mere names and within to see the real nature of the agreement, and determines from all its provisions taken together. If the agreement is in substance and effect a sale, it must be so declared, no matter by what name the parties choose to designate it. *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. Rep. 496.

For example, where the consignee of goods may sell them upon terms to be fixed by himself, and there is no provision for the return of any goods that may not be sold, but he is bound to pay the consignor a fixed price for the goods at a fixed time, regardless of whether they have been sold or not, or whether the proceeds of sale have been collected or not, such transaction constitutes a sale and not an agency. *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. Rep. 496.

II. CONTRACT OF SALE.

1. MUTUAL AGREEMENT.—To constitute a sale of personal property, there must be a mutual agreement on the part of the seller to sell and of the buyer to buy. *Bartholomae v. Paull*, 18 W. Va. 771.

This agreement, however, need not be express, but it may be implied from the language or conduct of the parties. *Bartholomae v. Paull*, 18 W. Va. 771.

It is essential to the force and efficacy of every contract of sale that the buyer and seller should mutually contemplate the same subject matter of sale, therefore where a merchant orders goods of a certain kind and style, and the party to whom the order is given undertakes to fill it by delivering goods of a different kind and style, the merchant ordering the goods may refuse to receive them, on the ground that the goods delivered are not the goods ordered. *Haxall v. Willis*, 15 Gratt. 450.

But if the buyer, notwithstanding the want of correspondence between the goods ordered and sent, accepts and treats them as a compliance with his order, he cannot afterwards, as a general rule, set up any want of correspondence, to defeat the seller's right to recover the price. *Haxall v. Willis*, 15 Gratt. 451.

2. OFFER AND ACCEPTANCE.—Where an agent, having full authority to sell an article at a price named, offers the article at that price, and the offer is accepted unconditionally, this completes the contract of sale between the parties, without confirmation by the principal, or communication of such confirmation to the purchaser. *Insurance Co. v. Gamble*, 94 Va. 622, 37 S. E. Rep. 463.

In order to constitute a complete sale there must be a distinct act of acceptance on the part of the buyer. *Bartholomae v. Paull*, 18 W. Va. 771.

III. SUBJECTS OF SALE.

1. EXISTENCE OF THING SOLD.—Personal property to be the subject of sale, must have an existence;

but it need not have, in every sense, a perfect, tangible existence, to be regarded in law as capable of ownership; but a potential existence is sufficient. For example, a man may not sell the fruit from trees, or wool or lambs from sheep, which he has not; but he may do so if he then owns the trees or sheep. Their ownership gives potential existence to the fruit and wool and lambs, though as yet the trees have not blossomed, or the wool grown, or the ewes become pregnant. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. Rep. 807. See *Braxton v. Bell*, 92 Va. 229, 23 S. E. Rep. 289.

a. Expectant Interests.—The actual adult owner of a vested expectant interest in property, whether in reversion or remainder, may sell such interest, and the sale will be binding on him, in the absence of fraud or imposition on the part of the purchaser. *Cribbins v. Markwood*, 13 Gratt. 495, 67 Am. Dec. 775.

But equity extends a very anxious protection to persons selling expectant interests, although they do not stand in the relation of expectant heirs, and trivial circumstances, added to inadequacy of price, will be sufficient to set aside such sales. *McKinney v. Pinckard*, 2 Leigh 149, 21 Am. Dec. 601.

b. Possibilities.—A mere contingent possibility, not coupled with an interest, is not the subject of sale, as all the wool one shall ever have, or the sheep which a lessee was covenanted to leave at the end of an existing term. But if rights are vested, or possibilities are distinctly connected with interest or property, they may be sold. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. Rep. 807.

IV. WHEN TITLE PASSES.

1. *INTENTION GOVERNS.*—The main inquiry in determining whether the title has or has not passed by the contract is: what was the intention of the parties? The intention of the parties in a contract of this character is the agreement, for it will not be denied by any one that the parties can expressly agree that the articles purchased shall pass at once to the buyer, although they are to be measured, weighed or counted, and the price is to be precisely ascertained and paid in the future. See *Morgan v. King*, 28 W. Va. 14.

The question whether a sale of personal property is complete or only executory, is to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale. *Morgan v. King*, 28 W. Va. 1; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910; *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. Rep. 691, 45 Am. St. Rep. 859.

2. *UNCONDITIONAL SALE OF CHATTELS.*—But where there is an executed sale of an interest in property, without reservation, the title passes immediately upon the sale to the buyer, and, therefore, it is unnecessary for the seller to allege, in an action on the contract, that he has transferred his interest. *Smith v. Burton*, 94 Va. 158, 26 S. E. Rep. 412.

Where a bill of sale is executed from one person to another, for a steamboat, and delivery and possession accompanies the act, thereby rendering the sale complete, there is no such right of ownership or title in the seller as would authorize one of his creditors to attach the boat. *Hobbs v. Steamboat Interchange*, 1 W. Va. 57.

3. SOMETHING REMAINING TO BE DONE.

a. In General.—Where anything remains to be done by the seller as between him and the buyer essential to put the goods sold in a deliverable state; or where anything remains to be done by the seller for the purpose of ascertaining the price of the goods, as weighing, testing or measuring them, where the price is to

depend upon the quantity or quality of the goods, the performance of these things, in the absence of anything indicating a contrary intent, is a condition precedent to the transfer of the property, and therefore, in the meantime, the goods remain at the risk of the seller. These principles are known as *LORD BLACKBURN'S* first and second rules. *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726; *Dixon v. Myers*, 7 Gratt. 240; *Morgan v. King*, 28 W. Va. 1; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910.

On the other hand, where there is a contract for an immediate sale, and nothing remains to be done by the seller as between him and the buyer, the seller immediately acquires a property in the price, and the buyer a property in the goods, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed the loss falls upon the buyer. *Chapman v. Campbell*, 13 Gratt. 106; *Hobbs v. The Steamboat Interchange*, 1 W. Va. 57.

For example, when logs are delivered, measured and branded with the brand of the purchaser, at the point or place of delivery in strict accordance with the unequivocal stipulations of the written contract of purchase, the sale is complete, and the title passes and vests in the purchaser, notwithstanding other provisions in such written contract by which the seller agrees for a fixed compensation safely and without loss or damage to deliver such logs at another different point for the purchaser. *Bank of Huntington v. Napier*, 41 W. Va. 481, 23 S. E. Rep. 800.

Co-ownership and Warehouse Rent.—So also, where there is a usage, when barrels of flour are delivered by a warehouseman to a purchaser, to charge co-ownership and warehouse rent to the seller, neither of these things shows anything farther to be done by the seller, nor any obstacle to the delivery of the flour. *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726.

Rule Where Goods Are Actually Delivered.—But where there has been an actual change in the possession and custody of the thing bargained for, the rule is essentially different. In other words, where the subject matter of the contract has not only been completely ascertained and identified, but actually delivered, the mere fact that the weighing, counting or measuring, is yet to be done by the buyer, simply in order to ascertain the aggregate sum of money which he is to pay as the price, does not of itself show such a defect in the transfer of the title as may prevent the risk of the loss from being cast on the buyer. *Haxall v. Willis*, 15 Gratt. 434.

b. Part of Uniform Mass.—When the subject matter of the sale is part of an ascertained mass of uniform quality and value, no separation is necessary to vest title in the purchaser to the part sold. Thus, separation is unnecessary to pass the title to a number of barrels of flour sold out of a larger number of the same brand, quality and price. *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726.

For example, where there is a sale of a specified number of barrels of flour lying in a certain warehouse, the barrels having on them different brands, and the buyer gives a check in payment, and the seller gives to the buyer a bill of parcels, specifying the number of barrels of each brand, and an order on the warehouseman for the flour, and a receipt in full for the price of the flour, this is a complete and executed contract, and the title passes to the buyer so that if the property is destroyed before actual delivery, the loss falls on the buyer. *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726.

(1) *Sale of Nonspecific Goods.*—Where the subject of the sale is nonspecific goods, the property

does not pass until an appropriation of the specific goods has been made with the assent of both seller and buyer. *American Hide, etc., Co. v. Chalkley*, 101 Va. 458, 44 S. E. Rep. 705.

It has been held, however, that where the seller delivers nonspecific goods, such as salt to be made, to the person authorized by the buyer to receive it, this vests title in the buyer and he may maintain trover to recover it from a third person who wrongfully converts it to his own use. *Lewis v. Arnold*, 18 Gratt. 454.

(2) **Goods Sufficiently Designated.**—Where goods sold are sufficiently designated, so that no question can arise as to the thing intended, it is not absolutely necessary that there should be a delivery, or that the goods should be in a deliverable condition, or that the quality or quantity, when the price depends upon either or both, should be determined; these are circumstances indicating the intent but are not conclusive. *Morgan v. King*, 28 W. Va. 1. Approved in *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910.

But where there is a sale of goods generally, but neither the goods sold, nor the mass itself out of which the goods sold are to be taken, is ascertained or designated, no title to the property vests in the purchaser till delivery, because until then the very goods sold are not ascertained. *State v. Hughes*, 23 W. Va. 347.

Nor does the title to property vest in the buyer upon the signing and delivering of a contract of the following purport: "I have this day sold to B. all my Swiss cheese now in my cellars, between 80 and 90 loaves (this does not include cracked or second-class cheese), at 12½ cents per pound; the cheese to be paid for when received; the second grade cheese to be 10½ cents per lb.; B. to pay ¼ freight from F., and to have all out of the cellars before Jan'y 1, 1886;" the contract being dated and delivered October 27, 1884. *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910.

Pleasants v. Pendleton has been cited frequently by the courts in other states of the union, but it has by no means met with universal approval. It was cited with approval in *Kimberly v. Patchin*, 19 N. Y. 336, 75 Am. Dec. 339; *Watts v. Hendry*, 18 Fla. 523; *Kingman v. Hohenquist* (Kan.), 59 Am. Rep. 606. *Hurff v. Hires*, 11 Vroom (N. J.) 593. But in *Woods v. McGee*, 7 Ohio Rep. part II, p. 127, 30 Am. Dec. 203, the court, after laying down the general rule that where a part of an undivided mass of property is sold, it is necessary that some further act should be done, specifying and identifying the part sold before the action of trover will lie, said: "The case of *Pleasants v. Pendleton*, 6 Rand. 473, is however, a very strong case the other way. But it is impossible to hide from one's self, that the fact of the small difference between one hundred and twenty-three barrels, the whole quantity, and one hundred and nineteen barrels, the number sold, may have gone a great way to influence the judgment. It was a hard case and hard cases always make a shipwreck of principles. It is impossible to answer the difficult inquiry. If a part only of the flour had been burnt in that case, on whom would the loss have fallen?"

And in *Ferguson v. Northern Bank* (Ky.), 29 Am. Rep. 424, the court said: "The case of *Pleasants v. Pendleton*, 6 Rand. 473, decided in the year 1823, has been cited as a strong case in support of *Kimberly v. Patchin*, but on an examination of that case it will be found that not one of the barrels of flour in the warehouse was branded like the one hundred and nineteen barrels claimed by the plaintiff, and it was there expressly held that the subject of the bargain was so designated

as to be clearly distinguishable." The case of *Pleasants v. Pendleton*, 6 Rand. 473, is also disapproved in *Hutchinson v. Hunter*, 7 Pa. St. 145.

4. **PAYMENT OF PURCHASE PRICE.**—Where payment of the purchase price is a condition precedent in a contract of sale, the title to the property does not pass to the buyer until that is done. *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 26 S. E. Rep. 188.

Thus, although every thing the seller has to do has been done, such as marking, measuring and weighing the goods, so that the title vests in the buyer, yet the seller is not required to part with the goods until he is paid for them, and he has a lien upon the goods for the price so long as they remain in his possession; nor does part payment destroy his lien. *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. Rep. 171.

Waiver of Payment.—But an absolute and unconditional delivery is regarded as a waiver of the condition. For example, where a sale is conditioned upon full payment on delivery of the property, an acceptance of a partial payment, with no express agreement as to credit, is a waiver of the condition. *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 26 S. E. Rep. 188.

Sale on Credit.—Moreover, a sale may be just as binding if made on credit as if made for ready money; and in such case the buyer may bring his action at once against the seller for refusing to deliver the property, without making any tender of the price. *Chapman v. Campbell*, 18 Gratt. 105.

V. DELIVERY OF GOODS.

1. **DUTY TO DELIVER.**—As soon as a contract for the sale of a chattel is completed, the seller, in the absence of a contrary indication or agreement, must deliver the property to the buyer when the latter has paid the consideration money. See *Chapman v. Campbell*, 18 Gratt. 110.

2. **TIME OF DELIVERY.**—As to the time of delivery, the law supposes, in the absence of evidence to the contrary, a reasonable time, unless a definite time is fixed by agreement. But if a definite time was set, this is of the essence of the contract as between the parties. *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573, 15 S. E. Rep. 80; *Boyd v. Gunnison*, 14 W. Va. 1. For example, where no time was fixed in a contract for the delivery of oil, it was held that the buyer could not, without the consent of the seller, extend the delivery of any part of the oil beyond a reasonable time. *Boyd v. Gunnison*, 14 W. Va. 1.

And where fruit trees are bought to be delivered in the fall, the buyer may refuse to accept them unless they are delivered in that part of the season properly suited for transplanting such trees. *Weltner v. Riggs*, 8 W. Va. 445.

Delivery by Installments.—But where the seller agrees to deliver the articles sold as fast as a certain party delivers them to him, the buyer cannot set a time within which the seller must complete the delivery or be deemed guilty of a breach of contract, so as to entitle such buyer to purchase the residue in market, and recover of the seller the difference between the market price and the sale price. *Smith v. Snyder*, 83 Va. 614; *Smith v. Snyder*, 77 Va. 432.

Postponement by Request of Buyer.—Where, in a contract of sale, delivery is postponed at the buyer's request and the contract is ultimately broken, this has the effect of postponing the date of breach, and therefore alters the time with reference to which damages are to be fixed. *Smith v. Snyder*, 77 Va. 432.

Notice of Time of Delivery.—Where no day is specified as the time of delivery, but it is to be

designated by the seller, he must give the buyer reasonable notice thereof. *Weltner v. Riggs*, 8 W. Va. 445; *Smith v. Snyder*, 77 Va. 442.

3. **PLACE OF DELIVERY.**—Where a contract for the sale of personal property names several places at which the property may be delivered, at the buyer's option, the buyer must within a reasonable time make his selection of the place of delivery. *Boyd v. Gunnison*, 14 W. Va. 1.

In *Boyd v. Gunnison*, 14 W. Va. 1, the contract was made on the 30th of March, 1868, for the sale of 2000 barrels of oil, the contract giving the buyer the right to select one of three places mentioned in the contract for the delivery of the oil, and on the 9th of April, 1868, the buyer selected the city of New York, one of the places mentioned in the contract, as the place of delivery. It was held that the selection was made in a reasonable time.

4. **QUANTITY TO BE DELIVERED.**—As to the quantity which the seller is bound to deliver, this depends, of course, upon the terms of the contract; therefore, if the quantity to be delivered is fixed by the agreement, the seller must deliver just what he bargained to deliver,—no more, no less; nor can the seller generally deliver a quantity in excess of that ordered: *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573, 15 S. E. Rep. 89.

If, on the other hand, the quantity delivered is less than that sold, it may be refused by the buyer; and if the contract be for a specified quantity, to be delivered in parcels from time to time, the buyer may return the parcels first received if the later deliveries be not made, for the contract is not performed by the seller's delivery of less than the whole quantity sold. *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573, 15 S. E. Rep. 89.

5. **SYMBOLICAL OR CONSTRUCTIVE DELIVERY.**—Actual delivery is not necessary to pass the title to the buyer and put the goods at his risk; a constructive or symbolical delivery, as by delivering the key of the warehouse in which the goods are deposited, is sufficient to pass them to the buyer. *Pleasants v. Pendleton*, 6 Rand. 473, 18 Am. Dec. 726.

6. **DELIVERY TO CARRIER.**—Where a seller delivers goods to a carrier by order of the purchaser, the delivery to the carrier is delivery to the purchaser, and the property vests immediately on its delivery to the carrier; and, therefore, the place of sale is necessarily the residence of the seller, whence the goods were shipped. *State v. Hughes*, 22 W. Va. 743; *Boyd v. Pollock*, 27 W. Va. 139; *Ford v. Friedman*, 40 W. Va. 177, 30 S. E. Rep. 930.

If goods are sold to a buyer to be delivered at a depot in a certain city, or to be delivered in the cars at the depot in that city, the goods remain at the risk of the seller, until they arrive at the depot in such city, but upon their arrival at the depot in such city, without being unloaded and without any notice of their arrival at the depot, they at once become the property of the buyer and are thenceforth at his risk. *Boyd v. Pollock*, 27 W. Va. 75.

7. **PROPERTY NOT IN POSSESSION OF SELLER.**—The completeness and efficacy of a sale are not necessarily affected by the consideration that the property is not in the actual possession of the seller, or if in his possession, is not to be immediately delivered. There is no principle of law which establishes that a sale of personal goods is invalid because they are not in the possession of the owner. The sale of a chattel in the possession of a third party, claiming no adverse title, is not the transfer of a right of action, but is a sale of the thing itself. *Chapman v. Campbell*, 13 Gratt. 105.

In *Chapman v. Campbell*, 13 Gratt. 105, a slave on trial for larceny before a county court was sold, but before he was discharged he made his escape

and was not heard of again. It was held that the contract of sale was complete, and the buyer bound for the price, though the slave was not and could not be delivered.

8. **EXCUSE FOR NONDELIVERY.**—Inability to perform a contract, caused by the seller's default, will not excuse a failure to deliver the goods according to the contract. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 285, 38 S. E. Rep. 141.

Injunction against Delivery.—But where the non-delivery of property contracted to be sold is due to the fact that the seller was enjoined from selling and delivering the property, the seller, in an action on the contract to recover the price, may show such injunction proceedings by producing a certified copy of the record. *Cogar v. Burns Lumber Co.*, 46 W. Va. 256, 33 S. E. Rep. 319.

9. **REMEDIES OF BUYER FOR NONDELIVERY OF GOODS.**

a. *In General.*—As soon as the contract of sale is completed, the buyer has a right to demand the thing sold immediately, in the absence of an agreement to the contrary; therefore, if he tenders the purchase money and demands the property, he may maintain detinue or trover if the delivery be refused. *Chapman v. Campbell*, 13 Gratt. 110.

b. *Accrual of Cause of Action.*—And where the seller refuses to perform his contract to sell and deliver goods the buyer may sue immediately for damages, without waiting for the time of performance to expire. *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. Rep. 630.

c. *Measure of Damages.*

(1) *In General.*—The proper measure of damages for the breach of an executory contract to deliver goods, is the difference between the contract price and the market price at the time and place of delivery, with interest thereon until paid. *Boyd v. Gunnison*, 14 W. Va. 1; *Perry Tie, etc., Co. v. Reynolds*, 100 Va. 264, 40 S. E. Rep. 919; *Trigg v. Clay*, 88 Va. 330, 13 S. E. Rep. 434, 29 Am. S. Rep. 723; *Smith v. Snyder*, 82 Va. 614; *Newbrought v. Walker*, 8 Gratt. 16; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 285, 38 S. E. Rep. 141; *Nottingham Coal, etc., Co. v. Preas*, 102 Va. 820, 47 S. E. Rep. 823.

(2) *Stock Sales.*—And the same rule applies in contracts for the sale and delivery of stock. *Bull v. Douglas*, 4 Munf. 303, 6 Am. Dec. 518; *Enders v. Board of Public Works*, 1 Gratt. 364.

(3) *Limitation of Rule.*—But the rule that the measure of damages, for failure of the seller to deliver goods as agreed, is the difference between the contract price and the market price of the article at the time of the breach, proceeds upon the assumption that the buyer can go into the market and obtain the article contracted for at that price. Therefore, when the circumstances of the case are such that the buyer cannot go into the market and supply himself with the article, the rule does not apply, for the reason of it has ceased. *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. Rep. 630. It has been held, where the seller breaks his contract to furnish goods which have been resold by the buyer before delivery, when similar goods cannot be purchased in the market, that the measure of damages is the difference between the contract price and the price at which they have been resold. *Trigg v. Clay*, 88 Va. 330, 13 S. E. Rep. 434, 29 Am. St. Rep. 723.

But in order for the buyer to recover as damages the difference between the market price and contract price at the time and place of delivery, it is not necessary that he should have actually gone into the market and bought other goods to supply the place of those not delivered. *Nottingham Coal, etc., Co. v. Preas*, 102 Va. 820, 47 S. E. Rep. 823.

(4) **Absence of Market Value at Place of Delivery.**—If there is no market price for the property at the time and place of delivery, the value of the property may be ascertained by showing its market price in other places, in the vicinity of the place of delivery, at or about the time of delivery. *McCormick v. Hamilton*, 23 Gratt. 561; *Nottingham Coal, etc., Co. v. Preas*, 102 Va. 830, 47 S. E. Rep. 833.

(5) **Proof of Market Value.**—In ascertaining what is the market value of personal property and the day of delivery at a certain place, it is proper to hear evidence as to the market value of the article within a reasonable time both before and after the day of delivery. *Boyd v. Gunnison*, 14 W. Va. 1.

(6) **Special Damages.**—The general rule is that the party injured by a breach of contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it and are capable of being definitely ascertained by reference to established market rates. *James v. Adams*, 8 W. Va. 568; *Newbrough v. Walker*, 8 Gratt. 16; *Trigg v. Clay*, 88 Va. 330, 13 S. E. Rep. 484, 29 Am. St. Rep. 723.

Contract Contemplating Resale.—Where a seller contracts to sell and deliver goods within a specified time, knowing at the time that the buyer has agreed to deliver the same to a subpurchaser at a fixed date, and the seller fails to deliver in time, he is liable to his buyer for the loss of profits which the latter would have made on a resale to the subpurchaser if the seller had fulfilled his contract, and for damages which the buyer was compelled to pay to the subpurchaser caused by the failure of the seller to deliver the goods within the time agreed upon, when the profits and damages paid are reasonable. *Perry Tie, etc., Co. v. Reynolds*, 100 Va. 264, 40 S. E. Rep. 919.

Demurrage and Dead Freight Paid by Buyer.—So also, where a buyer of goods made a charter party, agreeing to pay demurrage for delay beyond the time specified for delivery, and also for the payment of dead freight, and he was compelled to pay both in consequence of the seller's failure to deliver the goods within the time and in the quantity stipulated for, it was held that the buyer could recover from the seller the amount paid as demurrage and dead freight, especially when the vessel during the delay, was not used for other purposes, but kept waiting at the point of delivery ready to receive the goods, because of the assurance and representations of the seller that they would be delivered in a short time. *Perry Tie, etc., Co. v. Reynolds*, 100 Va. 264, 40 S. E. Rep. 919.

VI. RIGHTS OF BUYER.

1. **INSPECTION.**—Where a contract for the sale of goods provided that the buyer might inspect them before paying the purchase money, but that all disputes should be arbitrated, it was held that if the buyer, after inspecting the goods, rejects them without submitting the question of quality to arbitration, the seller might receive back the goods without being liable for damages because of their quality. *Baer's Sons Grocer Co. v. Cutting Fruit Packing Co.*, 42 W. Va. 350, 26 S. E. Rep. 191.

The maxim *caveat emptor* does not apply to a sale of goods where the buyer has no opportunity for inspection. *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910.

2. **RESCISSION.**—A buyer of goods who has the right to rescind a contract of sale, must rescind *in toto*; he cannot keep part of the goods, and return the remainder, without becoming liable for the whole. *Manass-Bruning Mfg. Co. Prince*, 51 W. Va. 510, 41 S. E. Rep. 907.

A purchaser of goods cannot keep a part of them, and return the remainder, and defeat payment for them according to the contract on the ground that the part returned were not of the agreed quality or make. *Manass-Bruning Mfg. Co. v. Prince*, 51 W. Va. 510, 41 S. E. Rep. 907. See monographic note on "Rescission, Cancellation and Reformation," appended to *Chamberlaine v. Marsh*, 6 Munf. 283.

VII. STOPPAGE IN TRANSITU.

In case of a sale of personal property not executed by delivery, but to be consummated by a delivery at another place, although in consequence of earnings paid, or otherwise, the property is so vested in the buyer that on complying or offering to comply with the contract on his part, he may recover the sum from the seller or his agent; yet, until delivery, and while the goods are *in transitu*, the seller may, on the buyer becoming bankrupt, or being likely to be so, arrest the goods, or order his agent to arrest them, which order, operating as an indemnity to the agent in addition to that arising from his possession of the goods, will be his guarantee for refusing to deliver them, though the agent might, under circumstances, also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on and execute the contract by delivery. *Howatt v. Davis*, 5 Munf. 34.

And if a factor or agent, having sold goods belonging to his principal, be ordered by him while they are yet *in transitu* not to deliver them to the buyer, of whose solvency doubts are entertained, but he delivers them notwithstanding such order, and without demanding security for his indemnity, the principal is entitled to an action against him in case the buyer should prove insolvent. *Howatt v. Davis*, 5 Munf. 34.

VIII. ACCEPTANCE OF GOODS.

1. **DUTY TO ACCEPT.**—If the goods ordered and the goods sent correspond in quality and quantity, the buyer is bound to accept them, and if he refuses, the rights and remedies of the seller are just as complete as if there had been a full and formal acceptance, and he may maintain an action on the contract against the buyer for the damages he has sustained for the failure of the buyer to comply with his contract. *Bartholomae v. Paull*, 18 W. Va. 771; *Haxall v. Willis*, 15 Gratt. 451; *McCormick v. Hamilton*, 23 Gratt. 561.

2. **UNREASONABLE DELAY.**—Moreover, if the buyer delays unreasonably in accepting the goods, he is liable for damages sustained by the seller, although guilty of no deception or fraud. *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

3. **AGENT MAY ACCEPT FOR HIS PRINCIPAL.**—*Proctor v. Spratley*, 78 Va. 264.

4. **DELAY IN REJECTION.**—A sale will be implied, where the person receiving the goods does not within a reasonable time repel the implication by returning the goods or notifying the seller that he will not accept them, and this whether he ordered the goods or not. *Bartholomae v. Paull*, 18 W. Va. 771; *Thompson v. Douglass*, 35 W. Va. 337; 13 S. E. Rep. 1015.

Question of Fact.—But what is a reasonable time for a buyer to return goods or notify the seller

that he will accept them, is a question of fact to be determined by the jury according to the circumstances of each case. *Bartholomae v. Paull*, 18 W. Va. 771; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. Rep. 1015.

5. ACTS OF OWNERSHIP.

a. In General.—Receipt of goods by a buyer will not be a binding acceptance if any act be done by the buyer which he would have no right to do unless he were the owner of the goods. *Manss-Bruning Shoe Mfg. Co. v. Prince*, 51 W. Va. 510, 41 S. E. Rep. 907. See *post*, this note, "Sales by Sample." For example, although goods are not ordered, still a sale will be implied, where he receives them and deals with them as his own, or treats them in a way inconsistent with a recognition of another's ownership. *Bartholomae v. Paull*, 18 W. Va. 771; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. Rep. 1015.

Likewise, although a buyer of goods countermands his order because they are delivered after the stipulated date, he must nevertheless pay for them, if he takes them from the railroad depot to his store, opens the boxes containing them, and examines them or does any act which only an owner can do. *Manss-Bruning Mfg. Co. v. Prince*, 51 W. Va. 510, 41 S. E. Rep. 907.

b. Permitting Third Person to Convert Goods.—Where one send goods to another, and the latter disclaims to have purchased them, but permits a third person to take them and convert them to his own use, this will make him liable as purchaser, although he may have allowed them to be taken by mistake. *Bartholomae v. Paull*, 18 W. Va. 771; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. Rep. 1015.

6. ACCEPTANCE AS WAIVER OF LATE DELIVERY.—Where goods are delivered after the stipulated date, the buyer must absolutely refuse to accept them if he wishes to insist upon the lateness of delivery, therefore, if he receives them and exercises acts of ownership over them, as by paying freight, taking the goods from the depot and examining them, or, *a fortiori*, by paying the price, he will be held to have waived the objection that the goods had come behind time. *Manss-Bruning Shoe Mfg. Co. v. Prince*, 51 W. Va. 510, 41 S. E. Rep. 907; *Reid v. Field*, 33 Va. 26, 1 S. E. Rep. 395.

Where the goods ordered are shipped so late in the season that the buyer refuses to accept them, and the seller replies offering to give the buyer an extra credit if he will accept them, but the buyer does not in any way reply to such offer in a reasonable time, and does not reship or in any way attempt to return the goods to the seller, the buyer will be presumed to have assented to the seller's offer, and to have accepted the goods. *Ford v. Friedman*, 40 W. Va. 177, 20 S. E. Rep. 930.

But an acceptance by the buyer of goods delivered at a time subsequent to that named in the contract for the delivery does not constitute a waiver of the buyer's claim for damages arising from the delay, especially when the conduct of the parties shows an intention on the buyer's part not to waive his rights to such damages. *Perry Tie, etc., Co. v. Reynolds*, 100 Va. 264, 40 S. E. Rep. 919.

7. REMEDIES OF SELLER FOR NONACCEPTANCE OF GOODS.

Where Contract Is Executory.—Where a contract of sale is executory, and the title and possession still remain in the seller, his remedy against the buyer, who wrongfully refuses to pay for and accept the goods, is an action of assumpsit on a special count to recover damages for the breach of the contract. *American Hide, etc., Co. v. Chalkley*, 101 Va. 458, 44 S. E. Rep. 703.

Where Contract Is Executed.—But where the title has passed, and the buyer refuses to pay for the goods, the remedy of the seller is an action for the agreed price. *American Hide, etc., Co. v. Chalkley*, 101 Va. 458, 44 S. E. Rep. 703.

If the buyer of goods refuses to accept them when tendered according to the contract of sale, the seller may elect to rescind the contract and keep or dispose of the goods for his own use, or to let it remain in full force and hold the buyer liable for the price of the goods and all damages arising from this breach of the contract. If he elects to let the contract remain in full force, he may either bring his action for the price of the goods when it is due and payable, or he may sell the goods, applying the net proceeds of sale to the credit of the buyer on account of the money due by him, and bring an action against him to recover the balance. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737.

Unreasonable Delay.—Where there is an unreasonable delay on the part of the buyer in accepting goods, the seller may recover damages sustained by him for loss resulting from such unreasonable delay, and also the profits he would have realized if he had been permitted to perform it fully. This is not a double recovery. *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

a. Accrual of Cause of Action.

Anticipatory Breach.—Where the buyer refuses to accept goods that he has ordered, the seller may at once sue for damages for breach of the contract, without waiting for the period for the delivery of the goods to elapse, and without tender of them. *James v. Adams*, 16 W. Va. 245; *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. Rep. 719.

Where there is a sale of personal property, to be paid for in installments, and the buyer fails to meet any one of the installments, whereupon the seller demands possession of the property, which the buyer refuses to surrender, the seller may at once bring an action against the buyer, without waiting until the time in which, by the terms of the contract, all the purchase money was to have been paid, even though in such contract the property is sold to have been hired to the buyer for that length of time. *McGinnis v. Savage*, 29 W. Va. 363, 1 S. E. Rep. 746.

b. Measure of Damages.—Where the contract of sale is executory, and the title and possession remain in the seller, the measure of damages for a refusal of the buyer to accept and pay for the goods, is the difference between the contract price and the market value of the goods at the time and place of delivery. *Weltner v. Riggs*, 3 W. Va. 445; *Hall v. Pierce*, 4 W. Va. 107; *Smith v. Snyder*, 77 Va. 432; *James v. Adams*, 16 W. Va. 245; *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

Under a contract to pay for a given quantity of ice per year, whether the whole quantity is accepted or not—the same to be delivered from day to day as the purchaser may require—the seller is not entitled to recover for the difference between the quantity contracted for and that actually accepted where the failure to accept more was due to the inability of the seller to furnish the ice as the parties had agreed. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 285, 38 S. E. Rep. 141.

c. Resale by the Seller.—When the buyer refuses to accept goods tendered according to the contract of sale, the seller may resell them at any time and in any state of the market and hold the buyer liable for any loss sustained; therefore, the fact that the seller delayed the resale of the goods for an unreasonable time upon a falling market, will not prevent recovery from the buyer of the difference between

the contract price and that obtained at the resale. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 787.

Notice of Intention to Resell.—Where a contract of sale is executory, and the buyer refuses to accept and pay for the goods, the seller should give him notice that he intends to sell, and hold him responsible for the loss.

This notice, it will be observed, is not a notice of resale, but a notice that the seller will assert his right of resale, and bind the buyer by the price obtained. *American Hide, etc., Co. v. Chalkley*, 101 Va. 458, 44 S. E. Rep. 705, citing *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 787.

Notice of Time and Place of Resale.—But where the seller elects to sell the goods and hold the buyer liable for the loss, it is not necessary that he should give notice to the buyer of the time and place of sale, and though he gives such notice, he may postpone the sale to another day, if that seems judicious. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 787.

Measure of Damages on Resale.—If the seller chooses to consider the property as the buyer's and resells it, using reasonable diligence to obtain its actual value at the time the contract is broken, then the measure of his recovery is the difference between the contract price of the goods and the net price which they produce at a resale, fairly made, after deducting all expenses incurred by the seller in taking care of the goods and selling them. *James v. Adams*, 8 W. Va. 568; *American Hide & Leather Co. v. Chalkley* 101 Va. 458, 44 S. E. Rep. 705.

d. Lien.—Where there is a sale of personal property to be paid for on delivery, the seller has a lien for the price so long as the property remains in his possession, but the transfer or surrender of possession by the seller destroys the lien. *James v. Bird*, 8 Leigh 510, 81 Am. Dec. 668.

Waiver.—This lien, however, may be waived by the seller. *Neff v. Baker* (Va.), 4 S. E. Rep. 620.

Equitable Lien.—But the seller of personal property has no implied or equitable lien on the property for the purchase money. *Williams v. Gillespie*, 30 W. Va. 586, 5 S. E. Rep. 210; *James v. Bird*, 8 Leigh 510, 81 Am. Dec. 668; *McCandlish v. Keen*, 13 Gratt. 629.

IX. FRAUDULENT SALES.

Where one buys property on credit with the positive intention not to pay for it, this is a fraudulent purchase, whether he makes false representations as to his ability to pay or not. *Miller v. White*, 46 W. Va. 67, 33 S. E. Rep. 333. See *Wickham v. Lewis*, 13 Gratt. 427; monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

But mere insolvency or inability to pay for property purchased will not render the sale fraudulent on the purchaser's part, if he expects and intends to pay, and has reasonable grounds for expecting to be able to pay. On the other hand, however, if, in addition to insolvency, he makes false statements of his pecuniary circumstances or business, or his ability to pay, calculated to induce the seller to believe he will be paid, the purchase is fraudulent. *Miller v. White*, 46 W. Va. 67, 33 S. E. Rep. 333.

The intention of the purchaser of property not to pay for it may be inferred by the jury from the circumstances, actions and conduct of the purchaser, not only in respect to the sale in question, but any other contemporaneous transactions. *Miller v. White*, 46 W. Va. 67, 33 S. E. Rep. 333.

X. SALES BY SAMPLE.

In General.—To authorize a jury to find that a sale is a sale by sample, the evidence must satisfactorily show that the parties contracted solely with reference to the sample exhibited. In other words, unless both parties deal with the sample with the mutual understanding that the bulk is like the sample, the sale is not a sale by the sample. *Proctor v. Spratley*, 78 Va. 254.

Acts of Ownership.—But even though a sale is by the sample, still if either the buyer or his agent, with full knowledge of the nonconformity of the bulk with the sample, exercises ownership over the goods as by offering them for sale, this acceptance is so far binding that the buyer cannot rescind either for nonconformity or for fraud. *Proctor v. Spratley*, 78 Va. 254.

Place for Comparing Bulk with Sample.—And where goods are sold by the sample, the place and time of delivery is the place and time in which the comparison between the bulk and sample should be made and the goods accepted, and is also the place and time of rejection for the nonconformity of the bulk with the sample. *Proctor v. Spratley*, 78 Va. 254.

Warranty.—If a sale is not a sale by the sample, there can be no warranty of quality implied, and the maxim *caveat emptor* applies. *Proctor v. Spratley*, 78 Va. 254.

XI. BONA FIDE PURCHASERS.

1. TRUSTEES IN DEEDS OF TRUST OR ASSIGNMENTS.—To secure creditors are unquestionably purchasers for value; but whether they are *bona fide* purchasers without notice depends on the facts of the case. *Chapman v. Chapman*, 91 Va. 397, 21 S. E. Rep. 818; *Dougllass Merchandise Co. v. Laird*, 37 W. Va. 687, 17 S. E. Rep. 188; *Oberdorfer v. Meyer*, 88 Va. 334, 13 S. E. Rep. 756; *Wickham v. Lewis*, 13 Gratt. 427, and note.

2. PURCHASER FROM FRAUDULENT BUYER.—Although a sale and delivery of goods is secured by the false and fraudulent representations of the buyer, yet the title vests in him until the seller has done some act to disaffirm the transaction; and therefore if the buyer transfers the property to an innocent purchaser for value before disaffirmance, the seller cannot recover the property. *Williams v. Given*, 6 Gratt. 268; *Wickham v. Lewis*, 13 Gratt. 427; *Jones v. Christian*, 86 Va. 1017, 11 S. E. Rep. 984; *Oberdorfer v. Meyer*, 88 Va. 334, 13 S. E. Rep. 756.

Thus, where a chattel is sold for cash on delivery, and the seller delivers it without exacting payment, he cannot recover the property from an innocent purchaser from the buyer before payment. *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

XII. CONDITIONAL SALES.

1. DEFINITION.—A conditional sale is a contract by which the owner parts with the title of the thing upon some specified condition, either precedent or subsequent. *Baldwin v. Van Wagner*, 33 W. Va. 233, 10 S. E. Rep. 716. For example, where a seller agrees to sell certain personal property to the buyer, and delivers possession, but expressly retains title until the payment of the purchase price, it is a conditional sale. *McComb v. Donald*, 82 Va. 903, 5 S. E. Rep. 558; *McGinnis v. Savage*, 29 W. Va. 363, 1 S. E. Rep. 746. See *Leavell v. Robinson*, 3 Leigh 181, holding a transfer of bank stock to be a conditional sale.

2. PAYMENT IN INSTALLMENTS.—Where personal property is sold to be paid for by the party receiving it in installments at specified times, and when so paid for it is to become his property, but that the title is to remain in the original owner until all the

purchase money has been paid, this constitutes a familiar example of a conditional sale. *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. Rep. 746.

And it is not an uncommon thing for parties to word such conditional sale as though it were a leasing or hiring of the property; the object of this is frequently to make such conditional sales valid, not only between the parties, but also, if possible, against innocent purchasers from, and creditors of, the buyer. But the courts, in determining the real character of the contract, will always look to its purpose, rather than the name given to it by the parties, and will hold that to be a conditional sale which is such in law or fact, though the parties termed it a lease. *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. Rep. 746; *Balwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. Rep. 716. See *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. Rep. 496.

In *Huffard v. Akers*, 52 W. Va. 21, 43 S. E. Rep. 124, the court distinguished *McGinnis v. Savage*, *supra*, and *Baldwin v. Van Wagner*, *supra*, on the ground that in those cases the agreement starts out calling it a lease, whereas in the case at bar it was called a sale.

3. SALE OR RETURN.—Where the condition of the sale is that the property may be returned if it does not prove "satisfactory" to the buyer, or if the buyer is not satisfied with it after trial, this is a sale on condition subsequent; that is, the title passes with the possession, but to be divested if the condition is not performed and the property returned. In such a sale the buyer must in fact be satisfied, and if he is dissatisfied however unreasonable or groundless his dissatisfaction may be, he may return the property. *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. Rep. 591, 45 Am. St. Rep. 859.

For example, one who buys a harvesting machine called a "binder," upon the condition that if it does not work to his satisfaction he may return it, has an absolute right to reject the machine if he so wills, without assigning any reason. *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. Rep. 591, 45 Am. St. Rep. 859.

If a slave be sold upon condition that the buyer may return him in a given time, and while in the buyer's possession, but not through his neglect, he be disabled by cold, so as to be of little value, the buyer may refuse to keep him, and is not responsible for the loss, unless he expressly agreed to be so liable. But the buyer is responsible, without such agreement, for ordinary neglect; that is, if he failed to take such care of the slave as any man of common prudence and capable of governing his family, takes of his own concerns. *Williams v. Moore*, 3 Munf. 310.

Bad Faith in Refusing to Accept.—Where it is provided in the contract of sale that the article to be made shall be satisfactory to the buyer, he may arbitrarily decline to accept it and his reasons for so doing cannot be investigated, unless he acted fraudulently and in bad faith. *Barrett v. Coal & Coke Co.*, 51 W. Va. 416, 41 S. E. Rep. 220; *Carpenter v. Virginia-Carolina Chemical Co.*, 98 Va. 177, 35 S. E. Rep. 358; *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. Rep. 591, 45 Am. St. Rep. 859.

But in order to make out a charge of bad faith on the part of the buyer in refusing to accept goods which he agreed to accept, if they proved satisfactory, the seller must establish bad faith clearly and distinctly. *Virginia-Carolina Chemical Co. v. Carpenter*, 99 Va. 292, 38 S. E. Rep. 143.

4. SALE ON TRIAL.—But sometimes the chattel is taken with the understanding that the buyer is to try it before the purchase shall take full effect; this is a sale on a condition precedent to buy if sat-

isfied; that is, the title does not pass until the condition is fully performed, although the possession is delivered. In either the bargain of sale or return, and the sale on trial, however, the buyer may peremptorily return within the time without giving any reason, if he acts honestly. *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. Rep. 591, 45 Am. St. Rep. 859.

5. RECORDATION OF CONDITIONAL SALES.

In *Virginia*.—Formerly in *Virginia*, conditional sales, though unrecorded, were valid as against purchasers from and creditors of the buyer; and therefore a subsequent purchaser, without notice from the buyer, acquired no title against the original seller. *McComb v. Donald*, 82 Va. 903, 5 S. E. Rep. 558; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

But by statute in *Virginia* conditional sales, reserving title to the seller, must now be recorded to be good against creditors and bona fide purchasers. Therefore, if a seller of goods, by an unrecorded bill of sale, delivers possession, but retains title until the price is paid, such sale is void as to creditors of and purchasers for value and without notice from the buyer. Va. Code 1887, § 2462; *Hash v. Lore*, 88 Va. 716, 14 S. E. Rep. 365; *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163; *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. Rep. 496.

Acknowledgment.—But mandamus will not lie to compel the clerk of the court to record a conditional sale, unless it is proved or acknowledged as required by law. *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163.

In *West Virginia*.—And in *West Virginia*, in order that conditional sales may be good as against third parties, notice of a reservation of title to the goods sold must be recorded in the clerk's office of the county court of the county where the property is. W. Va. Code, ch. 74, § 3; *Baldwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. Rep. 716; *Hyer v. Smith*, 48 W. Va. 560, 37 S. E. Rep. 633; *Troy Wagon Co. v. Hutton*, 53 W. Va. 154, 44 S. E. Rep. 135.

Accordingly it has been held that goods bought under a conditional sale and placed on the leased premises before the sale is recorded, are liable to distraint for rent. *Huffard v. Akers*, 52 W. Va. 21, 43 S. E. Rep. 124.

Delivery to Buyer Necessary.—But the statute does not apply unless possession of the property be delivered to the buyer. *Webster Lumber Co. v. Keystone Lumber Co.*, 51 W. Va. 545, 42 S. E. Rep. 632.

Acknowledgment of Notice.—Moreover, as the statute contains no provision requiring acknowledgment as a prerequisite to recordation, this notice of reservation of title may be recorded though unacknowledged. *Hatfield v. Haubert*, 51 W. Va. 190, 41 S. E. Rep. 144; *Troy Wagon Co. v. Hutton*, 53 W. Va. 154, 44 S. E. Rep. 135. The rule is otherwise in *Virginia*. *Callahan v. Young*, 90 Va. 574, 19 S. E. Rep. 163.

Miscellaneous Record Book.—Where a contract selling chattels, and reserving title until payment, is left with the county clerk to be recorded, the record is complete, and the fact that it is recorded in the "miscellaneous record book" will not invalidate its recordation. *Troy Wagon Co. v. Hutton*, 53 W. Va. 154, 44 S. E. Rep. 135.

Contracts of Hiring.—As the *West Virginia Code*, ch. 74, § 3, requires that conditional sales, but not contracts of hiring, be recorded in order to prevail against the creditors of and purchasers from the buyer, it will be readily seen that the question whether the transaction is a conditional sale or a hiring is important in controversies between the creditors or purchasers of the person having possession of the property and the persons claiming to

be the owners of it. But see opinion of HINTON, J., in *McComb v. Donald*, 82 Va. 907, 5 S. E. Rep. 560. For example, in *Baldwin v. Van Wagner*, 33 W. Va. 293, 10 S. E. Rep. 716, a piano was rented for a stipulated amount per month, the owner agreeing that when the value of the piano was paid in such monthly payments the title should vest in the renter. It was held that this agreement constituted a sale upon a condition precedent, and therefore void as to the creditors of the renter unless recorded.

Harrison v. Sims.

June, 1828.

Injunction—Execution on Personality. *—The owner of slave property, which has been taken by virtue of an execution issued against the goods and chattels of another, is entitled to an Injunction to stay the sale, though he neither alleges, nor proves the peculiar value of the property.

Randolph Harrison and Samuel Jones exhibited their Bill to Chancellor C. Taylor, in which they alleged that Executions to the amount of more than \$700, were levied upon three negro girls, viz: Julia, 507 Lavinia and Lucy, *together with other property, belonging to a certain Charles Irvine, of the county of Buckingham: that at the sale which took place on the 22d June, 1827, under the Executions, the Plaintiffs became the purchasers of the three girls, and of three mules, at the price of \$736, which property was left on the plantation of the said Irvine, for the convenience of his family, the said girls being favorite house-servants, but at all times completely under the control of the Plaintiffs: that a short time after the sale and purchase aforesaid, Edward W. Sims, the Defendant, who had an Execution, of subsequent date to those under which the Plaintiffs purchased, caused it to be levied on the three negro girls by the Sheriff of Buckingham, and they will be sold, if not prevented by the interposition of the Chancellor, on the second Monday in the following month. The Plaintiffs further state, that in consequence of their purchase, and the payment of the money, the Executions first spoken of have been returned satisfied; and to remove any false impression on the subject, they aver that it was a fair bona fide purchase, made with their own money. They therefore prayed that Sims might be made a party, and that an Injunction might be awarded, to restrain him and the Sheriff from proceeding further on the said Sims's Execution.

The Injunction was refused by the Chancellor, but was awarded by Judge Cabell, of the Court of Appeals.

The Defendant, Edward W. Sims, answered the Bill, denying that a Court of Equity had any jurisdiction in the cause, and stating many facts, which it is unnecessary to report, as the question before the Court did not turn on the verity of those facts.

The Court of Chancery, on the 28th January, 1828, made the following order: "On

*See on this subject, *foot-note* to *Randolph v. Randolph*, 6 Rand. 194; *foot-note* to *Kelly v. Scott*, 5 Gratt. 479; monographic note on "Executions" appended to *Palme, Surv. etc.*, v. Tutwiler, 27 Gratt. 440; monographic note on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

The principal case is cited in *Snoddy v. Haskins*, 12 Gratt. 368.

motion of the Defendant by Counsel, the Court, after considering the Bill only, and with due deference, being under the impression that perhaps the cases on like subjects in 3 Rand. may have escaped the notice of the Judges, doth order, that the 508 Injunction *awarded the Plaintiffs, the 6th July, 1827, by a Judge of the Supreme Court of Appeals, to enjoin the sale of the slaves in the Bill mentioned, be discharged, the same having been, as it seems to this Court, improvidently awarded."

From that order the Plaintiffs appealed to this Court.

Stavard for the Appellants.

The Attorney General for the Appellee.

June 4. The PRESIDENT delivered the opinion of the Court.†

The Chancellor was mistaken in supposing, when he dissolved the Injunction in this case, that the cases in 3 Rand. on like subjects, had escaped the notice of the Judges of the Court of Appeals. A more attentive consideration of those cases would have conducted him to a different conclusion. Though there is some little diversity of opinion, whether peculiar value of slave property ought to be stated in the Bill, praying relief in such cases, yet the result of the cases is, that when that matter is alleged in the Bill, as in the case now before us, an Injunction ought to be awarded, although the party might recover damages at Law for the abduction of his property, and possibly the property itself, in an action of Detinue. But, in the case of *Randolph v. Randolph*, ante, 194, by a full Court on a re-view of those cases, and to settle the Law, it has been decided, that in every case in which the owner of slave property, as in the case now before us, applies to a Court of Equity, he will be entitled to an injunction, and if he makes out his case, he will be entitled to relief, though he neither alleges, nor proves peculiar value of the property. The Decree dissolving the Injunction in this case is, therefore, reversed, and the Injunction re-instated.

509 *William Cutler v. John Hinton.

June, 1828.

Statute of Frauds—Collateral Promise—What Constitutes—Case at Bar.—If C. authorise H. to say to a merchant, "that he C. would pay for any goods sold to his son-in-law L." or to any merchant of whom L. "might purchase," or "might wish to

†Absent, JUDGE GREEN.

Statute of Frauds—Collateral Promise—What Constitutes.—In *Ware v. Stephenson*, 10 Leigh 167, it is said: "Whatever doubts may at one time have existed respecting the undertakings within the scope of the first section of the statute of frauds, it has long since been definitely settled that when the undertaking is for a consideration to be received by, or articles to be supplied to, a third person, if the transaction be such that the third person is responsible to the person who supplies the articles, or from whom the consideration proceeds, the undertaking is collateral, and if oral is not binding. *Matson, etc. v. Wharam*, 2 T. R. 80; *Cutler v. Hinton*, 6 Rand. 508."

To the same effect, the principal case is cited in *Noyes v. Humphreys*, 11 Gratt. 645; *Radclyff v. Poundstone*, 23 W. Va. 733. In *Riffe v. Gerow*, 29 W. Va. 468, 2 S. E. Rep. 107, it is said: "In *Prime v. Koehler*, 77 N. Y. 91, it was held that 'where the purpose of the promisor to pay the debt of a third person is to secure a benefit to the promisor, by relieving his property from a lien, or securing or confirming his possession, the promise is original, and not collat-

purchase goods, that he would pay for L." a certain sum; this is a collateral promise, and being verbal, is void under the Statute of Frauds.

Same-Same-Same-Evidence.—In such case, if the merchant charge the goods to L., the person to whom they are delivered, such entry in his books is, (like the admissions of a party,) strong evidence against him, that he is dealing with L., and not with C., but vice versa, if the entry be against C., the promiser, such entry is not evidence for the merchant, so as to make that an original, which would have been otherwise a collateral promise.

Same-How to Be Executed.—The Statute of Frauds, is a wise and salutary Law, and should be fairly and fully carried into execution by the Courts.

This was an appeal from a Decree of the Chancery Court held in Richmond, rendered in favour of the Appellee, against the Appellant.

William Cutler had brought Assumpsit against John Hinton, for money had and received to the Plaintiff's use, in the Superior Court of Prince George. He obtained a Verdict and Judgment against the Defendant, for \$2,786 60 cents, with interest from the 21st April, 1818. At that trial the Defendant offered in evidence, as a set-off, or discount against the Plaintiff's demand, an account raised against Cutler, by John Hanserd & Co., for the sum of \$795 10, of which a small part was for goods furnished Cutler himself, in March, 1816, but the chief part to Theoderick Love, in December, 1816, and January, 1817, and the testimony of Samuel Hinton, who stated that, in December, 1816, the Plaintiff, Cutler, desired him to say to any other merchants that he would pay for any goods sold to Theoderick Love, if the same did not exceed \$4000: that he made this communication to Hanserd & Co., among others: that in consequence of this communication, Hanserd & Co., delivered to said Love, most of the goods in the account mentioned, and some to the Plaintiff himself: that he has examined the books of Hanserd & Co., and *that on them the goods are charged to Cutler, and not to Love: that before the day of the commencement of this suit at Law, that co-partnership was dissolved, and that all right, title and interest in the stock in trade, as well as in the debts and credits, and books and accounts, were assigned and transferred, for valuable consideration, to the Defendant, John Hinton, and to prove this, a Deed was also given in evidence; but the Court refused to allow the account to go to the Jury as a set-off, because it was a debt due to a partnership, &c. The Verdict and

Judgment above mentioned, were the consequence.

John Hinton then exhibited his Bill to the Chancellor, praying that the above-mentioned sum of \$795 10, may be allowed to him as a discount, and that Cutler may be enjoined from enforcing so much of his Judgment by Execution: he states, that Cutler obtained the credit with Hanserd & Co., (the firm consisting of Hanserd Hinton) for his son-in-law, Love, some small part of the account being for himself; that the partnership is dissolved, of which public notice is given, and the partnership effects and debts assigned to himself. He states, moreover, that Cutler had taken a Deed from Love, for property in Petersburg, and that the real consideration of the Deed was, the responsibility which Cutler had encountered for Love's debts, and amongst others, this very debt.

Cutler, by his Answer, denied that he ever made himself responsible to the complainant for goods purchased from him by Love, or that he ever authorised Love to obtain them on his credit: he denies that Love ever conveyed to him any property to pay the debt, and asserts that Love is still considerably indebted to him. He then gives a narrative of Love's marriage with his daughter; of his becoming in debt to him; of his indiscretions and extravagance; of his promises to reform, and of his proposal to retire to the country, and keep a small store. He states, that he made some advances to him, gave his credit at one or two stores, to obtain such goods

as were immediately necessary, 511 *for which he, the Defendant, paid; that the Defendant promised Love that if he would reform, he would make him a semi-annual allowance for several years; that at Love's request, he repeated this promise in the presence of Samuel Hinton, that there might be a witness to the promise, and perhaps that it might improve Love's credit; that the promise would have been performed, if Love had complied with the condition, but he became more intemperate than ever, and the Defendant then withheld from him any further advances, that he might preserve for his wife and children those funds which, if given to him, would be squandered. The Defendant not meaning to cast any imputation on Samuel Hinton, the witness, supposes he may have misunderstood the conversation, and says it is impossible he could have been so stupid as to authorise the witness to proclaim to the merchants of Petersburg, that he meant to pay some thousands of dollars, to just as many as Love could get credit with for that amount. As the conversation has been misunderstood, and may be incorrectly represented in evidence, the Defendant considers himself compelled, in the just defence and protection of his estate, and of his family, to insist on the benefit of the Statute for the prevention of Frauds and Perjuries. On this Answer, issue was joined.

The evidence given, is to the following effect.

Samuel Hinton, in an affidavit, says, that in December, 1816, Cutler requested him to inform Hanserd & Co. or any other

eral, and so is not within the statute of frauds.' ANDREWS, J., in delivering the opinion of the court, said: 'The circumstances bring the case directly within the third class of cases enumerated in Leonard v. Vredenburg, 8 Johns. 28, viz., where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm running between the newly-contracting parties. In this class of cases the subsisting liability of the original debtor is no objection to the recovery: and, where the purpose of the promise is to secure a benefit to the promisor by relieving his property from a lien, or securing and confirming his possession, the promise is original, and not collateral, although a third person may be personally liable for the debt, and the promise may be in form a promise to pay such debt, and although the performance of the promise may result in discharging the debt.' See also, Wagoner v. Gray, 3 Hen. & M. 603; Cutler v. Hinton, 6 Rand. 509; Ware v. Stephenson, 10 Leigh 155; Noyes v. Humphreys, 11 Gratt. 436; Radcliff v. Poundstone, 23 W. Va. 724."

See further, monographic note on "Frauds, the Statute of" appended to Beale v. Diggs, 6 Gratt. 582.

person, of whom Love might purchase goods, that he would pay for Love four thousand dollars: that he gave Hanserd & Co. this information: that goods were furnished Love, and charged to Cutler: that a part of Hanserd & Co.'s account was for goods got by Cutler: and the witness expressed the opinion, that the goods delivered Love were sold from the information the witness gave to Hanserd & Co., and exclusively on the responsibility of Cutler.

Samuel Hinton afterwards gave a deposition, taken by virtue of a commission.

512 *He says, that in December, 1816, Cutler called on him and requested him to tell Hanserd & Co., and any other person of whom Love might wish to purchase goods, that he would pay for said Love, the sum of \$4,000: that it was not in his power to advance the money at that time. In answer to interrogatories by the Plaintiff, he says, that he gave this information to Hanserd & Co. a few moments after Cutler made the request, and before the goods were purchased: that, in his opinion, they would not have sold the goods, nor would Love have attempted to make the purchase, but on the faith of Cutler's promise: that Love was not present, when Cutler requested the witness to give the information: that the goods were charged to Cutler on their books: that \$645 35, are charged to Cutler, for goods delivered to Love; and \$42 13, for goods delivered Cutler: that Theoderick Love is considered by the witness, as a man of truth, honor, and integrity.

Samuel Turner deposed, that the mutual friends of Love and Cutler, suggested to the latter, in the fall and winter of 1816, when the habits of the former had undergone a change for the better, the propriety of advancing funds to Love to enable him to commence a small mercantile business: that it was finally agreed between them, that Cutler would give to Love four thousand dollars as a capital to commence with; to be paid by Cutler at different periods, and in the mean time he authorised and requested the witness, to inform any gentleman from whom Love might wish to purchase goods, of the arrangement: that the witness did make the statement to Colquhoun & Co., from whom Love bought goods: that, pending this arrangement, Love exhibited a statement of his debts, amounting to \$5,000; the witness was a principal creditor, and Cutler only a creditor for two or three hundred: witness had taken a Deed of Trust on Love's house and lot: and it was agreed between the parties, that as Love was about to move, he should make a Deed for the lot to Cutler: that the witness should be authorised to sell it,

513 pay himself, and *that the balance should be appropriated to the discharge of the before mentioned debts: that witness sold the lot, and after paying himself, there remained two negotiable notes of \$1,500 each, which Cutler demanded of him: he refused to deliver them, but knowing that Love was indebted to John Hinton, the witness delivered them to him, in order the better to secure the completion of the contemplated arrangement of Love,

say, the payment of his debts: the witness further said, in answer to interrogatories by the Plaintiff, that his impression was, at the time of the arrangement, that Cutler honestly intended to do his son-in-law a favor, but his conduct since, proves the reverse: that Cutler withholds from Love's creditors what they are justly entitled to: that Love is a man of strict honor and probity, and that witness's opinion of Cutler has undergone a change.

Theoderick Love testified, that in the fall of 1816, his father-in-law, Cutler, agreed to give him \$4,000, to commence a mercantile business, to be taken in goods, it not being convenient at that time for him to advance the money, and the goods could be got on a credit: to this end, Cutler went with the witness to Samuel Hinton, and Turner, and requested them to go with the witness to any merchant, of whom the witness might wish to purchase goods, and inform them that the witness had the privilege of buying to the above mentioned amount: that in making the purchases, the witness did not exceed the \$4,000; and a part of the goods he bought of Hanserd & Co. to the amount of nearly \$700: that being about to leave town, he offered his lot for sale publicly, but failed to sell: his object was, from the proceeds, to pay his debts: that he was advised to make a Deed to Dr. Cutler, to prevent a sacrifice, he being a monied man, and that no one would presume that he would sell it for less than its value; but, there was a perfect, full, and positive understanding, between Cutler, the witness, and his friends, that he was not to consider himself

the owner of the property, but that it 514 *was to be sold, and the proceeds applied to the payment of witness's debts: that Cutler was a creditor to a small amount, for which he was to be paid, but to the balance he had no earthly right: the witness, however, on further reflection, determined not to deliver the Deed to Cutler, and actually handed it to John Hinton, and requested him not to deliver it to Cutler, or any one else, till he received the proceeds of the sale, except so much as would pay Turner's claim, which was nearly two thousand dollars. The residue of this witness's evidence relates to a subject having no bearing on the case.

The Chancellor being of opinion that the undertaking of Cutler was not collateral, but direct, and that the whole credit was given to him, perpetuated the Injunction. From his Decree, Cutler appealed.

The Attorney General, for the Appellant. Leigh, for the Appellee.

June 5. JUDGE CARR.*

Cutler sued Hinton in Case for money had and received to his use. On non-assumpsit pleaded, the Defendant offered as a set-off, an account for goods, amounting to \$795 10. charged as taken up by Cutler, with the firm of Hanserd & Co., of which firm Hinton was one, and produced a Deed, showing a transfer of all the debts of the firm to Hinton, and also a witness to prove, that the goods were taken up by one Love,

*Absent, JUDGES GREEN, and COALTER.

(the son-in-law of Cutler,) on his (Cutler's) promise to pay. The Court rejected the set-off. The Defendant excepted, and a Verdict and Judgment were had against him for \$2,786 60, with interest. The Defendant took no appeal, but filed his Bill for an Injunction, stating the facts of Cutler's obtaining a credit with the Plaintiff's

house for his son-in-law, and a small part *for himself; that the debts of the firm were transferred to the Plaintiff; that the Plaintiff held a sum of money claimed by Cutler, which he was ready to pay him, retaining the amount which Cutler owed him; that Cutler sued for the money, and the Law Court refused to allow the set-off, because it was a debt due to a firm, &c., and praying the benefit of the set-off.

The Answer of Cutler denies positively that he owes the account claimed of him; avers that he never undertook to pay the firm for goods taken up by his son-in-law, Love, or gave him a credit with them, and relies on the Statute of Frauds to protect him from any such charge. Several depositions were taken, and on hearing, the Court perpetuated the Injunction for the \$795 10, and Cutler appealed.

On the argument, the Counsel for the Appellant rested principally on two points. 1st. That the account, if chargeable to Cutler, might have been set-off at Law, and so, that Equity had no jurisdiction: but 2dly. That it could be set-off, neither at Law nor in Equity, because the promise being collateral and verbal, was void under the Statute of Frauds. We will consider this last point first, as it strikes at the root of the claim. Upon this branch of the Statute, prescribing the mode in which "the special promise to answer for the debt, default, or miscarriage of another person," must be made, there is no difference of construction, that I have seen, between Courts of Law and Equity; indeed, it is a class of cases, which can very rarely come into Equity. The question generally is, whether the promise is for the debt of another, or not; in other words, (which, though not used by the Statute, have become technical terms,) whether the promise be collateral, or original. The cases are very numerous on the subject, and some of them contain very nice and subtle distinctions; but, the principle, which seems to be settled, is this, (as laid down by

Buller, J. in *Matoon v. Wharam*, 2 516 *Term Rep. 80, and by Judge Rbone, in *Waggoner v. Gray's Administrators*, 2 Hen. & Munf. 603.) "That if the person, for whose use the goods are furnished, be liable at all, any other promise by a third person to pay that debt, must be in writing, otherwise it is void by the Statute of Frauds." Thus, in *Anderson v. Hayman*, 1 Hen. Black. 120. The Plaintiff was a woollen draper in London: B. was his rider, to receive orders: the Defendant meeting with B. desired him to write to the Plaintiff, requesting him to supply the Defendant's son with whatever goods he might want, on his, the Defendant's credit; and at the same time said, "Use my son well, charge him as low as possible, and I will be bound for the payment of the money, as far as 800l. or 1,000l." B. wrote

to the Plaintiff, giving him the information. Soon after, the son received goods from the Plaintiff, to the amount of 800l. which were delivered to him, in consequence of the father's order. The son was debited in the Plaintiff's books: he afterwards became a bankrupt, and this action was brought against the father. The Court were clearly of opinion, that this promise, not being in writing was void by the Statute of Frauds, as it appeared that credit was given to the son, as well as to the father. In *Buckmyr v. Darnall*, 2 Lord Raymond, 1,085, the Plaintiff declared that the Defendant, in consideration that the Plaintiff, at his request, would let to hire, and deliver to one J. E. a gelding to ride to Reading, that the said J. E. would deliver the gelding to the Plaintiff. Held, that this was a collateral promise, because Detinue would lie against J. E. on the bailment. These cases, out of a vast multitude, serve to exemplify the general principle, that where the promisee as a double remedy, both against the promiser, and him in whose behalf the promise is made, such promise is collateral and must be in writing.

Let us now see what was Cutler's promise. Samuel Hinton has given evidence three times. In his evidence before the Law Court, he says that Cutler de- 517 sired him to "say to any other merchants that he would pay for any goods sold to Love, if the same did not exceed \$4,000. In his affidavit, he says, "In December, 1816, Doctor Cutler requested me to inform John Hanserd & Co., or any other person or persons, of whom Love, his son-in-law, might purchase goods, that he would pay for Love, \$4,000." In his deposition, he says, that in December, 1816, Cutler called on him, and requested him to tell Hanserd & Co., or any other person of whom Love might wish to purchase goods, that he would pay for said Love \$4,000. Now, take either of these forms, and it seems to me, that this is a collateral undertaking: he promises to pay for Love, to any person that Love might purchase, or wish to purchase goods of. Love, then, was to purchase the goods, which of course would render him liable for them, and Cutler was to pay the money for Love, not for himself. Unless I have confounded things strangely, this is clearly collateral. The next witness is Turner. He says that Cutler agreed to give Love \$4,000, as a capital to commence with; which sum was to be paid by Cutler, at different periods; and in the mean time, he authorised and requested the deponent to inform any gentleman, of whom Love might wish to purchase goods, "of the arrangement." Of what arrangement? Why, that he had agreed to give Love \$4,000. This might induce the merchants to trust Love, but surely would be no promise, either original or collateral, made by Cutler to the merchants, to pay them money. Love is the only other witness. I question very much whether he is admissible. He seems to stand nearly in the situation of Slaughter, in the case of *Waggoner v. Gray's Adm'rs*, (before cited,) who was pronounced by this Court to be inadmissi-

ble. I have not thought it worth while, however, to consider this point. Admitting his testimony, and that he puts the promise of Cutler in such a form as to make it an original one, yet the positive Answer of Cutler, directly responsive to the Bill, overweighs it, even if it were entitled

518 to full credit. *I consider, then, that the promise, as proved here, is collateral, and not being in writing, could raise no claim against Cutler. It may not be amiss to remark, that I have not overlooked the fact that the goods were charged by Hanserd & Co. to Cutler, and not Love, and that this is noticed in the cases as a fact tending to show to whom the credit was originally given: it seems to me, that such entries made in the books of merchants, are better evidence against than for them. Where they charge the goods to the person to whom they are furnished, it is strong to show that they considered themselves dealing with him, and (like the admissions of a party,) may be safely taken against them: but it would be of dangerous tendency to say, that by an entry made by themselves, in their own books, they could change the complexion of their case, and made that an original, which would otherwise have been a collateral promise. This would be departing wholly from the general policy of the Law, and the particular policy of the Statute of Frauds, which is, in my opinion, a wise and salutary Law, and should be fairly and fully carried into execution by the Courts.

With respect to the question of set-off, it need hardly be considered: for, as to that part of the account claimed as furnished to Love, on the promise of Cutler, it was (if I am right,) no debt at all; and as to the part charged as furnished to Cutler himself, we think it no ground for coming into Equity.

I think that the Decree should be reversed, the Injunction dissolved, and the Bill dismissed.

JUDGE CABELL, and the PRESIDENT, concurred.

519 *Webster v. Couch.

October, 1838.

Injunction—Reinstating—Appeal.—When a Chancellor refuses to re-instate an Injunction, on new proofs of the allegations on a Bill, a Judge of the Court of Appeals has a right, on an appeal to him, to reinstate it.

Same*—Bill of Discovery—Allegations of Bill Denied—Effect.—In a Bill of Discovery, if the Defendant makes no discovery, but on the contrary, negatives the allegations of the Bill, the Injunction awarded on the Bill should be dissolved.

Set-Off—Unliquidated Damages.—Unliquidated damages for a substantive injury, cannot be set-off, either at Law, or in Equity, against a legal demand.

***Injunction—Adequate Remedy at Law.**—In *Shepherd v. Groff*, 34 W. Va. 126, 11 S. E. Rep. 998, it is said: "There is another, and perhaps a stronger reason for denying equity jurisdiction, and that is that a complete and adequate remedy is afforded in a court of common law. Where there is such a remedy at law, it is well settled that equity will not interpose by injunction, and where the bill shows no ground of equitable jurisdiction, it should be dismissed. *Surber v. McClintic*, 10 W. Va. 236: *Morehead v. De Ford*, 8 W. Va. 316; opinion in *Goolsby v. St. John*, 25 Gratt. 151; *Poage v. Bell*, 8 Rand. 586; *Webster v. Couch*, 6 Rand. (Va.) 519; *High. Inj.*, § 30."

See further, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

†**Set-Off—Unliquidated Damages.**—To the point that

Edmund Webster exhibited his Bill to Chancellor C. Taylor, setting forth, that in the year 1816, he, the Plaintiff, and a certain Daniel Couch, entered into an agreement, whereby the Plaintiff became bound to convey to Couch sundry houses and lots in the City of Richmond, for which he was to receive in exchange from Couch, a good title in fee-simple to a tract of land lying on the waters of Gold Mine Creek in Hanover, containing about eight hundred acres of land: that in consideration of the said exchange, the Plaintiff further agreed to pay to Couch, and to Ellis & Allen, at the rate of \$1,000 per annum, as rent for the said houses, from the 24th January, 1816, till the 1st May then next following. After executing Deeds in pursuance of the said agreement, Couch exhibited to the Plaintiff a lease, which he had previously made of part of the said land in Hanover, to a certain John T. Swann, by which the Plaintiff discovered to his great surprise, that the lessee, amongst other things, was authorized to cut and carry off from the said land, a large quantity of timber, for the purpose of erecting a barn. The Plaintiff expressed his surprise, that Couch had never, previous to the final execution of the agreement, intimated to him the authority thus given to Swann. In reply, Couch admitted that he had not, but said that timber thus cut might be valued, and settled between himself and the Plaintiff, at the same time with the rent which should become due from the Plaintiff as aforesaid.

520 *The Plaintiff further stated, that Couch mentioned at the same time, that Swann was bound by the lease to cultivate that portion of the land which had been rented to him in a farmer like manner, and expressly promised to make good to the Plaintiff, on a settlement of the rent, all damages, should any ensue to the land, from improper or negligent cultivation; and the Plaintiff avers, that the fertility of the soil was greatly diminished by Swann, and the land much injured, both by the improper cultivation, and the destruction of its timber.

He states, that Couch instituted a suit at Law against him for the rent, and recovered judgment for the whole amount, without allowing him any discount, or deduction for the injury done to the land, and the value of the timber cut therefrom: that he could not at Law establish the facts herein stated, there being no witnesses then, or now known to him, who could be produced to prove them: that an Execution has issued against his effects, which will be unjustly sacrificed, unless prevented by a Court of Equity.

He therefore prays, that Couch, and Ellis & Allen, (for whose benefit the Judgment

unliquidated damages cannot be set-off in equity the principal case is cited in *Cabell v. Roberts*, 6 Rand. 584; *Gilliat v. Lynch*, 2 Leigh 506; *Robertson v. Hokshead*, 3 Leigh 678; *Harrison v. Wortham*, 8 Leigh 304; *Rosenberger v. Keller*, 33 Gratt. 486; *Kinzie v. Rieley*, 100 W. Va. 716, 42 S. E. Rep. 672.

See further, monographic note on "Set-Off, Recoupment and Counterclaim" appended to *Anderson v. Bullock*, 4 Munf. 442.

The principal case is also cited in *Fisher v. Burdett*, 21 W. Va. 629.

was rendered,) may be made Defendants; that Couch may more particularly be required to say, whether he did not promise and engage to allow the Plaintiff on a final settlement of the rent, the value of the timber cut, and all damage done to the land by Swann: that an account may be directed to be taken, before a Commissioner, or in some other proper way, of the value of the said timber, and damage to the land; and for an Injunction to the Judgment.

The Injunction was awarded by the Chancellor, on the 18th August, 1820.

Couch answered, saying expressly, that at the time he entered into the contract with the Plaintiff, he made known the fact that the land had been leased to Swann, the particular terms of which he believes were known to the Plaintiff. He says, it is untrue that he ever admitted that he had

not informed the Plaintiff of the 521 terms of Swann's lease; and, as to the surprise of which the Plaintiff speaks, when the lease to Swann was exhibited, the Defendant remarks, that there was no written lease between Swann and himself; it was a verbal agreement only, of which the Plaintiff was apprised before he entered into the contract.

He says, that by the terms of the lease to Swann, it was agreed that if he would cultivate a crop of tobacco, he might have liberty to cut from the land as many poles as would build a house sufficient to cure the tobacco made, and erect it on his own land; there was no permission to erect a barn, nor was none erected. He denies that he ever did agree with Webster to be liable, or responsible in any way, for the cultivation of the land by Swann, or any one else, or to make good any damage which might be done to the land, though he denies that any damage was done, or that the cultivation was improper as far as he knows or believes. He admits, that after the money was due to him for the rent, and after repeated applications for it, he did offer the Plaintiff that if he would pay him what was due, he might have the poles which had been cut from the land valued, and the valuation allowed, but this he refused to do; he avers that the offer was one he was not bound to make, but it was made to prevent delay, and to avoid a suit. The Judgment at Law was entirely for his own benefit.

Ellis & Allan answered, denying that they had any interest in the suit.

The Court dissolved the Injunction, on the 15th January, 1821.

Afterwards, the Plaintiff filed the affidavits of John Webster and Samuel Gibbs, taken on the 8th and 9th June, 1821. The first witness, in answer to interrogatories put by the Plaintiff, stated that he was overseer for Swann, in 1816; that the land leased by Swann from Couch, was between two and three hundred acres; that it was not cultivated in a farmer-like manner; that it would have been worth 250 dolls.

522 to put it in such order, for he never saw land worse cultivated than it was; and that the timber cut off the land was worth 150 dolls., at least.

The second witness said, that he lived with Edmund Webster, at Gold Mine, in

1816: that in the course of the year Couch called on Webster, to know if he could pay him the money due him for the rent of the houses: that Webster told Couch that if he would pay him for the waste of the timber that Swann had taken from the land, and the injury done the land by bad cultivation, he would pay him: Couch said, that he would have no objection to leave the difference in dispute to any of the neighbours; he could not do so at that time, but would have it done shortly: Webster told Couch, he was anxious to have it settled as soon as possible, as he had no wish to be involved in a law suit.

On the 15th June, 1821, after exhibiting these affidavits, the Plaintiff moved the Court to re-instate the Injunction, but the application was rejected.

The Plaintiff then petitioned Judge Coalter to re-instate the Injunction, for the following reasons:

The affidavit of Webber, he alleges, establishes the fact that timber to the amount of \$150, was cut off the land leased to Swann, and that by improper cultivation it has sustained an injury to the amount of \$250 more: that it is admitted by the Defendant Couch, in his Answer, that by the terms of the contract with Swann, he was at liberty to cut timber on the land, and that the Plaintiff charges that the terms of that contract were concealed from him by Couch: this is charged by the Bill, and the Answer in that respect is quite evasive, the respondent stating his belief that the terms of the contract were known to the Plaintiff, but not owning the fact. In addition to which, he alleges, that there is no privity between the Plaintiff and Swann, which would entitle him to redress for the injury sustained by the land, his claim for which is on Couch alone.

523 *On the 21st June, 1821, Judge Coalter re-instated the Injunction.

The Affidavits of Webber and Gibbs, were again taken by the Plaintiff, on due notice to the Defendants. There was no variance in the evidence of the first, except that in the last affidavit he estimated the injury from bad cultivation at \$200, and the value of timber taken off, at \$200 or \$250. The second witness, Gibbs, deposed, that Couch called on him to take notice that he was willing to pay Webster for the timber cut off the land, and the damages sustained by bad cultivation, and it was to be left to disinterested neighbours to estimate the damage in both cases. He also expressed his opinion, that the land was much injured by the taking off the timber, it being a scarce article.

The Court of Chancery, on the 25th February, 1822, gave the following opinion: "On motion of the Defendants by Counsel, to discharge the order awarding an Injunction in this cause, made by a Judge of the Supreme Court of Appeals, on the 21st day of June last, the Court being of opinion, that according to the plain letter of the Act, by which a Judge, or Judges of the Supreme Court of Appeals, may exercise original jurisdiction in granting an Injunction upon the original Bill, if refused by a Chancellor, yet such Judge or Judges, are not authorised in the opinion of this Court,

by that Act, to grant another Injunction in the same case, after a dissolution in a Superior Court of Chancery, although such Judge, or Judges may grant an appeal: such is the written Law: wherefore, the Court doth discharge the said order, as im- providently awarded."

The Plaintiff obtained a Supersedeas to the said Decree, from a Judge of this Court. Hay, for the Plaintiff in Error.

Johnson, for the Defendants.

524 *October 15. 'The PRESIDENT delivered the opinion of the Court.*

It cannot now be doubted, after repeated decisions of this Court, that from the refusal of a Chancellor to re-instate an Injunction upon new proofs of the allegations of a Bill, an appeal lies to any one of the Judges of this Court, and that the Chancellor erred in this case in dissolving the Injunction, on the ground that the order made by one of the Judges of this Court, re-instating the Injunction, was coram non iudice. But unless the rules of pleading in Chancery are to be totally disregarded, he was correct in dissolving the Injunction, though ordered by a Judge of this Court.

The Bill, although it prays relief, is purely a Bill of Discovery, upon the express ground, that the Plaintiff was entirely ignorant of any testimony to prove its allegations, without the Answer of the Defendant Couch, with whom the contract, to be set-off against the Judgment at Law, is alleged to have been made. His Answer makes no discovery, but on the contrary negatives all the material allegations in the Bill: but, if it had not, upon the proofs in the Record, a Court of Equity would have afforded no relief. The ground for relief is unliquidated damages for a substantive injury, the remedy for which was by a suit at Law, there being no impediment to it. It was not a matter of account, to be adjusted and set-off, either in the Court of Law in which the Judgment was rendered, or in a Court of Equity. The order dissolving the Injunction is therefore affirmed.

525 *Bowyer v. Martin and Carraway.†

October, 1828.

Written Instrument—Interpretation—Latent Ambiguity—Parol Testimony.—Where there is a latent ambiguity in a written instrument, it may be explained by parol testimony: or where the terms used in the instrument have not a definite legal signification, the custom of the trade, or the acts of the parties, may be resorted to, for the construction of them. But, where there is no ambiguity, parol evidence, to explain or contradict it, ought not to be heard.

John Bowyer sued out from the Justices of Greenbrier County, a Writ of Unlawful Detainer against Joseph Martin and Charles Carraway, for the purpose of being restored

to the possession of a certain tenement in the said County, containing, by estimation, twenty-four acres of land, including the Muddy Creek Sulphur Springs, commonly called Patterson's Sulphur Spring Tract. The proceedings were carried on regularly, in conformity with the directions of the Act concerning Forcible Entries and Detainers. 1 Rev. Code, ch. 115.

At the trial, the following articles of agreement appear to have been given in evidence: "This article witnesseth, that I, Nancy Patterson, let all my land, including the Sulphur Spring, to Sterling Levesey, for the term of twenty-five years. The said Sterling is to make all the necessary buildings for the use of the Sulphur Spring: He is also to put the Spring in as complete order as the nature of the place will admit of, although at his own expense; and the said Nancy, and the said Sterling, are to be equal shares in furnishing all the necessities for the accommodation of the Springs, such as bedding, provisions of all sorts, and spirits; the sugar camp is to be for the use of the Spring during the partnership, and the said Nancy, and the said Sterling, are to be equal shares in all the profits arising from the use of the said Spring, and farm also. If the said Nancy should think fit to dispose of her part before the partnership dissolves, the said Sterling is to have the refusal; or, should said Sterling think fit to dispose of his part, the said Nancy is to have the refusal; and the said Sterling is to leave all the improvements in repair at 526 "the expiration of the time; and to the true performance of the above, we do each of us bind ourselves, our heirs, &c. in the penal sum of one thousand pounds. Given under our hands and seals, this 21st day of November, 1815.

"Sterling Levesey, (Seal.)

"Nancy Patterson, (Seal.)"

This instrument was assigned on the 19th January, 1821, to John Bowyer, the complainant.

There is also copied into the Record, a Deed, bearing date 13th December, 1817, from Nancy Patterson to the Defendants, conveying to them the said parcel of land: and a Deed from Elizabeth Patterson, widow, and the heirs of James Patterson, releasing to the Defendants all their right to the same parcel of land.

The Defendants filed an exception to the opinion of the Justices, on the trial of the Unlawful Detainer, which states that the Defendants, having proved the acts and declarations of Sterling Levesey, under whom the Plaintiff claims, with the view of showing the understanding of the said Levesey, of the true intent and meaning of the contract of 6th November, 1815, be-

*Absent, JUDGE COALTER.

†For monographic note on Interpretation, see end of case.

***Written Instrument—Interpretation—Latent Ambiguity—Parol Testimony.**—The principal of explaining a written instrument by parol testimony applies to those cases only where there is some latent ambiguity in the written instrument, or where its terms have not a definite legal signification. Harris v. Carson, 7 Leigh 639, citing the principal case as authority.

If parties, in making a contract, use words of definite legal signification, they must be understood

as using such words in their definite legal sense. Findley v. Findley, 11 Gratt. 438, citing the principal case.

It is well settled that when there is no ambiguity in a written contract, parol evidence is inadmissible to contradict or vary its terms. McGuire v. Wright, 18 W. Va. 513, citing the principal case.

See principal case also cited in Eakin v. Hawkins, 48 W. Va. 366, 37 S. E. Rep. 625.

See generally, monographic note on "Contracts" appended to Enders v. The Board of Public Works, 1 Gratt. 364; monographic note on "Evidence" appended to Lee v. Tapscott, 3 Wash. 276.

tween him and Nancy Patterson, under whom the Defendants claim, the said writing upon its face appearing to the Defendant's Counsel to be ambiguous, moved the Court to instruct the Jury, that such evidence was legal and admissible, but the Court refused to give the instruction, and instructed the Jury, that such evidence was inadmissible, either to contradict, or explain away, the plain intention as manifested by the said contract. The Jury rendered a verdict in favor of the Plaintiff, and the Justices gave Judgment, that he recover the possession and costs, and awarded a Writ of Possession.

The Judge of the Superior Court of Law for Greenbrier County, awarded a Supersedeas to the Judgment of the Justices; and on the trial of the Supersedeas, that Court, being of opinion that the Justices erred in refusing to permit the Defendants to give evidence of the understanding
527 *of the parties as to the original article of partnership or agreement entered into between them, and how they used and occupied the premises, before the assignment to the Plaintiff, Bowyer; and being also of opinion, that from the original articles, the parties were partners, and each had a right to enter on the premises, and neither had a right to exclude the other: and that therefore, the Plaintiff, Bowyer, could not have any better title under his assignment, and was not entitled to the entire possession of the whole premises, in exclusion of the other parties, reversed the Judgment and awarded a Writ of Restitution to the Defendants, Martin and Carraway, to restore to them the possession of the said tenement.

To the Judgment of the said Superior Court, a Supersedeas was awarded by the Court of Appeals.

Chapman Johnson, for the Plaintiff in Error.

No Counsel for the Defendants in Error.

October 15. The Court delivered its opinion.*

JUDGE CABELL.

It was not competent to the Superior Court, to give any Judgment on the merits of the case depending on the title of the parties, since the proceedings presented no such question to the Court. The verdict was a general one, and the only question presented by the Record for the consideration of the Superior Court, was, whether the Court of the Justices improperly refused to give the instruction that was asked for, or gave an improper instruction.

Where there is a latent ambiguity in a written instrument, it may be explained by parol testimony: or, where the terms used in a written agreement have not
528 a definite *legal signification the custom of the trade, or the acts of the parties, may be resorted to, for the construction of them. But, the agreement in this case, (if that which is copied into the Record be the one referred to in the Bill of Exceptions,) contains no ambiguity whatever, nor is there a word which has not a definite legal signification. It was therefore, right in the Court of the Jus-

tices, to refuse the instruction which was asked for, and the instruction which was given, was likewise correct.

The Judgment of the Superior Court is reversed, and that of the Justices affirmed, with a direction to the Superior Court, to award a Writ of Re-restitution, if the Writ of Restitution awarded by that Court has been executed.

JUDGE GREEN and the PRESIDENT concurred.

INTERPRETATION.

- I. Object of Interpretation.
 - A. Intention of Parties.
 - II. General Rules of Interpretation.
 - A. Consideration of Different Parts of Instruments.
 1. Instrument to Be Construed as a Whole.
 2. Every Part to Be Given Effect.
 3. Repugnant Clauses.
 4. Several Deeds Comprising One Transaction.
 5. Meaning of Words and Phrases.
 - B. Reasonable and Equitable Construction Preferred.
 - C. Language Construed against the User Thereof.
 - D. Surrounding Circumstances.
 - E. Construction by Parties.
- Cross References to Monographic Notes.**
- Arbitration and Award, appended to Bassett v. Cunningham, 9 Gratt. 664.
- Attachments, appended to Lancaster v. Wilson, 27 Gratt. 624.
- Constitutional Law, appended to Commonwealth v. Adcock, 8 Gratt. 661.
- Covenants, appended to Todd v. Summers, 2 Gratt. 107.
- Decrees, appended to Evans v. Spurgin, 11 Gratt. 615.
- Deeds, appended to Flott v. Commonwealth, 13 Gratt. 564.
- Evidence, appended to Lee v. Tapscott, 2 Wash. 276.
- Instructions, appended to Womack v. Circle, 29 Gratt. 192.
- Insurance, Fire and Marine, appended to Mutual, etc., Co. v. Holt, 29 Gratt. 612.
- Insurance, Life and Accident, appended to McLean v. Piedmont Life Ins. Co., 29 Gratt. 361.
- Judgments, appended to Smith v. Charlton, 7 Gratt. 426.
- Landlord and Tenant, appended to Mason v. Moyers, 2 Rob. 606.
- Limitations of Actions, appended to Herrington v. Harkins, 1 Rob. 591.
- Wills, appended to Hughes v. Hughes, 2 Munf. 209.

I. OBJECT OF INTERPRETATION.

A. INTENTION OF PARTIES.—The object of the interpretation of a written instrument is to determine the intention of the parties as evidenced by their language incorporated therein. Bradley v. Zehmer, 82 Va. 685; Hotchkiss v. Middlekauf, 96 Va. 653, 32 S. E. Rep. 36; Temple v. Wright, 94 Va. 340, 26 S. E. Rep. 844.

Hence agreements are always to be construed according to the evident intent of the parties, appearing from the deed itself, without a rigid adherence to the letter. Hawkins v. Berkley, 1 Wash. 206; Mineral Development Co. v. James, 7 Va. Law Reg. 558; Nye v. Lovitt, 92 Va. 715, 24 S. E. Rep. 845. See also, Cobbs v. Fountaine, 3 Rand. 487.

Such intention, as derived from the deed itself should be sought after, and carried into effect, if it

*Absent, JUDGES COALTER and CARR.

can be done consistently with the rules of law. *Allemon v. Gray*, 92 Va. 216, 23 S. E. Rep. 296.

Meaning of Words Used.—While in the interpretation of instruments the intention of the parties is endeavored to be ascertained, still it must nevertheless be borne in mind that the true inquiry is not what the parties intended to express, but what the words so used do express. *Stokes v. VanWyck*, 83 Va. 729, 3 S. E. Rep. 887; *Burke v. Lee*, 76 Va. 889; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. Rep. 28; *Sutherland v. Sydnor*, 84 Va. 880, 6 S. E. Rep. 480. But see *Mineral Development Co. v. James*, 7 Va. Law Reg. 558.

II. GENERAL RULES OF INTERPRETATION.

A. CONSIDERATION OF DIFFERENT PARTS OF INSTRUMENTS.

1. **INSTRUMENT TO BE CONSTRUED AS A WHOLE.**—The intention of an instrument may only be based upon an examination of it as a whole. This is a rule of frequent application and is founded upon the theory that the parties had the same general intention when formulating one part as another; consequently in cases of ambiguity or inconsistency, in some of its component parts, the general intention can only be determined by a consideration of such instrument as an entirety. *Allemon v. Gray*, 92 Va. 216, 23 S. E. Rep. 296; *Temple v. Wright*, 94 Va. 340, 26 S. E. Rep. 844; *Bradley v. Zehmer*, 83 Va. 686; *Wootton v. Redd*, 12 Gratt. 208; *Tabb v. Archer*, 3 Hen. & M. 899; *Heatherly v. Farmers' Bank*, 81 W. Va. 70, 5 S. E. Rep. 754. See also, *Mineral Development Co. v. James (Va.)*, 7 Va. Law Reg. 558; *Cobbs v. Fountaine*, 3 Rand. 487.

General Words Limited by Particular Words.—General words preceding words of a more particular or specific description, are restricted by the latter. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. Rep. 851, 7 Va. Law Reg. 824.

For it is a canon of construction that words of particular description will control rather than general terms of description, where both cannot stand together. *Glenn v. Augusta Perpetual, etc., Co.*, 99 Va. 700, 40 S. E. Rep. 25.

2. **EVERY PART TO BE GIVEN EFFECT.**—In the interpretation of written contracts, every part of the contract must be made to take effect, if possible, and every word to operate in some shape or other. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. Rep. 851, 7 Va. Law Reg. 824; *Tate v. Tate*, 75 Va. 522; *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. Rep. 217.

Omitted Words Supplied.—Therefore words omitted in an instrument, and also in a record or statute, which can be clearly ascertained by the context, will be supplied by the court, and the instrument, record or statute will be read and treated as if the words were in it. *Harman v. Howe*, 27 Gratt. 676; *Liston v. Jenkins*, 3 W. Va. 64; *Seeden v. King*, 2 Call 72.

Substitution of Words.—Upon the same principle one word will be substituted for another which is plainly erroneous, as where an "and" is used for an "or." *Loyd v. Lynchburg Nat. Bank*, 86 Va. 690, 11 S. E. Rep. 104.

Grammatical Inaccuracies.—Furthermore bad grammar or punctuation will not vitiate an instrument, nor overrule nor control its meaning. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. Rep. 832.

3. **REPUGNANT CLAUSES.**—If there be a conflict between two clauses in a deed the former will control, as where a grantor after conveying a fee simple estate attempted to restrict it by a subsequent clause. *Held*, that such clause was inoperative. *Blair v. Muse*, 83 Va. 238, 2 S. E. Rep. 31.

4. SEVERAL DEEDS COMPRISING ONE TRANSACTION.

—Where two or more deeds are executed contemporaneously and taken together they constitute one transaction, they will be considered in matters of interpretation one instrument. *Anderson v. Harvey*, 10 Gratt. 386.

Thus, if land be conveyed to a party, who at the same time by a deed of even date conveys it to a trustee to secure the unpaid purchase money, the two deeds will be regarded as parts of the same transaction. *George v. Cooper*, 15 W. Va. 666.

Must Be Unity of Parties and Subject Matter.—But in construing two deeds as one transaction there must be a unity of parties and subject matter. *Nye v. Lovitt*, 92 Va. 711, 24 S. E. Rep. 345.

5. MEANING OF WORDS AND PHRASES.

Ordinary Meaning Generally Given.—It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. Rep. 217.

Consequently, technical rules of construction are not to be invoked to defeat the intention of the maker of the instrument, when his or her intention clearly appears, by giving to the words used their natural and ordinary import. *Lindsey v. Eckels*, 99 Va. 671, 40 S. E. Rep. 23.

Technical Terms and Expressions.—But technical words used must receive their technical meaning, unless it clearly appears from other parts of the deed that the grantor did not intend that they should have that meaning. *Nye v. Lovitt*, 92 Va. 716, 24 S. E. Rep. 345.

Legal Terms.—Likewise if parties in making a contract, use words of definite legal significance, they must be understood as using such words in their definite legal sense. *Findley v. Findley*, 11 Gratt. 434; *Nye v. Lovitt*, 92 Va. 715, 24 S. E. Rep. 345; *Rayfield v. Gaines*, 17 Gratt. 1.

B. **REASONABLE AND EQUITABLE CONSTRUCTION PREFERRED.**—Every contract must receive a reasonable construction. *Young v. Ellis*, 91 Va. 301, 21 S. E. Rep. 480.

For a construction should be avoided, if it can be done consistently with the terms of the agreement, which would be unreasonable or unequal, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties. *Young v. Ellis*, 91 Va. 297, 21 S. E. Rep. 480.

Construction in Favor of Instrument.—The parties must have intended something by their agreement, therefore a construction which will render the contract frivolous or ineffectual should be avoided. *Cobbs v. Fountaine*, 3 Rand. 487.

C. **LANGUAGE CONSTRUED AGAINST THE USER THEREOF**—In case of doubt or ambiguity in an instrument, it will be construed most strongly against the grantor so as to give it effect, rather than that it should be void for uncertainty. *Bank v. Green*, 45 W. Va. 168, 31 S. E. Rep. 263; *Carrington v. Goddin*, 13 Gratt. 587; *Tate v. Tate*, 75 Va. 522; *Allemon v. Gray*, 92 Va. 216, 23 S. E. Rep. 296.

But this rule is not applicable to any case but one of strict equivocation,—cases where the language of the deed is susceptible of two interpretations. It does not mean that the words are to be twisted out of their proper meaning, but only that, where the words may properly bear two meanings, and where, after having applied evidence, whether extrinsic or intrinsic, there still exists an ambiguity they must be taken in the meaning most disadvantageous to the person who used them, unless the adoption of that meaning would work a wrong. *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. Rep. 217; *Tate v. Tate*, 75 Va. 522.

D. SURROUNDING CIRCUMSTANCES.—When the language of a written agreement is susceptible of more than one interpretation, that is to say, is on its face ambiguous, the courts will look at the surrounding circumstances existing when the contract was made, at the situation of the parties, and the subject matter of the contract, and will even call in aid the acts done by the parties under it, as affording a clew to the intention of the parties; but the court never resorts in such a case to the verbal declaration of the parties either before, at the time, or after the execution of the contract, to aid it in giving construction to its language. *Scrags v. Hill*, 37 W. Va. 706, 17 S. E. Rep. 185; *Young v. Ellis*, 91 Va. 297, 21 S. E. Rep. 480; *Titchenell v. Jackson*, 26 W. Va. 469; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. Rep. 692; *Lindsey v. Eckels*, 99 Va. 671, 40 S. E. Rep. 23; *Clark v. Nunn*, 25 Gratt. 290; *Allemon v. Gray*, 92 Va. 216, 23 S. E. Rep. 298; *Stace v. Bumgardner*, 89 Va. 421, 16 S. E. Rep. 252; *Caperton v. Caperton*, 36 W. Va. 479, 15 S. E. Rep. 257; *Glenn v. Augusta Perpetual, etc., Co.*, 99 Va. 701, 40 S. E. Rep. 25; *Scoville v. Terry*, 84 Va. 549, 5 S. E. Rep. 530; *Talbott v. Richmond, etc., R. R. Co.*, 31 Gratt. 689. See also, *Leake v. Benson*, 29 Gratt. 153; *Heatherly v. Farmers' Bank*, 31 W. Va. 70, 5 S. E. Rep. 754; *Hurst v. Hurst*, 7 W. Va. 299; *Crislip v. Cain*, 19 W. Va. 483; *Crawford v. Jarrett*, 2 Leigh 630; *Bierne v. Erskine*, 5 Leigh 59; *Keyton v. Brawford*, 5 Leigh 29; *Mutual Reserve, etc., v. Taylor*, 99 Va. 208, 37 S. E. Rep. 854.

E. CONSTRUCTION BY PARTIES.—Where the language of an instrument is ambiguous, and the intention of the parties is the subject of inquiry, the construction placed upon such language by the parties themselves is entitled to great weight. *King v. Norfolk & W. R. Co.*, 99 Va. 625, 39 S. E. Rep. 701; *Kidwell v. Baltimore & O. R. Co.*, 11 Gratt. 676; *Bank v. McVeigh*, 32 Gratt. 580; *Grubb v. Burford*, 98 Va. 553, 37 S. E. Rep. 4; *Clark v. Nunn*, 26 Gratt. 287; *American Mang. Co. v. Virginia Mang. Co.*, 91 Va. 282, 21 S. E. Rep. 466; *Knick v. Knick*, 75 Va. 20.

Although when the meaning of an instrument is clear, an erroneous construction of it by the parties will not control its effect. *Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 8 S. E. Rep. 787; *Holston Salt & Plaster Co. v. Campbell*, 89 Va. 400, 16 S. E. Rep. 274; *Knick v. Knick*, 75 Va. 20; *Bank v. McVeigh*, 32 Gratt. 541.

Purpose Rather than Name.—Furthermore, in determining the real character of a contract, courts will always look to its purpose, rather than to the name given it by the parties. *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 86 Va. 10, 9 S. E. Rep. 759.

Questions of Law and Fact.—In a doubtful case, the construction, placed upon a contract by the parties, will be accepted by the court, but what construction has been so placed is a question of fact, and, in actions at law, is to be determined by a jury. *Camp v. Wilson*, 5 Va. Law Reg. 402.

529 *Graham's Administrators v. Pence.

October, 1828.

Arbitration and Award*—Award—Setting Aside—Misbehavior of Arbitrators.—Although the submission of a case to arbitration, where a suit is depending in a Court of Law, does not come within the provisions of the Statute concerning Awards, yet the Court, (in which the submission is made a rule of Court) has a general superintendence over the award made by virtue of such submission, and may annul it, for misbehaviour of

***Arbitration and Award.**—See generally, monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

†**Same—Award—Setting Aside—Misbehavior of Arbitrators.**—A court of equity will set aside an award for fraud, collusion, corruption or gross

the arbitrators, apparent mistakes on its face, &c. It is unnecessary in such case to resort to a Court of Equity to annul it.

Same—Same—Same—What Constitutes—Case at Bar.—Two arbitrators meet to decide the case referred to them, on the day appointed, and continue the case for good cause shown by the Defendant. On the same day they determine that they will no longer act as arbitrators, and give notice of their declension to the parties. But on being pressed by the Plaintiff, they are prevailed on by him to act again, and authorise the Plaintiff to give notice to the Defendant, of the time and place for arbitrating it; the Defendant, on the day, and at the place, protests against their power to act, and refuses to submit his case, or his evidence to them. The arbitrators, however, proceed to make up an award on the Plaintiff's ex parte evidence. This is such misbehaviour as should annul the award.

Appellate Practice—Case at Bar.—A Defendant files four pleas, one general, and three special. The third plea, which is the second special plea, is bad; and the fourth plea, being the third special plea, is good. The Record states that the Plaintiff objected to the reception of the third special plea, which objection was over-ruled. There is no other designation of the plea which was objected to, but by its number. The Court of Appeals has no other guide than the Record, and as the third special plea was good, (although the second was bad,) they must say that the objection to the third special plea was properly over-ruled.

Assumpsit in the County Court of Rockingham by Margaret Graham, Administratrix of John Graham, deceased, against John Pence for goods, wares and merchandise, sold and delivered, amounting to 94l. 4 4½. At May Term, 1819, the Defendant pleaded the general issue, and had leave to file a special plea within sixty days. At the August Term following, by consent of the parties, all matters in difference between them in this suit were referred to Robert Hinds and Samuel Henry, whose award, or the award of their umpire, to be made the Judgment of the Court. At February Term, 1820, an award was returned by the arbitrators, by which they awarded \$203 40 to the Plaintiff. The award was set aside by the Court, for reasons appearing to them, and by consent

530 *of parties, the suit was referred back to the same arbitrators, who are to meet on the first Friday in March next. At the May Term following, they returned an award in the following words: "In pursuance of the annexed order, we met on the first Friday in March, at the house of John Morrison, for the purpose of deciding the case referred to us by the said order, both parties being present. John Pence produced an affidavit, by which it appeared that he was not prepared to go on to a decision of the case, in consequence of the absence of a material witness, it became therefore improper to proceed in the case on that day. We afterwards concluded we would have nothing to do with the business, but on the 11th March, 1820, a notice was given to the said Pence, that on the 24th day of March, we would meet at the counting-room of Samuel Henry, for the purpose of deciding the case referred to us as aforesaid, and upon the said 24th March, agreeably to the said notice, we did meet at the

misconduct in the arbitrators. *Fluharty v. Beatty*, 22 W. Va. 706, citing the principal case to sustain the statement.

See principal case also cited with approval in *May v. Yancey*, 4 Leigh 368; *Jenkins v. Liston*, 13 Gratt. 539.

‡**Appellate Practice.**—See monographic note on "Appeal and Error" appended to *Hill v. Salem, etc., Turnpike Company*, 1 Rob. 268.

counting-room of Samuel Henry, both parties being present; we proceeded to examine the matters submitted to us, and after considering the same, we do adjudge and order, that the Defendant do pay unto the Plaintiffs the sum of \$174 75, with interest thereon from the 17th December, 1808, with the costs attached to the same. Given under our hands and seals this 24th March, 1820.

"Saml. Henry, (Seal.)

"Robert Henis, (Seal.)"

The Court, on motion of the Defendant for reasons appearing to them, and for the testimony of Samuel Henry, one of the arbitrators, set aside the award; and on the further motion of the Defendant, the Court set aside the order of reference, to which order the Plaintiffs objected, and the cause was continued. The affidavit of Henry is to the following effect: that on the 1st March, the parties met, and the case was continued; that the arbitrators decided, on the same day, that they would not arbitrate the suit at all, and would have nothing more to do with it; that in pursuance

531 *of said determination, the arbitrators drew up a paper to that effect, signed it, and communicated its contents to the parties: that thereafter, the said Henry having been pressed by the Plaintiff to alter that determination, and making another effort to decide the said cause, he authorised the Plaintiff for himself, (but whether the other arbitrator was consulted, he knew not,) to give the notice referred to in the award: that they did meet at the time and place appointed, but Pence declined going into the question, not considering himself bound to submit to their decision, as they had at their first meeting determined to have nothing to do with the case: that he left them, and they proceeded on the Plaintiff's evidence, without hearing any from the Defendant, and made up the award as returned: that at the first meeting, Pence produced his account, amounting to more than the Plaintiff's, and stated at the last meeting, that one Wells, who decided in Harrisonburg, could establish a part of his set-offs, but he did not recollect that on the last day he mentioned the name of a witness residing in Hardy, on account of whose absence, the case had been continued at the first meeting.

At the same Term, the Defendant pleaded first, non-assumpsit, and also filed three special pleas, the first of which was a plea of set-off; the second, the Act of Limitations of one year, in bar of merchants' accounts, and the third, the General Act of Limitations. The record further states, that at the August term, 1820, the Plaintiff objected to the third special plea filed at the May term, which objection was over-ruled, and then the Plaintiff replied generally to the said special pleas, and issue was joined.

At the October Term, the cause was tried by a Jury. Verdict and Judgment for the Defendant, from which Judgment the Plaintiff appealed to the Superior Court of Rockingham. At the May Term, 1821, of that Court, the Judgment was affirmed,

and the Plaintiff appealed to the Court of Appeals.

532 *Johnson, for the Appellant.
Wickham, for the Appellee.

October 21. JUDGE CARR delivered his opinion.

The Plaintiffs sued the Defendant on an account for goods, wares and merchandize, &c. Plea, non-assumpsit. By consent, the case was referred to arbitrators. They returned an award in favor of the Plaintiffs, for \$203 40, which for reasons appearing to the Court, was set aside, and by consent, the cause was again referred to the same arbitrators, who again made an award in favor of the Plaintiffs \$174 75, which, on motion of the Defendant's Attorney, was again set aside by the Court, and on his further motion, the order of reference was set aside, to which order the Plaintiffs objected and the cause was ordered to be continued, and leave given to the Defendant to file a special plea, provided it was filed during the Term; and at the same Term, the Defendant pleaded four pleas: 1st. Non-Assumpsit; 2d. A set-off; 3d. The Act of Limitations of Merchants' accounts; 4th. The Act of Limitations generally.

At the next Term, the Plaintiffs objected to the third special plea of the Defendant, which objection being over-ruled, the Plaintiffs replied generally to the special pleas, and issue was joined. At a subsequent Term, a Jury was sworn generally, and found a general verdict for the Defendant, and Judgment, for which the appeal was taken.

Many points were raised in the argument, but the case seemed to be considered as resting principally on two. 1. The correctness of the Court in setting aside the second award, and the order of reference. 2. In over-ruling the Plaintiff's objection to the third special plea.

Reasons for setting aside awards, are either for illegality or injustice, apparent on their face, or for misbehaviour in the arbitrators. With respect to the first,

533 Courts deal *liberally and favourably with awards, but they are much more strict, where the question of misbehaviour is raised. On the question of misbehaviour, I consider Courts of Law (in awards made, as here, by rule of Court,) to have the same power as Courts of Equity. On first looking into this subject, I doubted with respect to this power. In *Wills v. Maccarmick*, 2 Wils. Rep. 148, and *1st. Wm's. Saund.* 327, note (b.) it is laid down, that at Common Law, no award, whether the submission was by bond, other writing, or by parol, could be set aside for misbehaviour of the arbitrators, in any action, either upon the bond of submission, or the award: This could only be effected by a resort to Equity. Prior to the Statute of 9th and 10th Wm. 3, ch. 15, the Courts had permitted parties who had suits depending, to submit them to arbitration, and to make such submission a rule of Court, and the award when made, was considered a part of the rule; and though such award was not entered as the Judgment of the Court, the refusal of a party to execute it, was treated as a contempt of

the rule, and process issued against him, to show cause why he should not be punished for such contempt. For cause, he might show any thing on the face of the award which vitiated it, or he might go into evidence to show any misbehaviour, partiality, or corruption in the arbitrators; and success in either of these attempts, cleared his contempt. This was a striking difference between submissions by rule of Court, and otherwise. The utility of these references by rule of Court being found, the before-mentioned Statute was enacted, enabling persons, who had no existing suit in Court, to agree that their submission of their controversy to the award or umpirage of any person or persons, should be made a rule of Court, and to insert such agreement in the submission, or the condition of the bond or promise, whereby they oblige themselves to submit to the award or umpirage, which being proved in Court shall be entered of record,

and a rule shall thereupon be made
534 by the Court, that the parties *shall submit to, and be concluded by the arbitration or umpirage, which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and the party disobeying such arbitration or umpirage, was subject to process of contempt. Our Statute concerning Awards, is almost a literal transcript from this. The only material difference between them is, that under our Statute, the award, when returned, "may be entered up as the Judgment or Decree of the Court:" by the British Statute, it cannot. It has been decided in England, that their Act intended to put cases, not depending in Court, on the same footing with those that were; and both there and here, the Courts have construed the Statute to extend to those cases only, which were submitted by bond or other writing, where there was no suit depending, not to cases referred by rule of Court between suitors. The case before us is one of this last class, and therefore, not governed by the Statute. If it had been so governed, there could have been no doubt about the Court's having the power to set aside the award; for, the Statute expressly enables them to do so "for corruption, or other undue means, or where there shall have been evident partiality, or misbehaviour in the arbitrators or umpires, or any of them." It was clear, that in cases referred (not under the Statute) by rule of Court, the Court would not punish a party for contempt, if he could show any error apparent on the face of the award, or by evidence, could establish misbehaviour in the arbitrators; but, my doubt was, whether the Court could act upon the award, and annul it. This doubt has been removed by further examination. As the Statute meant to place the parties (who, having no suit in Court, chose to submit their controversies to arbitration, and have such submission made a rule of Court,) on the same footing with those who, having suits in Court, referred them by entry on the Record, the fact that the Statute, in the cases governed by it, gives the Court express power to set aside awards, furnishes prima facie evidence,

535 that the Legislature *considered the Courts as having such power in cases not under the Statute. The very fact too, that the parties have given the Court a superintendence of the award, would seem to vest them with power to set it aside; and such I find the decision, and the reasoning in *Rogers v. Dallimore*, 6 Taunt. 111, 1 Com. L. Rep. 329. In that case, the order was made by rule of Court, in a case depending. The award was returned, and after the time, given by the Statute for making objections to the award had passed, a motion was made to set aside the award, on proof that the arbitrator had made a numerical mistake, which he was himself anxious to correct, having put down the sum awarded at 411. instead of 611. The motion was objected to, on the ground that the Court had no power to set aside the award. Gibbs, Ch. J. who delivered the opinion, says, "It has been urged for the Defendant, that the Court has no jurisdiction to set aside awards, except under the Statute; and that if the Plaintiff applies under the Statute, he is out of time. We think otherwise, and that the rule of Court which gives superintendence to the arbitrator, gives also to the Court a superintendence over the award, and that the Court have that authority in the present case."

The power being with the Court, we must enquire whether in this case it has been correctly exercised. The evidence on which the Court acted has not been brought before us in a regular way, so as to give us a distinct view of the whole ground they acted on. The Record states, that "on the motion of the Defendant, and reasons appearing to the Court, and from the testimony of the said Henry," (one of the arbitrators,) the Court set aside the award, and it was contended strongly that as we could not see those reasons appearing to the Court, which are exclusive of the evidence of Henry, we could not pass upon their act. If we considered it in this way, I do not think the Plaintiff would have any right to complain; for, as he objected

to the opinion of the Court, it was
536 his business *to bring the point before us in such a shape, as to show that we have the whole evidence on which the Court below proceeded. I will, however, examine the evidence of Henry, and taking it as the whole, consider whether the Court did right in setting aside the award. The facts are these: The arbitrators met on the day appointed. Pence produced an affidavit of the absence of a material witness, which rendered it improper, in the opinion of the arbitrators, to proceed: they, therefore, gave a continuance, but to what, or whether to any day, does not appear. On the same day of their first meeting, the arbitrators decided that they would not arbitrate the case at all, and would have nothing more to do with it, and drew up and signed a paper declaring their decision, the contents of which they communicated to the parties. Afterwards Henry, (one of the arbitrators,) being pressed by the Plaintiff to make another effort to decide the case, authorised the Plaintiff (for himself, but whether the

other arbitrator was consulted he does not know,) to give the notice to the Defendant, which is annexed to the award. On the day stated in the notice, the arbitrators and parties met, when Pence said, that after their decision to have nothing to do with the case, he did not consider himself bound to submit it further to them; that he relied on that decision, which he called on them to return to Court, and left them, saying that they had no power to proceed. After he left them, they took up the case, and made their award on the evidence of the Plaintiff alone. The account produced by Pence, at their first meeting, exceeded that of the Plaintiff, and he said at the second meeting, that he had a witness residing in Harrisonburg, (where the award was made,) who could establish part of his set-off, but no witness for him was examined. Such are the facts.

In *Burton v. Knight*, 2 Vern. 514, it was decided, that if arbitrators hold private meetings with one of the parties, and admit him to be heard, to induce an alteration of their award, this is such gross partiality, as to induce a Court of
537 *Equity to set aside the award. In

Harris v. Mitchell, 2 Vern. 485, two arbitrators were named, with power to choose an umpire, if they could not agree. They disagreed, and not being able to agree on an umpire, threw up cross and pile for choice. The umpire so appointed, made an award, which was set aside for the conduct of the arbitrators in appointing him. So, where the arbitrators promised to hear witnesses, but afterwards made their award without hearing them, the award was set aside. 2 Vern. 251. In *Smith v. Coryton*, the arbitrator promised not to make his award until Smith, who was not well, should come abroad. Lord Nottingham inclined for that reason to set it aside, but the matter was compromised. *Ibid.* In *Atkinson v. Abraham*, 1 Bos. & Pul. 175, motion for rule to show cause why an award should not be set aside, on this ground, that after the evidence was closed on both sides, and the Plaintiff's Attorney gone, one of the Defendant's witnesses was re-examined, and gave a testimony different from that which he had given before and by which the arbitrator confessed that his judgment was influenced: Rule denied, but Eyre, Ch. J. said, that if it had appeared there was any surprise in it, that the second examination had been brought about through the management of the Defendant's Attorney, that might be a good objection. In *Walker v. Froisher*, 6 Ves. 70, the arbitrator gave notice to the parties that he should hear no more evidence: afterwards three persons came in, and the arbitrator examined them. On a Bill to set aside the award for this reason, Lord Eldon said, "I am well assured that the arbitrator is a most respectable man, but he has been surprised into a conduct, which upon general principles must be fatal to the award. He had examined different witnesses, at different times, in the presence of the parties. He recommended to them not to produce any more witnesses. To that recommendation they accede; and in effect say, 'upon the view

of what is disclosed to you, do what is right between us.'" After this he
538 hears *three other persons, and he admits he took minutes of what was said. It did not pass as mere conversation. It does not appear, that he afterwards held any communication with the other party; or disclosed what passed to him: but the arbitrator swears, it had no effect on his award. I believe him. He is a most respectable man. But I cannot, from respect to any man, do that which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted, had or had not an effect on his mind. The award may have done perfect justice; but upon general principles, it cannot be supported." See also, *Chicot v. Lequesne*, 2 Ves. sen. 316, the strong remarks of Lord Hardwicke on this subject.

These are some of the cases on the subject. They show that strict impartiality must be observed, and that even where the Court thinks the arbitrators have been free from intentional wrong, they sometimes set aside their award, because their conduct has been such as, on general principles, cannot be supported. In the case before us it was strongly contended, that the arbitrators having declined to act upon the case, and executed a writing expressing that determination, which they communicated to the parties, had thereby divested themselves of the character and authority of arbitrators, and that the parties having assented to this, the arbitrators could not afterwards act without a re-appointment. I am by no means prepared to say, that there is nothing in this point, though I shall pass it over without further notice. The aspect of the case which strikes me as strongest against the award, is the appearance of partiality which is exhibited. After declining to act, and informing both parties of it, the Plaintiff goes to one of the arbitrators, has a private conversation with him, presses him to change his decision, and by what arguments, or means, we know not, prevails on him to agree to act. How the other arbitrator was proceeded with, we do not know. Now this was not the fair, and open course. As both parties had been apprised of the refusal to act, and had received the resignation of the arbitra-
539 tors, both ought to *have been heard before they determined to change their course. The Plaintiff, if he wished to urge the parties to hear the cause ought to have given the Defendant an opportunity of attending, and objecting, if he thought proper. Indeed, after a man is chosen arbitrator, he ought not to have a word of private, and ex parte conversation on the subject, with either of the parties: it casts suspicion on him, and as Lord Eldon observes, a Judge cannot take upon himself to say that such a conversation had no influence on his mind. Were not the circumstances well calculated to awaken suspicion of foul play in the Defendant's mind? He is told by the arbitrators that they will have nothing further to do with the case. After this, he finds that without any communication with him, by the per-

suasions of his opponent, they have changed their determination. He receives a notice to meet, drawn, as we must conclude by the Plaintiff, in the name of the arbitrators; for, we are told that Henry, authorised him to give a notice of the time and place. Can we feel surprised, that under these circumstances, he felt himself unsafe in their hands, and refused to submit his case, protesting against their power to act farther? And ought they, when they found that their power was denied, and that the case would not be submitted to them, to have gone on, and made their award? And that wholly on ex parte evidence, when they saw set-offs exhibited, exceeding the claim of the Plaintiff, and knew that the Defendant had witnesses to be examined? It seems to me, that in such a situation of things, the straight and fair course was, to have reported the facts to the Court, and let it decide whether their power continued, and whether in the existing state of feelings of one party at least, it was most likely to produce a just result, to send the case back to them; and it really seems strange, that they who, (before any objection was made to their proceeding,) had resolved to have nothing to do with the matter, should have been so changed by the representations of one party, as to persist to try the cause in spite of the oppositions of the other. I would by no means be understood

540 *to charge the arbitrators with actual partiality, but I do think that this conduct was such, as on general principles, furnishes a justification of the Court in setting aside their award. I think the Court did right too, in setting aside the order of reference. It was a matter perfectly within their power, (it seems to me,) and under the circumstances, sound discretion dictated it, for nothing satisfactory could be expected after what had happened.

With respect to the power of a party to revoke the authority of the arbitrators at any time before the award made, that question is not meant to be touched by this opinion. The last objection is, with respect to the conduct of the Court in admitting the third special plea. It is admitted that there would have been no error in receiving an informal plea, to which the Plaintiff made no objection, because the Plaintiff might either demur, or take issue. If he did the latter, a general verdict, (as there was here,) would cure the informality. But the Plaintiff here, did object. The question seems to be, to which plea? The Record says, the third special plea. There were four pleas; one general, three special. The Counsel for the Plaintiff, contends that the objection was to the plea of non-assumpsit within one year, because this is the third plea, and evidently a bad plea, while the plea of non-assumpsit within five years, is the fourth plea, and is well pleaded. But, the plea of non-assumpsit within one year, though the third plea, is, not the third special plea, but the second only. The third special plea is non-assumpsit within five years, and this, though well pleaded, is the plea which the Record says was objected to. There is no

other description of the plea in the objection, than the number, and that certainly leads us to the last plea. I cannot therefore say, that the Court erred in overruling the objection, and upon the whole, think the Judgment must be affirmed.

All the other Judges concurred, and the Judgment was affirmed.*

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*Hunter v. Jones.

October, 1822.

Detinue—Evidence.—In an action of Detinue for a slave, between the child, who is sole distributee of an intestate father, and a purchaser from the widow's second husband, an order of Court appointing Commissioners to assign the widow her dower, although made ex parte, and on motion, without regular proceedings in Chancery, and the report of the Commissioners, are proper evidence, to show the slave was allotted to the widow for life only; especially, where the widow and her second husband were present, and consenting to the allotment.

Evidence—Answer in Equity.—The Answer of a Defendant in Equity, is competent evidence against the same Defendant, in a suit at Law against him, although the Plaintiff at Law was not a party to the suit in Equity.

Same—Declarations of Vendor.—The declarations of a vendor of a slave, made after the sale, are good evidence against the vendee, if they accord with the acknowledgments of the vendee himself, previously made.

Dower—Case at Bar.—If a widow, who is also Administratrix of an estate, appropriates the profits to the purchase of slaves, or other personal property, and afterwards she and her second husband agree to consider the property so purchased as part of the intestate's estate, (in lieu of accounting for the estate,) and to take the property so purchased as part of her dower, or distributable share for life, such arrangement is binding on them, and on purchasers from them, so as to vest the title, after the death of the widow, in the distributee of the first husband, in like manner as if that particular property had belonged to the intestate in his life-time.

Parol Gift—Slave—Validity.—A parol gift of a slave by a father to an infant child living with him, by a declaration that the gift is made, without delivery of possession, is not good against a subsequent purchaser of that slave, although such purchaser knew at the time of his purchase, that the father had so made the gift.

Instruction—Erroneous—Question Did Not Arise in Cause—Effect.—If an erroneous instruction be given to a Jury by a Court, and it appears, by other Bills of Exceptions, that the question, on which that erroneous instruction was given, did not arise in the cause, the Judgment will be affirmed, notwithstanding the erroneous instruction.

Detinue in the Superior Court of Law for Campbell County, brought by Powhatau Jones, Plaintiff, against Benjamin Hunter, Defendant, to recover a negro man slave,

*JUDGE GREEN, absent.

†**Detinue.**—See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578. See principal case cited in Tabb v. Cabell, 17 Gratt. 170.

‡**Evidence—Answer in Equity.**—There is a volume of law to show that pleadings in another cause may be used for evidentiary or collateral purposes where only one party to the case on trial was a party to the former one. An answer in chancery may be used as evidence of an admission of a fact or facts. Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. Rep. 1037, citing the principal case; Tabb v. Cabell, 17 Gratt. 160; 1 Greenl. Ev. § 527a; 1 Whart. Ev. § 836, 838, as its authority.

§**Gifts of Personality.**—In Virginia for more than a hundred years, there have been statutes prescribing what is necessary to make a valid gift of slaves. Dickeschied v. Bank, 28 W. Va. 367, citing the principal case; Durham v. Dunkley, 6 Rand. 135; Patterson v. Franklin, 7 Leigh 590; Shirley v. Long, 6 Rand. 735; Brown v. Handley, 7 Leigh 119; Barker v. Barker, 2 Gratt. 344. See principal case also cited in Thomas v. Lewis, 80 Va. 82, 15 S. E. Rep. 389.

†**Instructions—Erroneous—Effect.**—In Kolner v. Rankin, 11 Gratt. 429, it is said: "That an instruction presents merely an abstract proposition, is certainly a very sufficient reason why a court may

named Ford. On the trial, on the general issue, the Defendant filed three several Bills of Exceptions to the opinions of the Court.

The first Bill of Exceptions sets forth, that the Plaintiff, who claimed the slave as one of those assigned as a part of the dower of his mother in his father's slaves, introduced in support of his action a paper in the following words: "Campbell October Court, 1805. Ordered, that John 542 *Reid, Dennis Kelly, Thomas Jones and John Strange, or any three of them, lay off and allot to Judith Rosser, formerly Judith Jones, a widow of Thomas Jones, deceased, her thirds of the land and personal estate belonging to the estate of Thomas Jones, deceased.

Teste, Ro: Alexander, C. C. C."

To which order is appended a report by all of the Commissioners, bearing date 16th October, 1805, that they had, agreeably to the order, laid off and allotted to the said Judith Rosser, as her thirds, five negroes, and sundry other personal estate: and that no land was contended for. The names of the negroes were, Phill, a man, Ford, a boy, Henry, a boy, and a woman, Dorcas, and her child, Sam. And to the report was also appended a certificate of the Clerk of the Court, that the above allotment was exhibited in Court December 9th, 1805, and ordered to be recorded. To the introduction of which paper the Defendant objected, because the said order of Court, and the proceedings thereupon had, were without any suit for the division of the estate of Thomas Jones, and because Pleasant Rosser, the second husband of Mrs. Jones, under whom the Defendant claims, was no party to the proceedings; but, the Court over-ruled the objection, and admitted the paper as evidence, the Plaintiff being at liberty to prove by other evidence, that the said Pleasant Rosser was a party in procuring the order of Court, and consenting to the division at the time.

The Plaintiff further introduced in evidence an Answer of the Defendant, Benjamin Hunter, to a Bill in Equity, exhibited by one John Talbot, against the said Hunter, and Pleasant Rosser, Defendants; in which Answer, the Defendant says, "That the Defendant, Pleasant Rosser, having intermarried with the widow of Thomas Jones, acquired in her right a number of slaves, and amongst others, the slave Ford: that he has been informed, and believes, that Ford was allotted, by the Commissioners appointed to divide the estate of Thomas Jones, 543 as a part *of Mrs. Rosser's dower slaves in the estate of her first husband: that some time in the year 1812,

refuse to give it: but if given and it state the law correctly. I am not aware that it has ever been held a sufficient cause for reversing the judgment. And though erroneous, it would, as it seems, not be deemed sufficient to reverse. *Hunter v. Jones, 6 Rand. 541.*" And in *Sheppard v. Insurance Company, 21 W. Va. 394*, the principal case is cited to sustain the proposition that, though an instruction be abstract, if it be not calculated to mislead, the case will not be reversed on that account.

To the same effect, the principal case is cited in *Kincheloe v. Tracewells, 11 Gratt. 609*; *Newberry v. Williams, 80 Va. 302*, 15 S. E. Rep. 865; *foot-note to Colvin v. Minefee, 11 Gratt. 87*. See further, *monographic note on "Instructions"* appended to *Womack v. Circle, 29 Gratt. 192*.

Pleasant Rosser proffered to sell Ford to the Defendant telling him that he could readily procure from Powhatan Jones the only child of his wife by her first husband, a release of any right or title which he might have at his mother's death; and the Defendant, having a short time before, had a conversation with Powhatan Jones, had reason to believe that Rosser, by releasing his title to some other slaves claimed by said Jones, would have it in his power to procure a release from Jones to Ford, and consented to become the purchaser of Ford, provided his title was secured: Rosser thereupon proposed to execute a Deed of Trust upon Daniel, to secure the title of Ford; which being satisfactory, the Defendant became the purchaser of Ford at his full value: that Pleasant Rosser has altogether failed to procure a release from Powhatan Jones, of Ford, and the Defendant, without knowing the situation of his title to Ford, yet as Powhatan Jones claims title to him at the death of his mother, and as the Defendant has been informed, and believes that he was allotted, by Commissioners appointed to divide the estate of Thomas Jones, deceased, to Mrs. Rosser for life only, he conceives himself well entitled to claim the benefit, as he does claim the benefit, of the provisions of the Deed of Trust, &c." The whole Record, of which this Answer formed a part, was exhibited in Court. The Defendant objected to its going in evidence, because the Plaintiff in this action was not a party in that suit in Chancery; but, the Court over-ruled the objection, and admitted the answer to be read to the Jury, for the purpose of proving the declarations of the Defendant in regard to his knowledge of the title to the slave in controversy, at the time of his purchase.

The Plaintiff further introduced a witness for the purpose of proving the declarations of Pleasant Rosser, under whom the Defendant claims title to the slave 544 in controversy. *To such declarations after said Rosser had sold the slave, the Defendant objected. But the Court over-ruled the objection, and allowed the Plaintiff to prove any declarations of the said Rosser, respecting the division of the estate of Thomas Jones, and which were calculated to show how, and upon what consideration, it happened that the negro slave in question was held, and regarded by him and his wife, who was the widow and Administratrix of said Thomas Jones, deceased, as part of the said Jones's estate, though purchased by the Administratrix after the said Jones's death; or any declarations which admitted that said slave was purchased for the estate, and was paid for with the money of the estate; and also any declarations which went to an acknowledgment that said Rosser was present at the time of the allotment of dower, and privy to the division which is set forth in the first part of this exception; no matter at what time these declarations were made. To these several opinions, the Defendant excepted.

The second Bill of Exceptions states, that the Defendant's Counsel, in the course of his argument, laid it down to be law.

that a parol gift of a slave, was void as to creditors, and subsequent purchasers for a valuable consideration, unless such gift come to the possession, and remain with the donee, and not with the donor; whereupon the Court stopped the Counsel, and said that was not the law in case of infants, and instructed the Jury that a parol gift of a slave by a parent to an infant child living with him, was good without any delivery of possession other than the declaration that the gift was then made, even against a subsequent purchaser for a valuable consideration, from such parent, if the purchaser, at the time of the purchase, knew that such slave had been so given to the infant, although the parent should retain the possession of such slave, from the time of the gift until the sale. To this opinion the Defendant excepted.

The third Bill of Exceptions states, that it having appeared in evidence that 545 the slave in question never did *belong to the Plaintiff's father, in his life-time, but was bought by the Plaintiff's mother, while a widow, who had taken a Bill of Sale for him and others, which is set out: (the Bill of Sale is executed by Jesse Jones to Judith Jones, dated 14th February, 1798, and conveys five negroes, of whom Ford is one, for the consideration of 200l.): the Plaintiff then offered proof to show that the purchase made by his mother, was paid for with the money derived from his father's estate, and paid by his, the Plaintiff's Guardian, after the division of the estate; and that at the time when the division was made, and his mother's dower of the estate of his father was allotted to her, she and her second husband, P. Rosser, were present, and rendered up the slaves which had been so purchased, as part of the estate of her deceased husband, and made no other account of the profits of the estate, from the death of her husband until the said division; and that the Plaintiff's Guardian being present, agreed to accept, and did accept, the slaves as part of the Plaintiff's father's estate, instead of any other account of profits, and so placed them before the Commissioners, with the consent of the said Rosser and wife, and to be counted as part of said estate, of which dower was to be allotted: whereupon the Plaintiff contended that, by consent of both parties concerned, the said slaves became, the slaves of his father's estate, and that the one in question being part of those assigned as dower slaves became after his mother's death, the property of the Plaintiff, this suit being instituted since her death. The Counsel for the Defendant contended, that if the slave never belonged to the Plaintiff's father, but was purchased by the mother, after her widowhood, the slave never could become the estate of the father, so as to be the subject of dower to the mother. But the Court instructed the Jury, that by consent of the parties interested, a slave thus circumstanced might be substituted, and pass as part of the dower slaves of a widow: and if the Jury should be of opinion, from the evidence before them, that such consent was made by 546 *the parties interested at the time,

and acted upon accordingly, the slaves must pass to the Plaintiff, in like manner as if he had been the property of his father in his life-time. To this opinion the Defendant excepted. Verdict and Judgment were thereupon rendered for the Plaintiff, and the Defendant appealed to this Court.

Johnson, for the Appellant.

Wyndham Robertson, for the Appellee.

October 31. JUDGE COALTER delivered his opinion.*

Although this case is rendered somewhat obscure, from the manner in which the points arising are stated in the various Bills of Exceptions, it seems to be substantially a case of this nature:

Thomas Jones departed this life intestate, leaving a widow and an only child, the present Plaintiff, who was an infant.

The widow administered on the estate, and having received the estate, and also derived considerable profit therefrom, she, with the assent of the Guardian of the child, made a purchase of several slaves, with the monies of the estate, and amongst them, the slave in controversy. The widow afterwards intermarried with Pleasant Rosser, after which, an order of Court was made, (on whose motion is not stated in the Record,) appointing Commissioners to assign to the widow her share of the real and personal estate. Rosser and Wife, and the Guardian of the infant, attended at the division made by the Commissioners, whether the husband and wife brought forward the slaves so purchased, as part of the estate of the intestate, and made no other account of the profits of the estate, and the Guardian of the infant agreed to accept the same as part of the father's estate, instead of any other account of 547 profits; and thus, by the *assent of all parties, they were treated and divided by the Commissioners of the estate of the intestate. Five slaves were thus allotted to the widow, including Ford, the slave in controversy, and Dorcas and her son Sam; which Dorcas was probably also one of the slaves so purchased, as one of that name is in the Bill of Sale.

The division thus made, was returned to Court and recorded. After this, the Defendant purchased the slave Ford from Rosser. The manner of this transaction is detailed in an Answer of the Defendant to a Bill in Chancery, exhibited against him and others, in relation to a slave named Daniel, by one Taibot, in which he states, that Rosser, having intermarried with the widow of Thomas Jones, acquired, in her right, a number of slaves, and amongst others, the slave Ford, and that he is informed, and believes, that Ford was allotted by Commissioners appointed to divide the estate of Thomas Jones, as part of Mrs. Rosser's dower slaves: that Rosser proffered to sell Ford to him, telling him he could procure from the Plaintiff a release of any right he might have at his mother's death; and that having had a communication with the Plaintiff a short time before, from which he was led to believe that such release might be procured on certain terms, he be-

*Absent, the PRESIDENT and JUDGE GREEN.

came the purchaser, on Rosser's executing a Deed of Trust on the slave Daniel, to secure the title of Ford: that the Defendant therefore claims the benefit of the Deed of Trust on Daniel, until the title to Ford is perfected, Rosser having failed to procure the release, and the Plaintiff asserting his title to Ford after the death of his mother.

Thus it seems the matter rested, till after the death of Mrs. Rosser, when the Plaintiff instituted this suit for the recovery of Ford.

The first Bill of Exceptions sets out the order of Court appointing Commissioners, and their report. These documents were objected to, because there had been no suit for the division of the estate, and because Pleasant Rosser was no party to the proceedings; but, the Court over-ruled

548 *the objections, and admitted the paper as evidence, the Plaintiff being at liberty to prove by other evidence, that Rosser was a party in procuring the order of Court, and present at, and consenting to, the division. The same Bill of Exceptions sets out the Answer of the Defendant above noticed, which was offered by the Plaintiff, and objected to by the Defendant, because the Plaintiff in this suit was no party to that suit; which fact, to save the expense of copying the whole Record, was admitted. This objection was over-ruled, and the Answer admitted to be read, in order to prove the declarations of the Defendant in regard to his knowledge of the title to the slave at the time of his purchase.

It is furthermore set out in this Bill of Exceptions, that the Plaintiff introduced a witness to prove the declarations of Rosser, under whom the Defendant claims title, but the Defendant objected to any evidence of the declarations of Rosser, made after he had sold the slave in question. But the Court allowed the Plaintiff to prove any declarations of Rosser, respecting the division of the estate of Thomas Jones, and which were calculated to show how, and upon what considerations it happened that the slave in question was held, and regarded by him and his wife, as part of the estate of Jones, though purchased by the Administratrix, after the death of said Jones, or any declarations which admitted that said slave was purchased for the estate, and was paid for with the money of the estate; also, any declarations which went to an acknowledgment that said Rosser was present at the time of the allotment, set out in the documents before referred to, no matter at what time these declarations were made.

For the contents of the second Bill of Exceptions, see the statement prefixed to this opinion.

The third Bill of Exceptions sets out the testimony as to the purchase of the slave by the Widow and Administratrix, with the monies of the estate as first above stated, and the instruction of the Court, 549 that by consent of the *parties interested, a slave thus circumstanced might be substituted, and pass as part of the dower slaves of a widow; and that if the Jury should be of opinion, from the evidence, that such consent was made by

the parties at the time, and acted on accordingly, the slave must pass to the Plaintiff, in like manner as if he had been the property of the Plaintiff's father.

The Jury being satisfied of the facts stated in this last Bill of Exceptions, and being no doubt also satisfied of the fact, that the Defendant had full notice of the Plaintiff's claim, and that he had taken satisfactory security for the title when he made the purchase, there can be no doubt where the justice of this case lies. The only question is, whether any thing has been decided by the Court which shall make it necessary to reverse the Judgment.

The order of Court, and the report of the Commissioners, were properly admitted as evidence, especially when connected with the other facts, showing the assent, and presence of all parties at the time of the allotment. The Answer too, was properly admitted, to show that the Defendant was informed that the slave in dispute had been allotted, and that the Plaintiff claimed him after the death of his mother.

And as to the declarations made by Rosser, after the sale to the Defendant, that such allotment had been made, and that the slave was held by him and his wife under it, as stated in the Bill of Exceptions, however that matter might have been but for the disclosures and circumstances stated in the Answer set out in the first Bill of Exceptions, yet as these declarations were in accordance with the notice the Defendant admits he received before his purchase, I cannot say they were improperly admitted to go to the Jury. They were mere repetitions of what the vendor had, in perfect fairness, made known to his vendee at the time of the sale.

So, too, as to the facts set out in the third Bill of Exceptions, if they were believed by the Jury, they well warranted the conclusion they were instructed they 550 might *draw from them, to wit, that as the parties had agreed to consider the slaves, purchased with the monies of the estate, as though they originally belonged to it, and had treated them as such, instead of calling the Administratrix to account for the estate, it was an arrangement that bound her and her husband, and was equally binding on those claiming under him, so as to vest the title in the Plaintiff, in like manner as if they had belonged to the intestate.

The only remaining question, is that arising out of the second Bill of Exceptions, as to the parol gift of a slave by a parent to an infant child, residing with him. As an abstract point of Law, this I think was badly decided, and how such a question could arise in this case, in which nothing is said about a gift of a slave, is not perceived.

Had an instruction been asked for on that point, it seems to me, it might well have been refused on that ground; and had the Court simply told the Jury, that however the Law might be on that point, as there was no case before them involving the question, it would be improper for them to consider it. I presume there would have been no doubt of the propriety of such direction. It would seem to me hard and

unreasonable, therefore, that an erroneous opinion of a Court on a point, which, decided either way, would not affect the case before them, should have the effect of reversing a Judgment, clearly right, according to the merits of the case really before the Court and Jury.

At present advised, I am not inclined to reverse the Judgment on this ground. If we did so, we could only direct that on a new trial, if the case should be made out as one of a parol gift of the slave in dispute, no such direction should be given. But as no such case had been insisted on, but the reverse, as expressly stated in the third Bill of Exceptions, it would surely be idle to send it back under the preposterous idea that the Plaintiff would make out such a case, and thereby clearly defeat his own claim.

JUDGES CABELL and CARR concurred that the Judgment should be affirmed.

551 *Ming and Green v. Gwatkin.

November, 1828.

Pleading and Practice—Suit in One Name—Judgment in Another—Effect.—A suit instituted in one name, will not justify a Declaration and Judgment in another; therefore, when a Plaintiff has two baptismal names, and a mistake is made in the second or middle name, it is a misnomer it is a fatal error, not only on a plea in abatement, but on a Judgment by default.

Mary G. Gwatkin sued out a Writ of *Capias ad Respondendum*, in debt, against Amos Hoff and Charles Ming, from the Office of the Superior Court of Law for Prince William County. It was returned "No inhabitant," as to Hoff, and the suit abated as to him. It was executed on Ming, who gave Jesse Green as his appearance bail. The Bail-Bond was copied into the Record, by which the Plaintiff was called Mary G. Gwatkin.

The Declaration was in the name of Mary S. Gwatkin, and the Judgment, which was an office Judgment, not set aside, was rendered in behalf of the Plaintiff, without naming her. The Bill penal, which was filed with the Declaration, had also the S., and not the G., in the middle name.

One of the Defendants being taken in Execution, a Writ of Error was awarded by this Court, without requiring security except for the costs, under the Act of Assembly, passed at the Session of 1824-5, ch. 21, p. 20.

***Pleading and Practice—Variance as to Name—Effect.**—If there be a variance as to the middle name of the payee of a note, between the description of the note in the declaration and the note itself, and such variance would even be deemed material, and it is not taken advantage of in some way before judgment, it will not be ground for reversal of the judgment, being cured by § 8, ch. 134, of the Code. This is so, though the judgment was rendered upon defendant's demurrer to the plaintiff's evidence. Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197. In delivering the opinion of the court, JUDGE BRANNON said: "In *Ming v. Gwatkin*, 6 Rand. (Va.) 551, a variance between writ and declaration as to initial of middle name was held fatal. The case is doubtful. Just the contrary was held in *Dabneys v. Knapp*, 2 Gratt. 855, as to difference in names of Samuel P. and Samuel B. Christian. The *Ming Case* was cited, but not followed. Besides, the *Ming Case* was under a statute which did not cure a defect in judgment by default. *Hatcher v. Lewis*, 4 Rand. (Va.) 152; *Wainwright v. Harper*, 3 Leigh 270."

Johnson, for the Plaintiff in Error.
No Counsel for the Defendant.

November 1. JUDGE CABELL delivered the opinion of the Court.

Many objections were made to the Judgment, but it is unnecessary to notice more than one of them.

The Judgment was by default for want of appearance, and consequently the Writ and Bail-Bond are parts of the Record. *Shelton v. Pollock & Co.*, 1 Hen. & Munf. 423; *Quarles v. Buford*, 3 Munf. 487.

552 *The Writ is in the name of Mary G. Gwatkin, as Plaintiff, and the Bail-Bond states the suit as being in the same name. But, the Declaration and Judgment are in the name of Mary S. Gwatkin. The baptismal name, Mary G., in the Writ and Bail-Bond, is essentially different from the baptismal name, Mary S., in the Declaration and Judgment. A suit instituted in one name, will not justify a Declaration and Judgment in another. On this ground, without noticing any other, the Court is of opinion to reverse the Judgment, and to set aside all the proceedings subsequent to the Writ and Bail-Bond.

Note by the Reporter. The rule in New-York seems to be different. See the case of *Franklin & al. v. Talmadge*, 5 Johns. Rep. 84. In that case, the question arose on a motion to exclude a Deed from going in evidence, on the ground of its being variant from the Declaration.

Lamb v. Smith.

November, 1828.

Parol Sale of Land—Mistake—Equitable Relief—Rescission of Contract.—Where a vendor sells a lot of land by parol; puts the purchaser in possession, and receives the purchase money, but conveys a different lot: On a Bill filed by the purchaser, requiring the vendor either to correct the mistake by conveying the lot really purchased, or to refund the money, the Court of Equity, on being satisfied that the vendor had no title to the property sold, will rescind the contract, and decree the money to be refunded.

John M. Smith, exhibited his Bill to the Chancellor of the Richmond District, setting forth, that in the year 1814, he purchased of a certain William Lamb, a lot of land in the City of Richmond, forty-three feet one way, and one hundred and thirty feet the other, for which he agreed to give seven hundred dollars: that on the lot thus purchased, there stood a small house, of which, with the lot itself, the Plaintiff

†Contract—Rescission—Mistake.—It is well-settled law that, although there be no fraud, or default on either side, yet the mutual error of the parties, if that error be in a matter which is the cause of the contract, that is, is the substance of the thing contracted for, is a good ground for rescinding even an executed contract. *Glassell v. Thomas*, 3 Leigh 125, citing the principal case to sustain the point. And in *Leas v. Eldson*, 9 Gratt. 278. JUDGE MONCURE, in delivering the opinion of the court, said: "It is now well settled that a mutual mistake of the parties in a matter which is part of the essence of the contract and substance of the thing contracted for, will be corrected by a court of equity, and may be good ground for rescinding the contract or executing it on equitable terms of compensation, according to circumstances, even though the contract be in writing, and required to be so by the statute of frauds. 1 Story's Eq. Jur. §§ 134, 144, 152, 162; 1 Munf. 330; 6 Munf. 283; 3 Rand. 504; 6 Rand. 562; 3 Leigh 118."

To the same effect, the principal case is cited in *Butcher v. Peterson*, 26 W. Va. 451; *Fearon Lumber and Vener Co. v. Wilson*, 51 W. Va. 30, 41 S. E. Rep. 139.

was immediately put in possession, 553 and that he "has paid the whole amount of the purchase money; that being satisfied with the soundness of Lamb's title, and that he could obtain a title whenever he should demand it, he never did demand it at all, but that some time in the year 1816, the said Lamb and his wife, conveyed to the Plaintiff a totally different piece of land, having no building on it, and worth scarcely one-tenth part of the land actually sold: that the Deed was lodged in the Office, and duly admitted to record, but was never presented to the Plaintiff, nor accepted by him, nor ever sanctioned by him in any other manner whatever: that there was no written contract between them; but the Complainant exhibits a diagram of the lot purchased, and of that conveyed, by which it appears that they are both on the same square, but the lot conveyed is at right angles with the lot sold, and the former includes only forty-three feet square (at the remote end,) of the latter, running on to a different street for quantity. Each lot, is however, forty-three feet one way, by one hundred and thirty the other. He avers that he never contemplated a purchase of any but the lot on which the house stood, of which he received possession from the Defendant himself: that he would not have given the same price for the other lot, nor wished to purchase it, as the Defendant well knew. He avers that he did not know of the Deed, until informed of it by the Clerk; he then took the Deed out of the Office, but relying on its correctness in every respect, did not immediately examine it. When he did examine it, he found, to his great surprise, that it was not only imperfect, but did not purport to convey to him the property he had purchased, but different property, which he would not have as a gratuity. He immediately communicated these facts to the Defendant, and demanded of him either a Deed for the lot actually sold, or the return of the purchase money, both of which were refused. As the Deed was thus fraudulently forced upon him, under a total ignorance and mistake on his part, and he refused to acquiesce in the fraud as soon as it was detected, he prays for relief.

554 *The Defendant in his Answer admitted, that he had agreed to sell the Plaintiff a lot in the City of Richmond, of the dimensions mentioned in the Bill, and that he had received the purchase money. He avers that he has made a Deed conveying, as he supposed, and still supposes, the very property he sold the Plaintiff, "but that the Respondent is an illiterate man, and knows only from the information of others the contents of Deeds executed to him, or by him." He says that his intention was to sell to the Complainant the lot which he himself had brought of James Boulton, and which Boulton had bought of Col. Richard Adams. He avers that he believes that he has conveyed to the Plaintiff the identical property conveyed by Boulton to him, and that he supposed it to be the very lot which the Plaintiff claims, that he bought. If it be not, he alleges that he himself has been imposed on by Boulton, and that Boulton's heirs or devisees ought

to be made parties to this suit, and compelled to execute the conveyance.

A survey of both lots was ordered by the Court of Chancery. According to the plat returned, it appears that the diagram, exhibited by the Plaintiff with his Bill, was substantially correct. Each lot was forty-three feet nine inches in front, running back one hundred and thirty-two feet. They fronted on different streets, and were at right angles to each other, the lot conveyed only including forty-three feet nine inches of the lot sold.

Sundry depositions were taken in the cause; and the Court of Chancery, being satisfied that the proofs fully supported the allegations of the Plaintiff's Bill, decreed, that the Deed from the Defendant to the Plaintiff, be delivered to him to be cancelled, and that the Defendant pay the Plaintiff the sum of seven hundred dollars, with interest thereon from the 8th November, 1819, till paid, and costs. From this Decree, the Defendant, Lamb, appealed to this Court.

555 *Daniel, for the Appellant.

The Attorney General, for the Appellee.

November 7. JUDGE GREEN.

This is not a Bill for the specific execution of a parol contract only, but to remedy a mistake in the execution of such a contract, offering the Defendant the alternative to correct the mistake, by conveying the property really purchased, if he has a title to it, or to re-pay the money, if he has not. Here was a mutual mistake as to the very subject of the contract, and it is void, and should be rescinded, and the parties put in statu quo, by the repayment of the money, the vendor having no title to the property really sold. The Decree should be affirmed.

JUDGES CARR, COALTER and CABELL concurred.*

556

*Truss v. Old.

November, 1828.

Trespass Quare Clausum Fregit—Possession.—Possession is indispensably necessary to support trespass quare clausum fregit.

Guardian and Ward—Interest in Ward's Land—Trespass by Guardian—Guardians in Socage, and Testamentary Guardians, (although they have no beneficial interest, yet) have a legal interest, and the possession of the Ward's land during the Guardianship. If, therefore, a person trespass on the lands of an infant, and cut and carry away his trees, without the license of the Guardian, the Ward cannot maintain Trespass, but the Guardian may, and must account to the Ward for the damages recovered.

Same:—Trespass by Ward.—If the trees are cut and carried away by permission of the Guardian, no Trespass is committed, and the infant, even after the Guardianship has ceased, cannot maintain Trespass for the act. The wrong must be compensated to the Ward by the Guardian.

Same:—Timber Trees Thrown Down—Right of Guardian to Sell.—It seems that if timber trees, growing on the inheritance of a Ward, are thrown

*Abrent, the PRESIDENT.

†Trespass.—See monographic note on "Trespass" appended to *Quarles v. Lacy*, 4 Munf. 251.

‡Guardian and Ward.—See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

See the principal case cited in *Hunter v. Lawrence*, 11 Gratt. 180; *Cochran v. Hyre*, 49 W. Va. 315. 38 S. E. Rep. 655.

§Same.—Rights of Guardian in Ward's Land—Trespass by Guardian.—The guardian has the legal right to the possession of the ward's land during the guard-

down by tempest, or otherwise, they become personal property, and the Guardian has a legal right to sell them, as being perishable and of no value except as a subject of sale, and in such case, the infant cannot bring Trover for them.

This was a Supersedeas to a Judgment of the Superior Court of Norfolk County. James Old, an infant by Edward J. Wilson, his Guardian and next friend, brought an action of Trespass quare clausum fregit, in the said Court against Wm. Truss. The Plaintiff, in his Declaration, complains that the Defendant with force and arms, entered on the land of the Plaintiff, and cut down, took and carried away certain pine trees, and underwood growing thereon, of the value of \$1,000. The Defendant pleaded "not guilty," with liberty, by consent of parties, to prove any thing under this plea that he might do under accord and satisfaction, and the Plaintiff replied generally. The Jury found a verdict for the Plaintiff for \$160 damages, and Judgment was accordingly given for this sum and costs. To maintain the issue on his part, the Plaintiff proved that in the year — the Defendant entered on the Plaintiff's lands, situated in Norfolk County, and cut down and carried away seven or eight pine trees, of the value of \$——. The Defendant proved that at and before the time of the said entry, cutting and carrying away, Kedar Old was the Plaintiff's Guardian, legally appointed *and qualified by the County Court of Norfolk: that as Guardian, the Defendant made a contract with him, by which the said Guardian gave him liberty to enter upon the land and cut and carry away the trees mentioned above, upon paying their value, and that afterwards the Defendant paid the said Guardian the sum of one hundred and five dollars, the sum estimated by the said Guardian and the Defendant to be the value of the said trees: that at the time the said contract was made, the Plaintiff had little or no income, although he had some personal property, and that his Guardian, who was his Grand father, stated that he wanted some money to pay for his Ward's schooling and clothes: that Kedar Old has since died, and the next friend has qualified as Guardian. On motion of the Plaintiff's Counsel, the Court instructed the Jury, that the said Kedar Old, as Guardian, had no authority to grant liberty to

lanship. He may maintain trespass for an injury to the soil; or even ejectment for its recovery. He may grant a copyhold in reversion or remainder in his own name. He may have a writ of right of ward, and recover the land and damages, as well as the body of his ward. *Zirkie v. McCue*, 26 Gratt. 526, citing the principal case, and 2 P. Wms. 122, as its authority. And in *Ware v. Ware*, 28 Gratt. 673, it is said: "Although the guardian has no beneficial interest in the estate of his ward, still his authority is coupled with an interest, and is not barely an office. In respect to the real estate, he may make a lease for years, upon which ejectment may be maintained; he may have an action of trespass against a stranger, in his own name, for spoiling the grass; he may have a writ of right of ward, and recover the land and damages, as well as the body of the ward; he may assign dower and institute proceedings for partition." *Truss v. Old*, 6 Rand. 554." To the same effect, the principal case is cited in *Brockenbrough v. Turner*, 78 Va. 454; *Burdett v. Cain*, 8 W. Va. 285; *McDoddrell v. Pardee*, etc., *Lumber Co.*, 40 W. Va. 567, 21 S. E. Rep. 878 (in this case, it was held that not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care and management of his ward's estate.)

the Defendant to cut down the said trees, and that notwithstanding the contract between the Guardian and the Defendant, the cutting was a trespass, for which this action was well brought, and that the said sum of one hundred and five dollars having been paid by the Defendant in execution of the contract so made with the Guardian, was no satisfaction of the said trespass, and no sufficient defence under the plea of accord and satisfaction. To this opinion of the Court, the Counsel for the Defendant filed his Bill of Exceptions, from which the above statement is extracted.

The Defendant, by Leigh, his Counsel, prayed this Court to grant him a Supersedeas to the said Judgment, on the following grounds:

1. That in this country growing timber may be sold by a Guardian from his Ward's land, and the proceeds of such timber may well be considered as fair profits of the estate.

2. That if not, the Guardian who has permitted another person to cut the timber, is guilty of the waste, and the Guardian alone is responsible to the Ward.

3. That the license of the Guardian to any person to cut and take away timber from his Ward's land, at all events, 558 *works a complete bar to the action of Trespass. The Supersedeas was awarded.

Leigh, for the Appellant.

Stanard for the Appellee.

November 12. JUDGE GREEN delivered his opinion.*

Possession is indispensably necessary to support an action of Trespass, quare clausum fregit; (See the cases collected 20 Vin. Abr. 463, pl. 9, 12, 13, 14;) and whether an infant can maintain such an action for a trespass done to his lands, whilst he is in the wardship of his Guardian, depends on the question, whether, in point of Law, the possession is in the Guardian, or Ward.

Our Statute concerning Guardians, recognizes only two descriptions of Guardians who have any power over the property of their Wards; Guardians in Socage, and those appointed by the father under that Statute, who are put in all respects upon the footing of the former, our Statute in this respect being a copy of the Statute of 12 Car. 2, ch. 14. Under that Statute it has been held, that although the Statutory Guardian, and Guardian in Socage, have no beneficial interest, yet their authority is coupled with a legal interest, and is not barely an office. *Shaftsbury v. Shaftsbury*, *Gilb. Rep.* 172; *Eyre v. Shaftsbury*, 2 P. Wms. 102, S. C. It is an interest like that of a Trustee for the separate use of a married woman, an Executor in trust, or an Administrator of an estate of which there is no surplus, after the payment of debts, all of whom have a legal, without any beneficial interest. When we consider the purposes for which the law appoints Guardians to infants, it is obvious that to enable them to effect the objects of their appointment, they must have a legal right to 559 the exclusive *possession and con-

*Absent, JUDGES CABELL and COALTER

troul of the infant's property, so long as the Guardianship continues, without which they could not manage the property beneficially for the infant, as by renting, or cultivating, and disposing of the produce of their lands, hiring their other property, and selling that which is perishable, and which might otherwise be wholly lost. The infant being incapable of making any contract in respect to these subjects, his Guardian could not make a valid contract in his name, and must of necessity transact all in relation to his Ward's property, in his own name.

Accordingly, the authorities are uniform that a Guardian in Socage has a legal right to the possession and disposition of his Ward's land, during the continuance of his Wardship. Littleton (B. 2, §123,) takes this for granted, by stating that when the Guardianship terminates, the Ward may enter, and oust the Guardian. So the Guardian in Socage may justify the occupation of the land against the heir himself. Kelw, 46, b. He may grant a copy holding reversion, or remainder, in his own name, as dominus pro tempore, 2 P. Wms. 122; Shopland v. Ryoler, Cro. Jac. 55 and 99: He may sue and avow in his own name, 2 P. Wms. 122: He may make a lease for years, during the Wardship, upon which an ejectment may be maintained, 14 Vin. Abr. 185, pl. 4; and see Ibid. pl. 3, and 6, and cases there cited. He may have an action of Trespass against a stranger, for spoiling the grass in the Socage lands, in his own name, and not in the name of his Ward. Br. Trespass, pl. 175; Br. Garden, pl. 5, cited in Vin. Abr. 196, pl. 3, note. He may have a Writ of Right of Ward, and recover the land and damages, as well as the body of the Ward, 14 Vin. Abr. 190, pl. 1, 2. He may have an ejectment of Ward, and if the Ward himself enters and ousts him of the land, he may recover it by a Writ of Intrusion of Ward. Br. Eject Custod. pl. 11, cited 14 Vin. Abr. letter N. pl. 1, note. And to the same effect was the Civil Law, from which the Law of Guardianship in Socage was in a
560 great degree taken. "Tutores sive pupilli eorum, sive ipsi possident, possessorum loco habentur." Dig. Lib. 2, c. 15, § 5. If the Defendant in this case had entered and cut and carried away the trees without the license of the Guardian, the Ward could not have maintained the action of Trespass. That would have belonged to the Guardian, who must have accounted to the Ward for the damages recovered. But, being done by the permission of the person legally in possession, there was no trespass whatever.

It was argued, that the trees being a part of the inheritance whilst standing, became, when severed from the soil, personal property belonging to the Ward, for which he might have maintained Trover, and that the misconception of the action is cured after verdict, by our new Statute of Jeofails. The Statute of Jeofails gives that effect to a verdict only when the verdict is given without exception, but here the objection is to the verdict itself, as given under a misdirection of the Court, and if improperly given, cannot cure any error. Besides,

although it is true that when timber trees growing on lands held temporarily by another, are cut, or thrown down by tempest or otherwise, they become personal property belonging to the owner of the inheritance, for which he may maintain Trover against any one who takes them, even the tenant (Uvedale v. Uvedale, 15 Vin. Abr. 142, pl. 3,) yet, in this case, the Plaintiff could not have maintained such an action against the Defendant, because the moment the trees became personal property, the Guardian had a legal right to sell them, as being perishable, and of no value, but as a subject of sale. The wrong, if any, done to the Plaintiff, must be compensated by the Guardian. The Judgment should be reversed, the verdict set aside, and a new trial awarded, in which the instruction excepted to is not to be given, if again asked for.

The PRESIDENT and JUDGE CARR concurred.

561

*Moses v. Denigree.

November, 1828.

Deed of Emancipation — Validity—Case at Bar.—A Deed of Emancipation of a slave, executed in 1781, directing the freedom to commence when he should come of age, that is, in 1798, is absolutely void: for, at that time the Act of 1723 was in force, by which emancipation was prohibited, except for meritorious services, and by permission of the Governor and Council.

Same—Same—Case Explained.—The devise in *Pleasants v. Pleasants*, was supported, because the Testator did not attempt to vest a right to freedom in violation of Law, but directed that his slaves should have their freedom whenever the Laws would permit it, and created a trust to support it: and that case has carried the doctrine far enough. But, where either a Deed or Will, made before May, 1782, emancipates a slave absolutely and without condition, (although the freedom is to take effect at a future time,) it is unlawful, and therefore void.

This was an action brought in forma pauperis in the Borough Court of Norfolk, by Moses, a negro man, to recover his freedom of the Appellee, Denigree, by whom he was held and treated as a slave. Judgment was rendered for the Plaintiff in the Court below, and a Supersedeas obtained, to bring the cause before the Superior Court of Norfolk County. The Superior Court reversed the decision of the Court below, and the Defendant, Moses, appealed to this Court.

At the trial of the case in the Borough Court, the parties, by their attorneys, agreed a case in lieu of a special verdict, which sets forth the following facts: Samuel Pretlow of Surry County, being at that time the owner of the Plaintiff, then a little boy, on the 13th day of November, 1781, signed, sealed and acknowledged, in the presence of two witnesses, a writing purporting to be a Deed of Emancipation in favor of the Plaintiff, in the following words: "I, Samuel Pretlow, of Surry County in Virginia, after deliberate consideration, and from the conviction of my own mind, being fully persuaded that freedom is the natural right of all mankind, and that no Law, moral or divine, hath given me a right to, or property in, the persons of my fellow-creatures; and being desirous to fulfill the injunction of our Lord 562 and Saviour Jesus Christ, by *doing to others as I would be done by, do therefore declare, that having under my

care a negro boy, named Moses, aged about six years, do therefore, for myself, my heirs, executors and administrators, hereby release unto him, the said Moses, all my right, interest and claim, or pretension of claim whatsoever, as to his person, or to any estate he may acquire, after he shall attain to the age of twenty-one years, which will be on the 31st day of the twelfth month in the year 1796, without any interruption from me, or any person claiming for, by, from, or under me. In witness whereof, I have hereunto set my hand and seal, this thirteenth day of the eleventh month in the year of our Lord 1781." The above Deed of Emancipation was recorded on the 26th day of April, 1819, in the County Court of Surry, on proof of the hand-writing of one of the subscribing witnesses, (both of the witnesses being then dead.) On the 14th day of November, 1781, Samuel Pretlow made his Will, which was recorded on 23d of April following, after the death of the said Pretlow. The Testator devised a tract of land to his son, Samuel, in fee, and also the labour of his negro, Robin, and three others, until they "become free, agreeable to the manumissions I have given under my hand and seal," and "bequeathed to his daughter, Mary, to her, and her heirs forever, the labour of four negroes, viz: Moses, Joe, Tom and Tabb, until they become free." The said writing, purporting to be a Deed of Emancipation, was found among the papers of the acting Executor about fourteen years before the institution of this suit, and was never given to the Appellant, but had been offered by the Executor to the Court many years before, to be recorded, when the Court refused to receive it. Samuel Pretlow remained in possession of the Plaintiff till his death. After that, with the assent of the Executor, the Plaintiff came into possession of Mary Pretlow, the daughter and legatee of the Testator, and so continued until the intermarriage of Mary Pretlow with one
563 Samuel Hart. The Plaintiff *was held by said Hart until his death, in about 1800, when he was sold by Hart's Executor to the Defendant, Denigree. The Plaintiff came of age on the 31st of December, 1796.

Wyndham Robertson, for the Appellant.
The Attorney General, and S. Taylor, for the Appellee.

November 13. JUDGE CARR.

On the 13th of November, 1781, Samuel Pretlow, by Deed, emancipated a negro boy of six years old, named Moses, "after he shall attain to the age of twenty-one years." On the next day he made his Will, in which there is the following clause: "I give and bequeathe unto my daughter, Mary, to her, and her heirs forever, 150l. in specie, and the labour of four negroes, viz: Moses, Joe, Tom and Tabb, until they become free." The Will was admitted to record in April, 1782, the Deed in 1819, and then on proof of the hand-writing of one of the subscribing witnesses, it being stated that they were both dead. Moses, on the death of Pretlow, went into the possession of Mary Pretlow, whose husband held him till his death, about 1800, and the husband's

Executor sold him to Denigree, the Defendant. This is the substance of the case agreed, and presents this question; is Moses entitled to his freedom? In 1723, it was enacted that no person should emancipate a slave but for meritorious services, and by permission of the Governor and Council. This Act continued in force till May, 1782, when a Law passed, saying, "That it shall hereafter be lawful for any person, by his last Will and Testament, or by any other instrument in writing under his hand and seal, attested and proved in the County Court, by two witnesses, or acknowledged by the party in the Court of the County where

he resides to emancipate and set free
564 his slaves, who shall *thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom, as if they had been particularly named, and freed by this Act." Did the Deed and Will either separately or conjointly entitle Moses to his freedom? The Deed was an attempt to do what was expressly forbidden by Law, the Act of 1723 declaring, that "No negro, mulatto or Indian slaves, shall be set free upon any pretence whatsoever, except for some meritorious services, to be adjudged and allowed by the Governor and Council, and a license thereupon first had and obtained." I suppose it need hardly be said that a Deed, made in direct violation of a positive Law, is void. If this Deed had been made after the Law of 1782, it would have been of no avail, for it has never been recorded according to the directions of that Act; and this Court, in *Givens v. Manns*, 6 Munf. 191, and *Lewis v. Fullerton*, 1 Rand. 15, have declared, that unless the Law is pursued in that respect, the Deed is void. By the Deed, then, as a Deed to emancipate, Moses gained nothing. The Will, taken by itself, is merely a bequest to Mary of the labor of Moses and three others, until they become free, and cannot, without violating every rule of construction, be taken to impart any right to Moses. But it is said, that the Will evidently refers to the Deed, and must be taken in connection with it. I have no doubt the Testator had that Deed in his mind when he wrote his Will; but this, so far from showing that he meant by his Will to confer freedom on Moses, is strong proof, (as was well remarked at the Bar,) that he had no such meaning, but considered that as done by the Deed already. This seems still more clear by another part of the Will, where, in the first bequest of the labor of other slaves, he says, "until they become free, agreeable to the manumissions I have given under my hand and seal." It is clear, then, that the Testator did not intend to free Moses by Will, and in the Will merely referred for the term of service, to the Deed by which he supposed
565 he had *given freedom, and this reference to a Deed void ab initio, it will hardly be contended, could make it valid. But, suppose the Testator had made the Deed a part of the Will; nay, suppose by the Will itself he had given to Moses his freedom after twenty-one, I say such a Will would have been void, and this even under the decision of *Pleasant v.*

Pleasants, 2 Call, 319, a case which has surely carried this doctrine as far as it ought to go. There, the Testator did not pretend by his Will to vest a present right to freedom, in violation of the Law, but devised his slaves to his children, with a clause, that whenever the Laws should permit it, they might have their freedom, and created a trust to support that devise. And the Decree in that case states, "If the Testators had devised the slaves, upon condition that the devisees should emancipate them immediately, the condition being unlawful, would have been void, and the property vested; yet the condition, that they should become free when the Law would permit it, was not of that sort." Here, neither the Will nor the Deed looked to the passage of a Law as a condition, but gave freedom upon the sole condition of the negro's living till twenty-one; and this was against Law, and void. I think the Judgment of the Superior Court must be affirmed.

All the other Judges concurred, and the Judgment was affirmed.

566

***Spotts v. Gillaspie.**

November, 1828.

Abolition of Slavery—Act of Pennsylvania—Construction.—The Act of Pennsylvania of 1780, for the gradual abolition of slavery, clearly includes all negro and mulatto children born of slave mothers after the passage of the Act, except in the cases excepted by the 10th section, such as domestic slaves attending on Delegates to Congress, &c. &c. **Same—Same—Same—Case at Bar.**—If, therefore, a citizen of Pennsylvania, after the passage of the Act, bequeath a female slave to a citizen and resident of Virginia, and after the legatee's title has accrued, the slave have a child born in Pennsylvania, and the child be then brought to Virginia, together with its slave mother, by her master, such child may recover its freedom in the Courts of Virginia.

Same—Same—Same—Same.—It seems, that though by the Act of Pennsylvania, the condition of the mother is so far changed, that her children born there, cannot be slaves, yet if she be removed by her master, her children born in Virginia are slaves, though those born in Pennsylvania are free.

'Susanna Gillaspie, a woman of colour, instituted her action in forma pauperis, in the Superior Court of Augusta, to recover her freedom, against Jacob Spotts, who detained her in slavery. The Jury found a special verdict, in which they found two Acts enacted by the Legislature of Pennsylvania, the first passed to the 1st March, 1780, entitled, "An Act for the gradual abolition of slavery," the other passed 29th March, 1788, in amendment of the former Act. By the third section of the first Act, it is enacted "That all persons as well negroes and mulattoes as others, who shall be born within this State from and after the passing of this Act, shall not be deemed and considered as servants for life, or slaves; and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within this State from and after the passing of this Act as aforesaid, shall be, and hereby is, utterly taken away, extinguished, and forever abolished."

Sec. 4th. "Provided always, and be it further enacted, That every negro and mulatto child, born within this State after the

passing of this Act as aforesaid, (who would, in case this Act had not been made, have been born a servant for years, or life, or a slave,) shall be deemed to be, and shall be, by virtue of this Act, the servant of such *person, or his or her assigns, who would, in such case, have been entitled to the service of such child, until such child shall attain unto the age of twenty-eight years, in the manner, and on the conditions, whereon servants bound by indenture for four years are or may be retained and holden; and shall be liable to like correction and punishment, and entitled to like relief, in case he or she be evilly treated by his or her master or mistress, and to like freedom dues and other privileges, as servants bound by indenture for four years are or may be entitled, unless the person, to whom the service of any such child shall belong, shall abandon his, or her claim to the same; in which case, the Overseers of the Poor of the City, Township or District, respectively, where such child shall be so abandoned, shall, by indenture, bind out every child so abandoned, as an apprentice, for a time not exceeding the age herein before limited for the service of such children."

The 5th section enacts, "That every person, who is, or shall be the owner of any negro or mulatto slave or servant for life or till the age of thirty-one years, now within this State, or his lawful attorney, shall, on or before the said first day of November next, deliver or cause to be delivered, in writing, to the Clerk of the Peace of the County, or to the Clerk of the Court of Record of the City of Philadelphia, in which he or she shall respectively inhabit, the name and surname, and occupation or profession of such owner, and the name of the County and Township, District or Ward, wherein he or she resideth; and also the name and names of any such slave and slaves, and servant and servants for life, or till the age of thirty-one years, together with their ages and sexes, severally and respectively set forth and annexed, by such person owned or statedly employed, and then being within this State, in order to ascertain and distinguish the slaves and servants for life, and till the age of thirty-one years, within this State, who shall be such on the said first day of November next, from all other persons; which 568 particulars *shall, by said Clerk of the Sessions and Clerk of the said City Court, be entered in books to be provided for that purpose by the said Clerks; and that no negro or mulatto now within this State, shall, from and after the said first day of November, be deemed a slave or servant for life, or till the age of thirty-one years, unless his or her name shall be entered as aforesaid on such Record, except such negro or mulatto slaves and servants as are herein-after excepted: the said Clerk to be entitled to a fee of two dollars for each slave or servant so entered as aforesaid, from the Treasurer of the County, to be allowed to him in his accounts."

The 10th section enacts, "That no man or woman of any nation or colour, except the negroes or mulattoes who shall be registered as aforesaid, shall, at any time here-

after be deemed, adjudged or holden, within the territories of this Commonwealth, as slaves or servants for life, but as free men and free women; except the domestic slaves attending upon Delegates in Congress from the other American States, Foreign Ministers and Consuls, and persons passing through or sojourning in this State, and not becoming resident therein, and seamen employed in ships not belonging to any inhabitant of this State, nor employed in any ship owned by any such inhabitant; provided, such domestic slaves be not alienated or sold to any inhabitant, nor (except in the case of Members of Congress, Foreign Ministers and Consuls,) retained in this State longer than six months."

It is not deemed necessary to transcribe any other parts of the Act, or of the subsequent Act of 1788.

The Jury further find, that James Gilchrist, previous to, and on the 26th April, 1782, held possession of a negro woman, named Hannah, in the County of Lancaster, and State of Pennsylvania, whom he claimed and treated as his slave; and that the said Gilchrist, who was a citizen of the said County and State, on the 26th April, 1782, made his last Will and Testament, which was duly admitted to record after

his death, which happened before the
569 5th of June *following. They find the Will in hæc verba, of which the fourth and fifth clauses are as follows: "4. I give unto my well beloved wife, Sarow Gilchrist, the remaining part of all my personable estate, except my negro wench Hannah, forever, and the benefits of my real estate in during her natural life. 5th. After the deyses of my well beloved wife Sarow, I give unto my son-in-law James Roberts, and Sarow his wife, my negro wench Hannah, to them, and their heirs forever.

They find, that the said Hannah is the negro wench mentioned in the fourth and fifth clauses of the said Will: that the Testator's widow in the said Will mentioned, departed this life before the birth of the said Plaintiff, Susanna, to wit, in the Spring of the year 1786; and that the said Plaintiff, Susanna, was born in the County and State aforesaid, in the Summer of the year 1786; and that after the death of said widow, to wit, in the Summer of 1786, when the Plaintiff, Susanna, was six weeks of age, a certain James Robertson, (by mistake, in the fifth clause of the Will, called James Roberts,) who resided at, and before the date of the said Will in Augusta County, Virginia, brought the said Hannah, and her child, the said Susanna, from the said County of Lancaster, in Pennsylvania, to his residence in Augusta County, in this State, claiming them as his property under the said Will. They further find, that the said James Robertson did not remove the said slave, Hannah, from Lancaster to his residence, before the birth of the child, the Plaintiff Susanna, because he conceived his right of possession did not vest until the death of the Testator's widow, which was a short time before the said birth, not more than sufficient to receive intelligence, and make preparation for the journey.

They further find, that the Defendant purchased the said Susanna from the said James Robertson, for a valuable consideration: that the said Law of Pennsylvania remained in full force from the passage of it, till after the removal of the said Hannah and Susanna to Virginia:
570 *and conclude, that if upon these facts the Law be for the Plaintiff, they find that the Plaintiff is free, and not a slave, and find for the Plaintiff one cent damages; but if the Law be for the Defendant, then they find for the Defendant.

The Superior Court gave Judgment for the Plaintiff, and the Defendant appealed. Stanard, for the Appellant.

Johnson, for the Appellee.

November 17. The PRESIDENT delivered his opinion.

This suit is in behalf of a pauper, and her descendants, for their freedom. The Jury have found a special verdict, on which the Court below has adjudged the Law for the Plaintiff, and an appeal is taken to this Court.

The Jury find, that in 1780, the State of Pennsylvania passed a Law for the gradual abolition of slavery, which they set out at length. The third section enacts, that all persons, as well negroes and mulattoes as others, who shall be born within this State, from and after the passing of this Act, shall not be deemed, and considered as servants for life, or slaves, and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the case of all children born within the State from and after the passing of the Act shall be, and is hereby utterly taken away, extinguished and abolished. By the fourth section, the children of slaves born within the State after the passing of the Act, are to be held by the owners of their mothers, until they shall arrive at the age of twenty-eight years, upon the same terms and conditions, that servants bound by indenture for four years are subject to, unless the person entitled to the service of such child, shall abandon his claim, in which case, the Overseers of the Poor shall by indenture, bind out every such child as an apprentice, for a time not exceeding the age be-

571 fore limited. *The fifth section directs, that all slaves, or servants for life, or thirty-one years, shall be registered by their owners, with the Clerk of the County, &c., in which he resides, before the 1st November following, and that no negro or mulatto now within the State shall be deemed a slave unless his, or her name shall be entered as aforesaid on such Record, except as after excepted. The tenth section contains the exception, which extends to domestic slaves attending upon Delegates in Congress, Foreign Ministers and Consuls, and persons passing through, or sojourning in the State, and not becoming residents therein, and seamen, &c. employed in ships not belonging to inhabitants of the State. These are all the parts of the Law that have any bearing on the case before us. The Jury also set out an Act of Pennsylvania in 1788, explaining and amending the former, which it does not seem necessary to notice. They next

find the Will of Gilcrist, a citizen of Pennsylvania, made in 1782, in which he gives to his wife for life, and after her death, to his son-in-law James Robertson, and Sarah his wife, his negro woman Hannah, whom the Jury find, he claimed and treated as a slave: they find that his widow died in the Spring of 1786: that shortly after, in the Summer of 1786, Hannah had a child, the Plaintiff, Susanna; that when Susanna was about six weeks old, the said James Robertson, who then, and at the making of the Will, lived in Augusta County, Virginia, went to Pennsylvania, and brought to Augusta, Hannah, and the Plaintiff, Susanna, claiming them as his property: that the Defendant Spotts, bought Susanna of Robertson, for a valuable consideration: and they further find, that the Pennsylvania Law of 1780, remained in full force from the passage thereof until the removal of Hannah and Susanna. These are the facts on which the question depends.

In the argument, it was contended, 1st. That the case before us was not embraced by the Law of Pennsylvania, because not within the words, and 572 meaning of the Law; *and 2dly. If it were, a Court in Virginia would not give effect to it, and thereby confiscate the property of a citizen of Virginia.

As to the first objection, it seems to me that the case is clearly embraced by the Law of Pennsylvania. The third section includes all children born of slaves after the passage thereof, to whomsoever their mothers might belong, whether citizens of Pennsylvania, or other States. The exceptions in the tenth section are pointed to children born of slaves within the State, and excludes them from the operation of the Act, because of the ownership of Delegates to Congress, &c. These exceptions do not narrow the construction of the Act, by any possible inference as to other children born of slaves within the State, than those within the exceptions. Throughout, the Law applies to them as persons, and not as property, by which to limit its operation, by the rights of the owners of the mothers.

The second question, then, as to the power of the State of Pennsylvania to confiscate the property of a citizen of Virginia, does not directly occur. The power of the State of Pennsylvania to change the condition of persons, held under its Law (and no other) in slavery, cannot be questioned, especially if they were not then the property of a citizen of another State, which is not the case before the Court.

If at the time the Act of 1780 passed, and went into operation, Hannah, the mother of Susanna, the Plaintiff, was the slave of Gilcrist, (which is not positively found by the verdict,) both his property in her, and her condition as a slave, were subject to the Law of Pennsylvania. It might, and did change the character of his property in her, and in so far, her condition as a slave. Before the passage of the Act of 1780, he held an absolute property in her, and her children then to be born. Afterwards, though his property in her was, as to her services, the same, her condition was so changed that she could

not be the mother of a slave in Pennsylvania, and his property in her to that extent was changed. The Law of Pennsylvania was, as regarded his property 573 *in her and her condition, executed.

His Will could not affect this state of things. It might pass his qualified property in her and her future offspring, according to the provisions of the Act, but it could not alter the then condition, either of Hannah, or of her offspring born afterwards: They remained as before under the Act. Susanna, the Plaintiff, was born under its operation in Pennsylvania: by it though born of a slave, she was free: and in this aspect of the case, the Court is not called on to execute the Law of Pennsylvania, but the Law of Virginia, which does not now, and did not then, permit a person free in Pennsylvania, to be held in slavery here.

If Susanna had been born in Virginia, after the removal of her mother, the question would be a different one. It might be argued, that though the Law of Pennsylvania had imparted to Hannah a new condition; that is, that though a slave absolutely as to service, her children were not to follow her condition as in Virginia, yet that in Virginia, her condition in Pennsylvania would not protect her children born here. How that would be, it is not necessary for the Court to decide. The Judgment ought to be affirmed.

The other JUDGES, CABELL, COALTER, GREEN and CARR, concurred, that the Judgment be affirmed.

574 *Hamlin's Administrator v. Atkinson, Surviving Justice, &c.*

November, 1823.

Joint Obligors—Death of One Obligor Pending Proceedings—Sci. Facias—Presumption—Where two obligors are sued, and both die pending the proceedings, though it is not expressed which of them died first; on a Sci. Fa. against the Administrator of one of them, who does not demur to the Sci. Fa., nor plead a variance between it and the proceedings on which it issued, but pleads to issue. It must be understood that the other obligor died first, and that the action survived against the obligor, against whose representative the Sci. Facias was sued out.

Evidence—Receipts—Witness.—If a witness introduced by the Plaintiff speaks of receipts which he had taken, the evidence ought to be rejected, unless he can show that they were lost, or out of the power of the Plaintiff.

Guardian and Ward—Official Bond—Discharge of Bond by Guardian and Ward.—A bond given by a guardian, on a settlement with his Ward after she comes of age, is no discharge of the Guardian's Bond, previously given by the Guardian and his sureties; nor can it be given in evidence under the plea of conditions performed in bar of the speciality, though it may be given in evidence as proof of what is due.

On the 28th July, 1823, Thomas Atkinson survivor of Peterson Goodwyn and four

*For monographic notes on Novation; Revival of Suits and Actions, see end of case.

*Evidence—Receipts.—In Bowles v. Elmore, 7 Gratt. 293, it is said: "When a receipt is given for a payment, the general opinion is that the payment may be proved as well by parol evidence of the facts as by the production and proof of the receipt, though the case of *Hamlin v. Atkinson*, 6 Rand. 574, has thrown some doubt on that question in this state. But I doubt whether the case under consideration falls in that class."

See generally, monographic note on "Evidence" appended to Lee v. Tanscott, 2 Wash. 276.

*Guardian and Ward—Official Bond Discharged—Bond by Guardian to Ward.—In Smith v. Blackwell,

others, Justices of Dinwiddie County, for the benefit, and at the costs of Mary W. Lanier, sued out of the Superior Court of Law for the Town of Petersburg, a Writ of Capias ad Respondendum against William Wills and John Hamlin, on a Guardian's bond executed by the former as principal, and the latter as surety. The Writ was executed on Wills, and returned "Not found," as to the other Defendant. An Alias was, in the following September, issued against Hamlin, returnable to the November Rules, and returned executed. The Plaintiff filed his Declaration against both Defendants at the September Rules, which sets forth the bond, of which the condition is that the Guardian, Wills, shall deliver to Mary W. Lanier, the Ward, on her attaining to lawful age, all the estate due to the said orphan, and to account, &c. The breaches assigned, are the neglect and refusal to deliver over the estate, and the non-payment to the Ward of the sum of \$373, with interest from the 1st March, 1819, found due from the Guardian. A common order was entered against

575 the Defendant, Wills, at the September Rules, which was confirmed at the October Rules, and a Writ of Enquiry then awarded; and at the October Term, the Court not being held, the cause was continued as to him. At the November Rules, the common order was entered against the other Defendant, Hamlin, which was confirmed, and the Writ of Enquiry awarded at the December Rules. At the next Term of the Court, which was in May, 1824, an entry was made on the Record, that "this suit abates by the death of the Defendant." [Although it must have been on the docket against two Defendants, yet it was abated only as to one, without naming which one.] At the October Term, 1824, the entry is, that "this suit, which stands for revival, is continued till the next Court." At the May Term, 1825, the Plaintiff, at the instance of the relator, sued out a Scire Facias to revive, against Vivant Quinchett, Administrator of John Hamilton, deceased; and that not being executed, an Alias Scire Facias was sued out against the same person, at the rules in August, 1825, returnable to September; and that being returned executed, a Judgment by default was entered against the Administrator, with a writ of Enquiry of damages. At the October Term, 1825, the cause was continued. At the May Term, 1826, the Defendant (who is described as Administrator of John Hamlin, deceased, who was co-obligor with William Wills, deceased,) pleaded "Conditions performed," on which issue being joined, a trial was had, and a Verdict and Judgment rendered in behalf of the Plaintiff for the debt in the Declaration mentioned, to be discharged by the payment of \$267, with interest from the 1st October, 1829. There was a Bill of Exceptions taken to two opinions of the Court given during the trial. It stated, that the Plaintiff introduced Robert Lanier as a witness to prove that he, as the Administrator of his mother, had paid to William Wills in his life-time, as Guardian of the beneficiary Plaintiff, the sum of about \$300,

at different times in the years 1808-'9 576 and '10, it being the *amount to which she was entitled from the said decedent's estate: that he took the said Will's receipts for the sums so paid: that on the evening before the witness gave evidence, he was requested by the Plaintiff's Counsel to bring the said receipts, but not recollecting where he had put them; and thinking it probable he could not find them, he had made no examination for them; whereupon, the Defendant objected to the said evidence, and required the production of the said receipts. but the Court over-ruled the objection, and admitted the testimony.

The Defendant afterwards proved that in 1819, a settlement had taken place between the said Mary W. Lanier, then of full age, and her said Guardian, in which the matter was found indebted to her in the sum of \$373, for the payment whereof, he executed his bond to her payable on demand, with interest from the date; that she took the said Bond, and had received two partial payments, which were credited on the

31 Gratt. 297. It is said: "The court is of opinion that the bonds executed by James Blackwell, deceased, in his lifetime, to his ward, James D. Blackwell, and which are the subject of this contention, were given for the balance due him by the said James Blackwell as his guardian: and that said bonds were given as an acknowledgment of the amount of his indebtedness to him and to get time for the payment thereof; that the giving of said bonds and their acceptance by the ward did not merge the debt due to the ward by the obligor in his fiduciary character, and was not a discharge or extinguishment of the same until paid; and the bonds being executed for a pre-existing debt, due from the obligor as guardian, were not a novation of the debt, and did not change its fiduciary character. In *Hamlin v. Atkinson*, 8 Rand. 574, the question whether a bond taken by the ward for the amount appearing due from the guardian on settlement merged the original right of action. JUDGE ALLEN remarks in Yerby & Wife v. Lynch & al. 3 Gratt. 460 was in effect decided by this court. It was there decided that such subsequent bond was no discharge of the official bond unless given and received in full satisfaction. A bond to perform that for which the party was before bound by another bond is no discharge of the latter.' And in the same case JUDGE STANARD concedes 'the inefficiency of one security to merge another of equal or higher dignity.' And in the same case JUDGE BROOKS said that the bond given by the guardian to the husband of his ward did not merge the official bond, is settled in the case of *Hamlin v. Atkinson*. 'In that case the bond of the guardian was given to his adult ward when she was *sui juris* and competent to contract for herself. Yet the court held that a bond for the same thing did not extinguish the official bond, and the ward might recover from the sureties in that bond what was due to her from the guardian, treating the bond given her as proof of what was due; and in this the whole court concurred.' In a note, it is said, JUDGE GREEN, in a manuscript opinion in *Hamlin's Adm'r v. Atkinson*, said: 'The bond given by the guardian to his ward for the amount due to her by settlement was not a discharge of the surety in his official bond. No bond can, in any case, be a bar or satisfaction of another by the same person.' By giving and receiving the bonds in this case the debt did not lose its fiduciary character. It not appearing that there was any agreement by the ward to receive it in full discharge and satisfaction of what was due to him from his guardian in his fiduciary character; of which it is necessary that the proof should be full and satisfactory. And the bond being for a debt which was fiduciary, it could not lose that character by lapse of time. It continues to be fiduciary until it is satisfied."

See principal case also cited with approval on this subject in Yerby v. Lynch, 3 Gratt. 485, 496, 504, 505, 512, 513; Barnum v. Frost, 17 Gratt. 418.

See further, monographic note on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398; monographic note on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

same, but that a balance was still due on the said Bond, to recover the amount of which, this action was brought; whereupon, the Defendant moved the Court to instruct the Jury, that the settlement of the Guardianship accounts between the Ward, after she was of age, and her Guardian, and the execution of the Bond by the latter to the former, together with her accepting the said Bond, and receiving partial payments thereon, discharged the Testator of the Defendant from his liability as surety of the Guardian for the sum for which the said Bond was taken; although there was no evidence to prove, that the said Bond was accepted by the said Mary W. Lanier, as full payment or satisfaction of the claim against her said Guardian; which instruction the Court refused to give, and the Defendant excepted. The case came here by a Superseas to the Judgment.

May, for the Plaintiff in Error.

Spooner, for the Defendant in Error.

577 *November 17. The PRESIDENT delivered his opinion.

The Record exhibits a case, in which it appears that there were several irregularities in the proceedings, all of which I think are cured, no advantage having been taken of them in the pleadings. The suit was instituted by Thomas Atkinson, as surviving Justice of Dinwiddie County, at the relation of Mary W. Lanier, against her Guardian, William Wills, and his surety, John Hamlin, on the Guardian's Bond, taken to the Justices of Dinwiddie County, in the usual form. The Writ was returned executed on Wills, and Hamlin not found. At the subsequent Rules, an Alias was sued out against Hamlin, and returned executed; and thereupon a Declaration was filed against both on the Guardian's Bond, of which profert is made, and breaches of the condition assigned, which are set out in the Declaration. Afterwards, a conditional order is entered against Wills, and is subsequently confirmed against him, he having been arrested, and not appearing. At a subsequent rule-day, and after a continuance of the cause as to Wills, by Law, there being no Court held in the month of October, 1823, a conditional Judgment is entered against Hamlin, also, and at another day at Rules confirmed against him, and a Writ of Enquiry awarded, as in the case of Wills. At a subsequent Term, the suit is entered abated by the death of the Defendant, without saying which. At the next Term the cause is continued for revival until the next Term. Then dropping the suit against Wills, as it would seem from the after-proceedings, at the next Term a Writ of Sci. Fa. is sued out against the Defendant, as Administrator of Hamlin, reciting that action to have been against him as co-obligor of Wills, the Guardian: the Sci. Fa. is returned, "came too late to hand to execute," and the suit is again continued, without noticing what suit, but it must be presumed the suit on the Sci. Fa., until the next Term, and then an Alias Scire Facias is sued out, and 578 being executed, as appears by the *return of it, and the Defendant failing to appear at Rules and plead, an Office-

Judgment is entered against him, and a Writ of Enquiry awarded. At another Term the suit is continued till the next Term, when the Defendant by his Attorney, pleaded to the Declaration, "conditions performed," to which the Plaintiff replied generally, and it was ordered that the Judgment in the Office be set aside, whereupon came a Jury, who found a general verdict for the Plaintiff, for the debt in the Declaration, to be discharged by the payment of \$267, with interest, and Judgment was entered accordingly.

The Scire Facias sued out against the Defendant, was in the nature of an action against him, which may be released by that name, (Litt. 505; Co. Litt. 290;) and might have been demurred to. Having failed to demur, or to plead any variance between it and the proceedings on which it issued, (Paradise's Adm'rs v. Cole & Henderson, 6 Munf. 218,) it must now be understood that Wills died first, and that the action survived against Hamlin, the intestate of the defendant, and upon his death, (after the death of Wills, the principal,) was properly revived by the Scire Facias against the Defendant, as Administrator of Hamlin.

The errors insisted on in the Bill of Exceptions, are of a different character. The first, is to the admission of the testimony of Robert Lanier, who gave evidence that he, as the Administrator of his mother, had paid to William Wills, the Guardian of Mary Lanier, the sum of about \$300, at different times in the years 1808-'9 and '10, it being the amount to which she was entitled from the decedent's estate; that he took the said Will's receipts for the sums so paid; that on the evening before the witness gave evidence, he was requested by the Plaintiff's Counsel to bring the said receipts, but not recollecting where he put them, and thinking it probable he could not find them, he had made no examination for them. Not now deciding whether, if the witness had spoken positively, and with certainty as to the dates and 579 amount of the payments made, *his evidence, if believed by the Jury, would have been equivalent to the receipts themselves, as being of equal degree, the Court is of opinion, that as he could not so speak, his testimony ought not to have been received in the absence of the receipts, unless it had appeared that they were lost, or out of the power of the Plaintiff, which is negated by the statement of the witness, that he was requested by the Plaintiff's Counsel to bring them, &c. It was error, therefore, to permit this evidence to go to the Jury.

The second objection is to the Court's refusing to instruct the Jury, that the acceptance by Mary Lanier, the Ward, after she had attained full age, of a Bond from the Guardian individually, for the sum of \$373, the balance due on a settlement, and on which partial payments had been made, was a discharge of the security on the Guardian's Bond. A Bond to perform that for which the party was before bound by another Bond, is no discharge of the latter, for accord, it is said, does not mend the matter; 1 Bac. Abr. 43; but, if it could

have been available in this case, it ought to have been pleaded. 2 Starkie, p. 26 and 27. It was not matter of evidence on the plea of conditions performed in bar of the specialty on which the suit was brought, though it was prima facie evidence of the amount due by the Guardian, liable to be repelled by evidence on the part of the security. If it could have been pleaded, the proof should have been full, that it was given and received in full satisfaction, as to which there was no evidence. There was no error, therefore, in refusing the instruction asked for by the Defendant. But, for the error in permitting parol evidence to go to the Jury in the absence of the receipts, the Judgment is to be reversed, the cause remanded for further proceedings, the verdict to be set aside, and a new trial awarded, on which the parol evidence is not to be admitted in the absence of the receipts, unless it shall appear that they are lost, or out of the power of the Plaintiff.

The other Judges, all being present, concurred.

NOVATION.

I. Depending on Intention.

A. General Rule.

1. Cases Illustrating the Rule.

a. Changing Place of Payment of Renewed Note.

b. Deed of Trust and Simple Contract Debt.

c. Deed of Trust as Collateral Security.

d. Store Account Merged, Rule in Equity.

e. Guardian's Bonds.

B. Evidence.

1. Bond as Proof of Amount Due.

2. Intention to Novate Must Be Made Clear.

Cross References to Monographic Notes.

Bills, Notes and Checks, appended to Archer v. Ward, 9 Gratt. 622.

Bonds, appended to Ward v. Churn, 18 Gratt. 801.

Contracts, appended to Enders v. The Board of Public Works, 1 Gratt. 364.

Official Bonds, appended to Sangster v. Com., 17 Gratt. 124.

I. DEPENDING ON INTENTION.

A. GENERAL RULE.—A mere change of securities of equal dignity is not a novation of the debt unless plainly so intended by the parties. Coles v. Withers, 33 Gratt. 186. See Gilbert v. Washington, etc., Co., 33 Gratt. 586; Fidelity Ins., etc., Co. v. Shenandoah Valley, etc., Co., 86 Va. 1, 9 S. E. Rep. 759; Moore v. Johnson, 34 Va. 672, 12 S. E. Rep. 918; Stimpson v. Bishop, 82 Va. 199; Yancey v. Mauck, 15 Gratt. 300; Fidelity Loan, etc., Co. v. Engleby, 99 Va. 168, 37 S. E. Rep. 937; Smith v. Watson, 82 Va. 712, 1 S. E. Rep. 96; Taylor v. The Bank of Alexandria, 5 Leigh 471; Feamster v. Withrow, 12 W. Va. 652; State Bank of Va. v. Domestic, etc., Co., 99 Va. 411, 39 S. E. Rep. 141.

1 CASES ILLUSTRATING THE RULE.

How Intention Determined Generally.—Though it is well settled that no mere change in the form of the evidence of a secured debt will discharge it, unless so intended, yet where one security is accepted in satisfaction of another, the debt is discharged, which will be determined generally, by the surrender or retention of the original security. Fidelity Ins., etc., Co. v. Shenandoah, etc., Co., 86 Va. 13, 9 S. E. Rep. 759. See Morris v. Harveys, 76 Va. 726; Niday

v. Harvey, 9 Gratt. 454; Fidelity, etc., Co. v. Engleby, 99 Va. 168, 37 S. E. Rep. 937; Deaton Grocery Co. v. Pepper, 98 Va. 587, 36 S. E. Rep. 988.

a. Changing Place of Payment of Renewed Note.—H. being in want of money, in August 1867, went to the city of Baltimore with a negotiable note for \$3,500, blank as to date, and place of payment, but signed by himself and endorsed by five persons, he and they living in Virginia. This note he sold to M. of Baltimore, at a discount; the proper date was inserted and the place of payment fixed at the National Exchange of Baltimore. This note was renewed with the same parties, and in April 1868 B. made a payment on it of \$550, and another note to meet the balance was made by the same parties, payable at the same bank, and M. agreed to take this note at the same discount. The last note being paid, M. sent it and all the previous notes and papers connected with the loan, with a statement of the amount due him, to a friend residing in Harrisonburg, with a request that he would take B.'s note for what was due, endorsed by the same parties. This was done, and the note was made payable at the National Bank at Harrisonburg. The taking of the last note was not a novation of the previously existing debt. Bowman v. Miller, 26 Gratt. 331. See Steptoe v. Pollard, 30 Gratt. 629; Karn v. Blackford, 1 Va. Dec. 841.

b. Deed of Trust and Simple Contract Debt.—Whether a bond and deed of trust to secure it, given by a partner after the dissolution of the partnership, for a simple contract debt of the partnership, releases the other partner in equity, depends upon the intention of the parties in giving and taking them; and this intention may be ascertained from the attendant circumstances. Niday v. Harvey, 9 Gratt. 454; Meade v. Grigsby, 26 Gratt. 612; Karn v. Blackford, 1 Va. Dec. 845; Steptoe v. Pollard, 30 Gratt. 629.

c. Deed of Trust as Collateral Security.—And, where the security furnished by a deed of trust, given as an additional or collateral security for the payment of a judgment, is entirely lost to the judgment creditor, he may enforce the judgment for its full amount against other property of the judgment debtor. In the case in judgment, the evidence shows that the deed of trust was not intended as a novation of the debt and that the sale made by the trustee, at which the judgment creditor purchased, was not made subject to the vendor's lien on the property conveyed in trust. Deaton Grocery Co. v. Pepper, 98 Va. 587, 36 S. E. Rep. 988.

d. Store Account Merged, Rule in Equity.—Where principal and a surety execute their bond to a party in settlement of an account due by the principal, at law the account is merged in the bond; but in equity the debt on the account will be held as still subsisting if necessary to do justice between the parties. Meade v. Grigsby, 26 Gratt. 612.

e. Guardian's Bonds.—B's guardian of J and upon J's coming of age B has a settlement with J of his account as guardian, and being found indebted on the account in the sum of \$3,000, he executes to J his four bonds, each for \$750 payable in one, two, three and four years, with interest. B pays the interest during his life and a part of the principal, and was, up to the war, able to pay the whole. The giving and taking these bonds was not a novation of the debt, but the debt due from B to J continued to be a fiduciary debt, and entitled to rank as such in the administration of B's estate. Smith v. Blackwell, 31 Gratt. 291. See Tilson v. Davis, 32 Gratt. 92; Hamlin v. Atkinson, 6 Rand. 574.

And, a bond given by a guardian on a settlement with his ward after she comes of age is no discharge of the guardian's bond previously given by the

guardian and his sureties. *Hamlin v. Atkinson*, 6 Rand. 574. See *Smith v. Blackwell*, 31 Gratt. 201.

B. EVIDENCE.

1. **BOND AS PROOF OF AMOUNT DUE.**—A bond given by a guardian on a settlement with his ward after she comes of age is no discharge of the guardian's bond previously given by the guardian and his sureties, and it cannot be given in evidence under the plea of conditions performed in bar of the specialty, though it may be given in evidence as proof of what is due. *Hamlin v. Atkinson*, 6 Rand. 574.

2. **INTENTION TO NOVATE MUST BE MADE CLEAR.**—And those who rely upon a satisfaction and discharge of the original debt by the creation of a new obligation must make it clear that the intention of the parties was to extinguish the original debt and create a new one. *Fidelity Loan, etc., v. Engleby*, 99 Va. 168, 37 S. E. Rep. 957; *State Bank of Va. v. Domestic Sewing, etc., Co.*, 99 Va. 411, 39 S. E. Rep. 141.

REVIVAL OF SUITS AND ACTIONS.

I. General Principles.

- A. Scire Facias an Action.
- B. Right of Revivor Statutory.
- C. Rules Governing Proceedings.

II. Necessity for Revival.

- A. Death of Lunatic.
- B. Death of Creditor Consenting to Judicial Sale of Debtor's Land.
- C. Where Action Survives to or against Co-plaintiffs or Defendants.
- D. Death after Verdict or Final Decree.
- E. Proceedings outside the Cause.
- F. Validity of Consent Orders.
- G. Presence of Proper Parties in Another Suit.

III. What Proceedings Revivable.

- A. General Rule.
- B. Action of Detinue.
- C. Unlawful Detainer.
- D. Action for Slander.
- E. Action for Damages to Land.
- F. Writ of Right.
- G. Application for Permission to Erect a Mill-Dam.

H. Trespass Q. C. F.

I. Joint Action.

J. Waiver of Objection.

IV. Parties.

- A. Plaintiff.
- B. Defendant.
- C. Unnecessary Parties.
- D. Waiver of Objections.

V. Proceedings for Revival.

- A. Form.
- B. Service of Process.
- C. Defence.
- D. Time of Revival.
- E. Order of Revival.

VI. Rights of Defendant.

- A. Right to Revive.
- B. Right to Hasten Revival by Plaintiff.

VII. Revival by Consent.

VIII. Presumption in Appellate Court.

IX. Revival of Appellate Proceedings.

Cross Reference to Monographic Note.

Scire Facias, appended to *Kyles v. Ford*, 2 Rand. 1.

I. GENERAL PRINCIPLES.

A. **SCIRE FACIAS AN ACTION.**—A *scire facias* to revive a suit, is in the nature of an action, and may be released by that name. *Hamlin v. Atkinson*, 6 Rand. 574.

B. **RIGHT OF REVIVOR STATUTORY.**—The right of revivor is a statutory right, and in the

absence of a statute authorizing it, no suit can be revived. *Ashby v. Harrison*, 1 Pat. & H. 1.

C. **RULES GOVERNING PROCEEDINGS.**—A *scire facias*, to revive a suit or action, decree or judgment, can only be issued in the suit to be revived; and if the suit was in equity, the *scire facias* must be in equity, and be governed by the rules of that court; and if the action was at law, the proceedings must conform to the rules of that court. *Garrison v. Myers*, 12 W. Va. 335.

II. NECESSITY FOR REVIVAL.

A. **DEATH OF LUNATIC.**—Where, pending a suit against a lunatic represented by his committee, the lunatic dies, the committee *ipso facto* becomes *functus officio* and the suit abates, and must be revived and proceed in the name of the lunatic's personal representative and heirs; and all proceedings had after lunatic's death and before such revival, are void. *Paxton v. Stuart*, 80 Va. 371.

B. **DEATH OF CREDITOR CONSENTING TO JUDICIAL SALE OF DEBTOR'S LAND.**—Where a decree of sale has been entered in a suit to enforce a vendor's lien, and a judgment creditor of the vendee, whose judgment binds his real estate, agrees to a private sale provided that after paying the vendor he should receive half the residue, and the purchase failed, it is error to order a resale without reviving the suit as to his administrator, where the judgment creditor has died, since by his consent to the first sale, such creditor becomes a party to the suit, and he may file a bill to review such decree. *Ayers v. Alphin*, 88 Va. 416, 13 S. E. Rep. 899.

C. **WHERE ACTION SURVIVES TO OR AGAINST COPLAINTIFFS OR DEFENDANTS.**—Where one of four plaintiffs in an action of detinue dies, it is error to award a *scire facias* to revive the action in the name of his executor, since such an action survives. *Rose v. Burgess*, 10 Leigh 186.

So, where one of two joint plaintiffs in an action of trespass *quare clausum fregit*, dies. *Tompkins v. Vintroux*, 3 W. Va. 148.

So where one, of several plaintiffs suing on an indemnifying bond, dies. *Beckham v. Duncan*, 1 Va. Dec. 669.

So where one of several joint defendants in an action on a joint contract dies before verdict. *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. Rep. 663.

In the case of a bill in equity against two persons, who have been auctioneers and partners, where one dies pending the suit; it is not necessary to revive the suit against the representative of the decedent; the plaintiff may proceed against the survivor alone. *Townes v. Birchett*, 12 Leigh 173. See also, *Cunningham v. Smithson*, 13 Leigh 33.

D. **DEATH AFTER VERDICT OR FINAL DECREE.**—If a party die after verdict, the fact does not abate the suit or call for revival. *Laldley v. Jasper*, 49 W. Va. 526, 39 S. E. Rep. 169.

Where a defendant dies after final decree, it is not necessary to suggest his death and revive the suit against his heirs in order to obtain a rule against persons not parties to the suit, but in possession of land decreed to the plaintiff. *Trimble v. Patton*, 5 W. Va. 432.

E. **PROCEEDINGS OUTSIDE THE CAUSE.**—If in a chancery cause land has been sold, and a sale confirmed, and a rule issued against the purchaser to show why the land should not be resold, to which rule the purchaser answers, and the evidence to overrule and support his answer is all taken, and the plaintiff in the original cause then dies, the original cause not having been revived, but the proceedings on the rule having been revived, the court

has jurisdiction to render a decree on the proceedings under the rule. *Crislip v. Cain*, 19 W. Va. 438.

F. VALIDITY OF CONSENT ORDERS.—Where no *scire facias* has ever issued against the heir of a deceased defendant, an order of dismissal "agreed" is not binding on them and hence is not binding on the plaintiff, so as to bar another action. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. Rep. 143.

G. PRESENCE OF PROPER PARTIES IN ANOTHER SUIT.—Where the sole defendant in two causes dies before decree, and in one case the cause had never been revived and in the other had been revived by consent as to the executor alone, and not in the name of the widow and heirs, who were necessary parties, though the causes are heard by consent, along with a third suit, in which the necessary parties in the former suit were before the court, the decree in the three causes will be reversed, and sent back to be revived as to the proper parties in the two former suits. *Callaghan v. Circle*, 12 W. Va. 563.

III. WHAT PROCEEDINGS REVIVABLE.

A. GENERAL RULE.—Any action may be revived if it were originally maintainable by or against the personal representative, if a personal action, and if a real or mixed action, by or against the heir or devisee. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. Rep. 143; *Taylor v. Rightmire*, 8 Leigh 468.

In *Cunningham v. Sayre*, 21 W. Va. 440, it was held that the provision of the Code, ch. 127, § 2, that "if a plaintiff or defendant dies pending any action whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution, in the same manner" as if it were a cause of action arising out of contract, was not intended to create any new right and give an action to the heir, devisee or representative which he had not at common law, but only to avoid the great inconvenience arising from following the technical rule of the common law in abating actions, when the personal representative, heir or devisee might bring another suit to accomplish substantially the same object.

Upon the death of a defendant in detinue, if his administrator consent that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a *scire facias* against the administrator, alleging that the property had come to his possession and was detained by him. *Greenlee v. Bailey*, 9 Leigh 536.

B. ACTION OF DETINUE.—An action of detinue cannot be revived against an executor unless the chattel demanded actually come into his possession, and such fact must appear by suggestion in the *scire facias*, or upon the return of a *scire facias* executed. The plaintiff should file a count alleging such possession, otherwise the *scire facias* will be bad on demurrer. *Catlett v. Russell*, 6 Leigh 344; *Allen v. Harlan*, 6 Leigh 42; *Greenlee v. Bailey*, 9 Leigh 526.

C. UNLAWFUL DETAINER.—Prior to the adoption of the Code of West Virginia, it was held that the proceeding of unlawful detainer is incapable of revival on the death of the defendant. *Chapman v. Dunlap*, 4 Gratt. 86. Or of the plaintiff. *Moran v. Eldridge*, 2 W. Va. 574.

But see *Cunningham v. Sayre*, 21 W. Va. 440, set out *ante* under "General Rule." III. A.

D. ACTION FOR SLANDER.—An action for slander abates on the death of the defendant, since it does not survive against his executor or administrator. *Hook v. Hancock*, 5 Munf. 546.

E. ACTION FOR DAMAGES TO LAND.—A proceeding to recover damages to land for injuries

occasioned by the building of a dam, is revivable on the death of the plaintiff, in the name of his administrators, but not his heirs. *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1.

F. WRIT OF RIGHT.—Where a writ of right abated by the death of the tenant in 1812, the abatement being entered of record, the suit could not be revived against the heirs of the tenant in 1890, under the Act of 1819, 1 Rev. Code, ch. 128, § 37, that statute being prospective. *Lovell v. Arnold*, 3 Leigh 16.

But under the statute, where a writ of right is brought against a feme life tenant, who dies, and the demandants revive the action against her heirs at law, though they claim and hold the land in controversy, not as heirs at law, but as devisees under the will of their father, the demandants may revive against the heirs of the first tenant; and they may defend the action by showing title in themselves, however derived. *Davis v. Teays*, 3 Gratt. 283.

G. APPLICATION FOR PERMISSION TO ERECT A MILLDAM.—If prior to the Code of 1849, any party resisting an application for permission to build a dam died, the proceeding might have been revived against his heirs, not by virtue of any statute authorizing revivals, but from the very nature of the statutory proceeding by the writ of *ad quod damnum*. If there is doubt about this, however, the comprehensive language of the new Code, in respect to revivals, leaves no room for doubt as to any such case arising since that Code. *Hale v. Burwell*, 2 Pat. & H. 608.

H. TRESPASS QUARE CLAUSUM FREGIT.—An action of trespass *quare clausum fregit*, is not converted into an action *de bonis asportatis*, by an allegation in the declaration, that trees cut were carried away; and therefore, the rule *actio personalis moritur cum persona* applies to such an action. *Harris v. Crenshaw*, 3 Rand. 14. See also, *Tompkins v. Vintroux*, 3 W. Va. 148.

I. JOINT ACTION.—Where one of two or more plaintiffs or defendants in a joint action dies pending the suit, and the action survives to or against the coplaintiffs or defendants, it is not revivable in the name of or against the personal representative of the deceased party. As to plaintiff, see *Tompkins v. Vintroux*, 3 W. Va. 148. As to defendant, see *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. Rep. 663.

J. WAIVER OF OBJECTION.—Where one coplaintiff in a joint action of trespass *q. c. f.* dies, if the action is revived by consent in the name of the sole devisee of the decedent, no objection can be afterwards raised by the parties consenting. *Tompkins v. Vintroux*, 3 W. Va. 148.

IV. PARTIES.

A. PLAINTIFF.

Administrator de Bonis Non.—Upon the death of a surviving executor it is competent and proper to revive the suit in the name of the administrator *de bonis non*. *Bell v. Humphrey*, 8 W. Va. 1.

Administrator of Husband.—In a suit by husband and wife, for the recovery of personal property in her right, if the husband dies, the right survives to her; and on her death, the suit should not be revived in the name of his administrator. *Vaughan v. Wilson*, 4 Hen. & M. 452.

Next Friend of Infant.—In *Wilson v. Smith*, 22 Gratt. 493, it was held that it was not proper to revive a suit in the name of a next friend of an infant heir, but some person should be allowed to prosecute the suit as next friend, for the infant, which may be done as well in some subsequent order as in the order reviving the suit.

Second Committee of Lunatic.—There being no statute authorizing it in 1824, the time of suing out the *scire facias* in this case, a suit in the name of the committee of a lunatic who was removed by an order of court after the institution of the suit, could not be revived at that time in the name of the committee appointed to succeed him. *Ashby v. Harrison*, 1 Pat. & H. 1.

Personal Representative of Deceased Joint Plaintiff.—Where one of several joint plaintiffs in an action of trespass *q. c. f.* dies, pending the action, the action cannot be revived in the name of the personal representative of the deceased plaintiff, since the action survives to the other joint plaintiffs. *Tompkins v. Vintroux*, 3 W. Va. 148.

Caveat Cases.—The executor of the caveator who is directed to sell the land is the proper party in whose name to revive a caveat, the devisees of the proceeds of sale should not be joined. *Caruthers v. Eldridge*, 12 Gratt. 670.

Cause Proceeding for Rents and Profits Only.—Where a decree has been rendered confirming a partition and decreeing a conveyance, and the cause was proceeding for the rents and profits only, on the death of the plaintiff, it is proper to revive the cause in the name of his executors only, and not his heirs, the executors being entitled to the rents and profits. *Ruffners v. Lewis*, 7 Leigh 720.

Suit for Partition.—Where the plaintiff in a suit for the partition of land dies pending the suit, his administrators with the will annexed are not necessary parties, but their joinder will do no harm if the proper parties are also made. *Wilson v. Smith*, 22 Gratt. 493.

Where the plaintiff in a suit for partition dies, it is proper to revive the suit in the name of his widow and infant son, they being his sole real representatives. *Wilson v. Smith*, 22 Gratt. 493.

B. DEFENDANT.

Administrator of Committee of Lunatic.—In *Paradise v. Cole*, 6 Munf. 218, the question was raised but not decided, whether a suit against the committee of an insane person could be revived against the administrator of such person, if such committee died during the pendency of the action.

Administrator de Bonis Non.—Where, pending a suit to recover a claim against the estate of a testator, the executor dies, it is proper to revive the suit against the administrator *de bonis non, c. t. a.* of such testator. *Jones v. Reid*, 12 W. Va. 350.

Representative of Deceased Joint Defendant.—If one of two or more defendants in an action at law upon a joint contract die before verdict, the suit abates as to the dead one, and cannot be revived and proceed against his representative and the survivor. *Hennings v. Farnsworth*, 41 W. Va. 548, 23 S. E. Rep. 663.

Suit for Conveyance of Land.—A suit in chancery for a conveyance of land, in case the defendant dies before a final decree, ought to be revived against his heirs and devisees, and all other persons holding, claiming, or in any manner interested, under him, in the land in question. *Key v. Lambert*, 1 Hen. & M. 330.

C. UNNECESSARY PARTIES.—Where the suit is revived in the names of the proper parties, the fact that unnecessary parties are also joined, is immaterial. *Wilson v. Smith*, 22 Gratt. 493. See also, *Caruthers v. Eldridge*, 12 Gratt. 670, *infra*. "Waiver of Objections."

D. WAIVER OF OBJECTIONS.—If, pending a suit against the committee of an insane person, the latter die, and a *scire facias* to revive the suit be issued against his administrators, who thereupon appear by counsel, and go to trial, on the issue joined between the plaintiffs and the committee; they cannot take objection in the appellate court, that the suit

ought not to have been revived against them. *Paradise v. Cole*, 6 Munf. 218.

Where a caveat is revived in the name of the executor of the caveator, who is directed to sell the land, and the devisees of the proceeds of the sale; and no objection is taken thereto until after the verdict, the executor being the proper party, the irregularity of joining the others with him will then be disregarded. *Caruthers v. Eldridge*, 12 Gratt. 670.

So where one coplaintiff in a joint action of trespass *q. c. f.* dies, and the case is revived in the name of a sole devisee of the deceased party by consent, no objection can be made thereafter by either of the parties consenting. *Tompkins v. Vintroux*, 3 W. Va. 148.

V. PROCEEDINGS FOR REVIVAL.

A. FORM.

Death of Plaintiff.—"Before the passage of any statute law, when a sole plaintiff died intestate his representative, his administrator or heirs, as the case might be, or both if each were interested, had a right by a bill of revivor to revive a cause in equity and proceed in it to a final decree. But in such a case this right of revival, if the cause of action itself survived, was, in the case put, absolute, and the parties filing the bill had only to prove that they were the representatives of the deceased, if this were denied, and the cause was as a matter of course revived. Both in England and in the various states of this union it was therefore wisely considered by the legislatures, that in such a case it was entirely unnecessary to require the representatives of the deceased plaintiff to file a formal bill of revivor, and that a simple motion with or without notice or a *scire facias* to revive the cause was all that was necessary to effect all the objects of a formal bill of revivor. In such case, under the statute law of Virginia in existence prior to 1810, on the decease of the plaintiff his representative might revive a chancery cause by *scire facias* without filing a formal bill of revivor; and this statute has been ever since continued as law both in Virginia and in this state. See *Vaughan v. Wilson*, 4 Hen. & M. 480; 1 R. C. of Va. of 1819, p. 497, § 38; Code of Va. 1873, ch. 167, § 4; Code W. Va., ch. 127, § 4. And in case of the plaintiff's death it was provided by act of Virginia passed March 7, 1826, see Sup. Rev. Code, pp. 130, 178, that in a suit of equity, if the plaintiff died, the cause might, unless cause be shown to the contrary, be revived in the name of his administrator or heir, etc., on motion without any notice; and this has continued the statute law both of Virginia and West Virginia. Code of Va. 1873, ch. 167, § 4; Code of W. Va., ch. 127, § 4." *Reid v. Stuart*, 30 W. Va. 882; *Gainer v. Gainer*, 30 W. Va. 390, 4 S. E. Rep. 494; *Gillespie v. Bailey*, 12 W. Va. 82; *Wilson v. Smith*, 22 Gratt. 493; *Vaughan v. Wilson*, 4 Hen. & M. 480.

These same statutory provisions are applicable to actions at law. *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. Rep. 143.

Under the Code, § 3303, declaring that a defendant who files a plea or account of set-off shall be deemed to have brought an action against the plaintiff, and that the plaintiff shall not, after such plea or account is filed, dismiss his cause without defendant's consent, the filing of a plea of set-off does not make the party filing the plea the plaintiff, and the original plaintiff the defendant, so as to deprive the original plaintiff's personal representatives on his death *pendente lite* from reviving the action by motion, as authorized by Code, § 3308. *Kinzie v. Riely*, 100 Va. 709, 42 S. E. Rep. 672.

Death of Defendant.—A chancery cause, upon the death of the defendant may be revived either by

the filing of a bill of revivor, or by *scire facias*. Bock v. Bock, 24 W. Va. 589; Vaughan v. Wilson, 4 Hen. & M. 480.

At Law.—In the case of the death of a defendant, the cause can only be revived against his personal representative, heirs or devisees by *scire facias*; for when a new defendant is to be brought into a suit it can only be done by the consent of such party, or by *scire facias*, as the right to revive by motion is confined by the statute, where the party who has died was plaintiff or appellant. The cause is not revived by order of the court directing a *scire facias* to be issued for that purpose, nor yet by the return of the *scire facias* executed upon the parties named therein, but by the order of the clerk entered at rules, or of the court entered in term by the consent of such parties, or upon the return of the *scire facias*, that the case proceed in the name of the proper parties. It is apparent, therefore, that a *scire facias* which failed to set out the names of the new parties to be brought into the suit would be utterly futile, as the same could never be executed. The action having abated by the death of the only defendant, no further proceeding therein could be taken, which could in any manner affect the rights of his heirs until they had been made defendants in the suit. Stockton v. Copeland, 30 W. Va. 674, 5 S. E. Rep. 143.

Bill of Revivor Not Abolished.—"While under these statutes a bill of revivor has long been disused in Virginia and in West Virginia and indeed in England, and the various states of this union, yet there is nothing in our statute law which prevents it from being used, if the parties entitled to revive a chancery cause when the plaintiff dies, choose to resort to this bill of revivor. Reid v. Stuart, 20 W. Va. 382; Gainer v. Gainer, 30 W. Va. 390, 4 S. E. Rep. 424; Bock v. Bock, 24 W. Va. 589.

Petition or Bill of Revivor.—If in such a case the defendant files, what he styles a petition, but which has in it all the allegations, which would be necessary to be made in a bill of revivor, and prays that the cause may be revived in the names of the proper representatives of the deceased plaintiff, the court will regard this as a bill of revivor, though it be styled a petition. Reid v. Stuart, 20 W. Va. 382.

B. SERVICE OF PROCESS.

Resident Parties.—A suit cannot be revived against a resident party unless there is an appearance for him or process returned executed. Duguid v. Patterson, 4 Hen. & M. 445.

Nonresident Parties.—There has been no instance of an order of publication, against an absent defendant, without original process; and the practice has always been to issue process, to revive, as well against the absent as home defendants; and then to make publication, in order to a revival of the suit; and so this case was revived accordingly. Yates v. Payne, 4 Hen. & M. 413; Duguid v. Patterson, 4 Hen. & M. 445.

So in Duguid v. Patterson, 4 Hen. & M. 445, it was held that a suit could not be proceeded in as against nonresident defendants until it had been revived on order of publication for two months, and a report, under an order for an account made before the revival of the suit, was set aside.

By Whom.—A *scire facias* to revive a suit in this court, which abates by the death of either party, must be served "by the sheriff or other officer to whom the same is directed;" the service thereof by a private individual, though proved by affidavit, not being sufficient. Anonymous, 4 Hen. & M. 401.

C. DEFENCE.—Objections to a *scire facias* to revive a suit cannot be made on motion; it should be by plea or demurrer, or if, at the hearing, the party

do not entitle himself to revive, the suit may be dismissed. Vaughan v. Wilson, 4 Hen. & M. 480. See also, Hamlin v. Atkinson, 6 Rand. 574.

D. TIME OF REVIVAL.—If a *scire facias* to revive a cause is returnable to one term of court, revival is not confined to that term, but may be entered at a subsequent term. Laidley v. Jasper, 49 W. Va. 525, 38 S. E. Rep. 160.

In Virginia a party on whom process to revive is served, is allowed one term from the return day of such process to prepare for trial. Minor v. Jones, 4 Hen. & M. 480.

But executors and administrators may waive such rule of court, it being for their benefit, and try the cause. Chew v. Hoe, 4 Hen. & M. 489.

E. ORDER OF REVIVAL.

Omission of Christian Names.—Where an order of revival suggests the death of the plaintiff, and that the suit be revived and proceeded in, in the name of "J & L, administrators with the will annexed, — Wilson, infant son and sole heir, and — Wilson, widow and devisee of said John W. Wilson, deceased." Though the christian names of the infant child and the widow are omitted, they are sufficiently described to identify them. Wilson v. Smith, 22 Gratt. 493.

VI. RIGHTS OF DEFENDANT.

A. RIGHT TO REVIVE.—As a general rule the plaintiff in a chancery suit can abandon his cause at his pleasure; and if having this right he dies, his representatives, heirs or administrators, or both, to whom his interest survives, alone, and not the defendants, have a right in such a case, to have the cause revived. But when the defendants have acquired such an interest in the cause, that the plaintiff would not be allowed to dismiss it at his pleasure, as where there has been an order of reference in the cause such that, if a balance should be found in favor of the defendant, he would be entitled to a decree against the plaintiff, and in that stage of the cause the plaintiff dies, the defendant will have a right to revive by bill of revivor or by statutory modes. Reid v. Stuart, 20 W. Va. 382.

B. RIGHT TO HASTEN REVIVAL BY PLAIN-TIFF.—The defendants may hasten the prosecution or discontinuance of the suit by suggesting the death of the plaintiff on the record, and, if no steps are taken to revive the suit at or before the second term of the court next after that at which there may have been a suggestion on the record of the death of the plaintiff, the court ought to enter an order discontinuing the suit; which order can never, after the adjournment of the court, be set aside, though the court may refuse to enter such order, or may set it aside, at any time during the term of the court, if good cause be shown why the suit should not be discontinued. Gainer v. Gainer, 30 W. Va. 390, 4 S. E. Rep. 424; Gillespie v. Bailey, 12 W. Va. 82.

So where the complainant in a bill of injunction dies, after answer filed, and before a decision of the cause, an order may be obtained, on the motion of the defendant, that, unless the representatives of the complainant shall appear, within a certain time fixed by the court, and cause the suit to be revived in their names, the injunction shall stand dissolved. Carter v. Washington, 1 Hen. & M. 203.

So where the defendant dies, after filing his answer to a bill of injunction, and before a decision of the cause, an order may be obtained, on the motion of his representatives, that, unless the complainant, within a certain time fixed by the court, shall revive the suit against them, the injunction

shall stand dissolved. *Kenner v. Hord*, 1 Hen. & M. 204; *White v. Fitzhugh*, 1 Hen. & M. 1.

But where four plaintiffs in equity unite in the same bill, praying injunction to stay proceedings on four several judgments at law against them respectively, on grounds of equity common to all, and the bill being exhibited against five parties defendants, an injunction is awarded; and, pending suit, two of plaintiffs and three of defendants die; and chancellor makes an order, that unless living plaintiffs, and representatives of deceased plaintiffs, revive the injunction, in name of representatives of deceased plaintiffs, against representatives of deceased defendants, on or before a given day, the injunction shall stand and be dissolved; this order is irregular and erroneous, and of course a decree dismissing the plaintiff's bill based upon such order is erroneous, being in accordance with the order. *McKays v. Hite*, 2 Leigh 145.

If the court is satisfied that the plaintiff's death has been suggested by the defendant, without any knowledge on his part that he is really dead, but only for the purpose of delay, the court may render a final decree in the cause then ready for such action, and disregard such suggestion. *Gillespie v. Bailey*, 12 W. Va. 70.

VII. REVIVAL BY CONSENT.

See *supra*, II, F; II, G; III, J; IV, D.

VIII. PRESUMPTION IN APPELLATE COURT.

It is the defendant's duty to show cause if he can, against the revival of the decree; the mere filing of his pleas is not sufficient, and the whole record being before the chancellor, where the *scire facias* recites sufficient of the record to show that the decree ought to have been revived, if it is revived the appellate court will presume in the absence of the record that it fully justified the court in its action. *Garrison v. Myers*, 12 W. Va. 330.

Where two obligors are sued, and both die pending the proceedings, though it is not expressed which of them died first; on a *sc. fa.* against the administrator of one of them, who does not demur to the *scire facias* nor plead a variance between it and the proceedings on which it issued, but pleads to issue, it must be understood that the other obligor died first, and that the action survived against the obligor, against whose representative the *scire facias* was sued out. *Hamlin v. Atkinson*, 6 Rand. 574.

IX. REVIVAL OF APPELLATE PROCEEDINGS.

See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

Revival Must Be in Name of Parties Specifically.—

Where the appellee dies, pending the appeal, it is not sufficient that the suit has been revived by consent of parties as to his heirs and representatives in their general character, without naming them, it must be revived against them specifically. *Southall v. McKeand*, *Wythe* 95.

The administrator *d. b. n.* upon the death of the administrator, may appeal from a decree against his administrator without a revival of the judgment. *Miller v. Neff*, 33 W. Va. 197, 10 S. E. Rep. 378.

580 *Cabell's Executors v. Roberts' Administrators.

November, 1828.

Equitable Relief—Judgment at Law—When Granted.*—It is not the province of Courts of Equity to see

*See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 435; monographic note on "Jurisdiction" appended to *Phlippen v. Durham*, 8 Gratt. 457.

The principal case is cited with approval in *Hudson v. Klue*, 9 Gratt. 384.

that justice is done, in the abstract, in all possible cases, but only to lend its aid, when from any cause, without his own default or neglect, a party Defendant at Law, cannot have justice done him in the Courts of Law; and this is true, where the discounts, abatements or damages, which are claimed to be set-off in Equity, arise out of a breach of the same contract on which the Judgment at Law is founded.

Same—Same—Same—Case at Bar.—Therefore, where C. bound himself to pay 100l. to R., for grain to be delivered by him for a fixed price, and within a certain time, and R. bound himself to C. by Bond to deliver grain of 100l. value, and R.'s Administrators sued C. at Law, and recovered Judgment for the 100l., Equity will not relieve C.; for, his payments and discounts were a proper subject of a defence at Law; or, if R. failed to comply with his contract, C.'s remedy was at Law on the Bond executed by R.

This was an appeal from a Decree of the Superior Court of Chancery for the Richmond District, reversing a Decree of the County Court of Buckingham, by which a Bill of Injunction, obtained by the Appellants, had been perpetuated. The Chancellor dissolved the Injunction, and dismissed the Bill. No other statement of the case is necessary than that which is contained in the following opinion.

Johnson, for the Appellants.

The Attorney General, for the Appellees.

November 24. JUDGE GREEN delivered his opinion.

In January, 1793, Frederick Cabell, as agent for his father, John Cabell, contracted with Roberts for 100l. worth of corn and wheat, at stipulated prices, for the use of his Iron Works in the County of Greenbrier, and executed a Bond to Roberts, in his father's name, for the 100l. At the same time, Roberts executed his Obligation to John Cabell, to deliver 100l. worth of grain to him, one half as it was wanted, the other by the 25th of December, 1793. In October, Cabell sold his Iron Works to Crawford, and Crawford stipulated to pay all Cabell's debts in Greenbrier and neighbourhood, out of the purchase money. Roberts, having delivered a part of the grain to Cabell, agreed to deliver the balance to Crawford, and to look to him for the 100l., which Crawford agreed to pay him, but Roberts did not agree to give up Cabell's liability. So that Crawford was Cabell's agent to receive the balance of the grain, and bound to him to pay the price of the whole to Roberts. In October, 1793, Cabell removed to Buckingham County, where Roberts' Administrators sued him upon his Bond in 1804, and obtained a Judgment by default. Cabell obtained an Injunction to this Judgment, on the sole ground that he did not execute the Bond, nor know of its existence until some time after it was executed, and had intended to defend the suit at Law, and written to a Lawyer for that purpose, but not knowing the state of the suit, was not present at August Court, when a Judgment by default went against him.

In 1812, Roberts' Administrators answered, objecting to the jurisdiction of the Court, and stating that they were informed, and believed that the Bond was executed by Frederick Cabell, as agent for his father, for the purchase of grain, the whole or greater part of which had been delivered to Cabell, or his agents. In 1818, J. Cabell died, and the suit in Chancery

being revived, his Executors filed an amended Bill, stating the substance of the original transactions as before set forth, with the addition, that only eighteen or twenty barrels of grain had been delivered under the contract to Cabell, and that Roberts had agreed to look to Crawford for the price of that, as well as for what he might afterwards deliver to him under the contract, and exonerated Cabell altogether, and that Roberts' Bond, then exhibited, had been mislaid, and found among Frederick Cabell's papers since John Cabell's death. To this, Roberts' Administrators answered as before, denying any agreement to exonerate Cabell, or the payment by Crawford, so far as they knew or

582 believed. "The County Court perpetuated, and the Chancellor dissolved the Injunction. A good deal of testimony was taken, some of which was objected to. The validity of these objections need not be considered, since they do not affect the result of the cause.

Upon the evidence, if I were a juror, I should have very great doubts, but upon the whole should probably conclude, that Roberts had delivered a considerable quantity of grain to Cabell, and perhaps the balance to Crawford, and for whatever he had delivered to both, he had been paid by Crawford. I could not otherwise account for his failure to call on Cabell within the nine or ten years he survived the period of these transactions. But, the County Court in Chancery was not the proper tribunal to determine upon these doubtful facts. They should have been submitted to a Jury, upon Cabell's defence to the action at Law against him, or in an action by Cabell, or his Executors, against the Administrators of Roberts on his Bond. Whatever Crawford had paid Roberts, was a legal discount against Cabell's Bond. And if he had not delivered the whole grain, there was no impediment to recovering satisfaction for it in a suit upon his Bond. It is not the province of a Court of Equity to see that justice in the abstract is done in all possible cases, but only to lend its aid when, from any cause, without his own default or negligence, a party cannot have justice done him in the Courts of Law. Nor does the circumstance, that the discounts, or abatements, or damages, claimed to be set-off in Equity, arise out of a breach of the same contract, upon which the Judgment at Law is founded, form an exception to the general rule, unless there be also some circumstance in the case, which, without the default or negligence of the party, prevented him from availing himself of such a breach by way of defence, or in an action at Law. The cases alluded to in the argument, in which an abatement in the price of land for a deficiency in quantity, has been allowed in Equity in this Court, and in which the payment

583 of the "purchase money has been suspended till some defect in the title should be supplied, form no such exception to the general rule. These have been either cases in which the purchaser has sued in Equity for a specific execution where it was necessary to the relief asked to adjust the price to be

paid under the contract, as in *Mills v. Bell*, 3 Call, 320; *Chinn v. Heale*, 1 Munf. 63; *Grantland v. Wright*, 2 Munf. 179, *Nelson v. Carrington*, 4 Munf. 332; or where the party had accepted a Deed, in which there was no covenant upon which he could recover compensation for the defect of title, or deficiency in the quantity of the land, as in *Joliffe v. Hite*, 1 Call, 301; *Hull v. Cunningham*, 1 Munf. 330; *Humphreys v. M'Clenachan*, 1 Munf. 493; *Sexton v. Pickering*, 3 Rand. 468; *Nelson v. Matthews*, 2 Hen. & Munf. 164. The cases in which relief had been given in this Court to the obligor against assignees, after Judgment at Law, upon Equities against the obligee, conform to the general rule. In the leading case of *Norton v. Rose*, 2 Wash. 233, the Equity was inherent in the original contract, and went to the whole consideration of the obligation upon which no defence or action at Law, even as against the obligee, could be founded. In *Pickett v. Morris*, *Ibid.* 255, a legal discount was offered and rejected in the trial at Law, and the party prevented by surprise from putting his case upon the Record, so as to reverse the Judgment by appeal. And in *Stockton v. Cook*, 3 Munf. 68, the obligor, against whom the assignee, had obtained a Judgment at Law, upon a Bond given in consideration of the purchase of land, had a conveyance from the obligees, with a covenant against incumbrances; there was an incumbrance, and although this was not a subject that could be discounted at Law, the obligor could have maintained an action at Law against the obligees, and have recovered the full amount of the incumbrance. He was relieved in Equity against the Judgment obtained by the assignee. Judge Fleming dissenting, amongst other reasons, alleging that the remedy of the

584 "Plaintiff in Equity, (if he was entitled to any,) was against the obligees. The Bill, however, charged that the obligees were insolvent, which, if true, rendered the remedy at Law against them unavailing.

During the present Term, it has been held that unliquidated damages, arising out of the same contract on which the Judgment sought to be enjoined was founded, cannot be set-off in Equity. *Webster v. Couch*, ante p. 519.

I think the Decree of the Chancellor was right, and should be affirmed. If the Appellants should suffer any injury from this, it is not from any defect in the Law, but the consequence of their not availing themselves of their legal remedies, and of applying to any improper tribunal.

Bolling v. Turner.

December, 1828.

Lunatic—Committee—Liability to Be Sued.—A Committee of a Lunatic, appointed by the Chancellor, is a mere Commissioner of the Court, managing the person and estate of the Lunatic, under the direction of the Chancellor, and is responsible to the Court as a receiver, removable in its discre-

*See monographic note on "Insanity" appended to *Boswell v. Com.* 20 Gratt. 860.

The principal case is cited with approval in *Bird v. Bird*, 21 Gratt. 717; *Pannill v. Calloway*, 78 Va. 394.

tion, and not liable to be sued at Law, on claims either against the Lunatic himself, or his estate, as in the case of a Committee appointed under the Statute.

Samuel Turner brought Assumpsit in the Superior Court of Prince George, against Robert Bolling, committee of Mary Anne Bolling, a lunatic, to recover \$919 80. There were five counts in the Declaration. The first was indebitatus assumpsit for goods, wares and merchandize sold and delivered to the lunatic before her lunacy. The second was on a quantum valebant for the goods sold and delivered to her. The third was on a quantum meruit, for work and labor done for her. The fourth was indebitatus assumpsit, for money laid out and

585 expended *by the Plaintiff for the use of the lunatic, for money lent and advanced to her; and for money had and received by her to the use of the Plaintiff before her lunacy. All of these four counts charged the assumpsit to be made by her before her lunacy. The fifth count was on an insimul computassent between the Defendant as committee of the lunatic, and the Plaintiff, in which the Defendant was charged to be found in arrears on account of the said lunatic in the sum claimed, and laid the assumpsit by the Defendant himself as committee. Plea, the general issue. On the trial the Jury found for the Plaintiff, subject, however, to the opinion of the Court, upon the question here stated. "The goods, &c. for which this action is brought, were furnished by the Plaintiff to the said Mary Anne Bolling, before the Defendant was appointed her committee, and were necessities required for her support, and the preservation of her property, and the Defendant was appointed a committee for the said Mary Anne, by the Superior Court of Chancery for the Richmond District, and not by any County or Corporation Court, in the mode prescribed in the Act of Assembly, and it is submitted to the Court, whether the Defendant is subject to this action. The said Mary Anne, at the time of the delivery of the goods, being in a state of mind which rendered her incapable of contracting." The Court decided in favor of the Plaintiff, and the Defendant appealed.

Allison, for the Appellant.

May, and Spooner, for the Appellee.

December 13. The PRESIDENT delivered the opinion of the Court.*

This is an action of Assumpsit by the Appellee against the Appellant, as the Committee of a lunatic, appointed by

586 *The Chancellor for goods, &c. furnished as necessities for the support of the lunatic, and for the preservation of her property, before the appointment of the Appellant, and when the lunatic was incapable of making any contract. The error in bringing this action was, in not distinguishing it from an action against the committee of a lunatic appointed under the Statute, in a case in which the lunatic is sent to the Hospital and is treated by the Statute as civiliter mortuus, and the committee as an Executor, and responsible in like manner. 1 Rev. Co. ch. 109, § 6, p. 413. A committee appointed by the Chan-

cellor, as in this case, is a mere Commissioner of the Court, managing the person and estate of the lunatic, under the direction of the Chancellor, and having such allowances for the support of the lunatic as may be considered proper, accounting for the management of the estate as a receiver of the Court, removable in its discretion, and is not liable to be sued on claims either against the lunatic or his estate, as in the case of a committee appointed under the Statute. A suit might have been brought against the lunatic herself for any debt incurred before the committee was appointed, and after Judgment her person might have been taken in execution, as in the case of any other debtor. During her lunacy she was incapable of making any contract, and was only liable to be sued for necessities, though no Execution could issue against her estate, that being under the control of the Chancellor; but the Chancellor, either before or after Judgment, may direct the debt to be paid out of her estate. 13 Vessey, 590, Anonymous, and Maddock's Ch. title "Idiot and Lunatic."

The Judgment is therefore to be reversed.

587 *Downman v. Rust and Others.*

December, 1838.

Legacies—When a Charge on Realty.—Although legacies do not stand upon as high ground as debts, yet if the personal fund be inadequate, or if there be expressions in a Will, tending to show that the Testator had the land in his mind, a Court will make them a charge on the land, rather than they shall go unpaid.

Same—Same—Case at Bar.—Therefore, where a single woman, having but little personal property, and real estate of considerable value, having only one brother, who would have been her heir and distributee, by her Will bequeaths pecuniary legacies to two of her friends, as tokens of affection, and makes the brother Executor, and residuary legatee, she must be considered as intending that the legacies should be paid out of the land, and they were decreed to be a charge upon it.

Same—Same—Same.—The Devisee of the land on

*For monographic note on Vendor and Purchaser, see end of case.

***Legacies—When a Charge on Realty.**—In Read v. Cather, 18 W. Va. 267, it is said: "Whether a legacy is a charge upon the real estate devised in a will is a question of intention upon the part of the testator. According to the English rule that intention is to be derived exclusively from the provisions of the will; and parol evidence is inadmissible to aid in ascertaining that intention. 1 Rep. Leg. 451 (576, 4 Ed.); Parker v. Fearnley, 2 Sim. & Stu. 462. In Virginia the rule is not so strict; and parol evidence is admissible. Downman v. Rust, 6 Rand. 587; Clark v. Buck, 1 Leigh 490; Trent v. Trent, Gilm. 174. CHANCELLOR KENT thus states the law: that the real estate will not be charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, or clearly to be inferred from the language and disposition of the will; and that it was not sufficient, that debts or legacies are directed to be paid, that alone does not create the charge; but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. Lupton v. Lupton, 2 Johns. Ch. 614."

To the same effect the principal case is cited in Gaw v. Huffman, 12 Gratt. 633; Hughes v. Tabb, 78 Va. 327; Lee v. Lee, 88 Va. 909, 14 S. E. Rep. 534; Thomas v. Rector, 23 W. Va. 34; Bird v. Stout, 40 W. Va. 46, 20 S. E. Rep. 853; Hogg v. Browning, 47 W. Va. 22, 34 S. E. Rep. 755.

See further, monographic note on "Marshalling Assets" appended to Carrington v. Didier, 8 Gratt. 280; monographic note on "Legacies and Devises" appended to Early v. Early, Gilm. 124.

***Trusts—Purchaser—Application of Purchase Money.**—On this subject, the principal case is cited in Lamar v. Hale, 79 Ga. 159; Rorer Iron Co. v. Trent, 83 Va. 415, 416, 2 S. E. Rep. 713; Woodwine v. Woodrum, 19 W. Va. 73.

*Absent, JUDGE COALTER.

which such charge is made, having conveyed the land in trust for payment of his own debts, and the land being sold by the Trustees, under the Deed, the purchaser having notice of the legacies, is bound to see to the application of the purchase money, and the land held to be chargeable in his hands with the payment of the legacies. So held, not on the ground that the purchaser is guilty of fraud, but on the principle of Caveat emptor.

Olivia Downman and Sarah Downman, filed their Bill in the Superior Court of Chancery at Fredericksburg, against the Appellee, Benjamin D. Rust, both in his own right, and as Executor of Elizabeth H. Rust, and others, to recover certain legacies bequeathed to the Complainants by the said Elizabeth H. Rust. After directing the Executor to pay all just debts of the Testatrix, the Will proceeds in the following words: "It is also my will and desire that my Executor pay to Mrs. Olivia Downman \$400 as a small token of my sincere love and gratitude for the parental like love and affection which she has manifested towards me and in the event of the death of Mrs. Olivia Downman before my Executor can make her the said payment, it is my will that the said sum of money be equally divided among her heirs. In like manner it is my will and desire that my Executor pay to Miss Sarah Downman of Moratico \$200 as a small token of my love and gratitude for the sisterlike attention she has always paid me to be distributed among her heirs equally in case of her death before my

588 Executor can pay her the said sum of \$200." The Testatrix then devises all the rest of her estate, real and personal, in fee simple, to her brother, Benjamin D. Rust, and appoints him Executor. The Bill states, (and the Defendant Rust admits in his Answer,) that the said Rust subsequently qualified as Executor: that the said Elizabeth H. Rust lived for many years before her death in the family of Olivia Downman, the mother of Sarah Downman, and was treated with the utmost tenderness and affection: that Benjamin D. Rust was the only brother of the Testatrix, and that she left neither father, mother, nor sister: that the personal estate of the said Elizabeth H. Rust, at the time of making her Will, and at the time of her death, about a month afterwards, did not amount to more than 60 or 70 dollars. It does not appear that the Testatrix left any debts. Elizabeth H. Rust, when she made her Will and at the time of her death, was seised of a tract of land of considerable value, called "Islington," on the Rappahannock, upon which Benjamin D. Rust entered as Devisee of his sister. On the 1st day of January, 1822, the Defendant Rust conveyed the land in question to Trustees, for certain purposes expressed in the Deed, and subsequently executed another Deed of Trust, conveying the same land to another Trustee, for the purpose of securing a debt due to one David Greenlaw. The land was offered for sale by the Trustee in the last Deed, and the said Greenlaw became the purchaser. It is stated in the Complainants' Bill, and not denied by the Defendants, that the Complainants gave notice of their claim to the Trustee and purchaser, to have their legacies satisfied out of the land. The Bill was filed for a

settlement of the account of the Executor, and payment of the legacies out of the personality, if sufficient, but if not, praying that the legacies may be considered as a charge upon the land. Rust, both in his own right, and as Executor, is made a Defendant, and also the Trustees in the two Deeds of Trust, and Greenlaw, a purchaser under one of those Deeds. It is stated in the Bill, that no inventory, appraisement, or account of sales, had been returned.

589 *The Chancellor directed the Executor to settle the account of his administration, and ordered the Bill of the Plaintiffs to be dismissed as to the Trustees, and as to Greenlaw, the purchaser; from which Decree the Plaintiffs appealed.

J. M. Patton, for the Appellants.
Johnson, for the Appellees.

December 17. JUDGE CARR delivered his opinion.*

Upon this case, two questions arise: 1st. Whether by the Will, the legacies are charged on the lands? 2d. If so, does that charge follow the land into the hands of the purchaser? It would seem almost useless to discuss the first point, since Counsel, so able and so diligent, felt himself obliged to admit, that in the hands of the devisee these lands were chargeable. I will, however, say a few words on the subject. Every question of a charge on land under a Will, is a question of intention. In the case of debts, it is so natural to suppose that a man in that solemn act, intended to be just, that Courts have taken very slight words in a Will to imply a charge upon lands. The Books are full of such cases. *Trent v. Trent*, in *Gilm. Rep.* 174, is one of that class. Legacies do not stand on quite so high ground, being voluntary gifts; but, yet every man is supposed to intend that they shall be paid, and to have settled in his mind the fund for their payment: and if there be no fund but land, or if there be expressions tending to show that the Testator had the land in his mind, the Court will turn them upon the land, rather than they should go unpaid. Thus, in *Elliot v. Hancock*, 2 *Vern.* 143, Testator devised \$1. per annum to his eldest son for

590 forty years, if he should so long live, and to his second *son, whom he made executor and residuary legatee, he devised his real estate in tail, with several remainders over. The Executor paid the annuity for twenty years, and then died. Decreed, the land should be liable to the annuity, though there were no express words to charge it, the devisee being Executor, and the heir, who was disinherited, having no other provision. *Alcock v. Sparhawk*, 2 *Vern.* 228, J. S. by his Will devised his lands to his brother (who was his heir at Law,) in fee, and giving sundry legacies, made his brother his Executor, desiring him to see his Will performed. *Per Curiam*. "The lands are subject and liable even on the face of the Will. Testator needed not to have devised the lands to his brother, for he was his heir at Law, unless he intended his brother should take them, subject to his legacies: but he is devisee and executor, and is desired to see

*Absent, the PRESIDENT and JUDGE GREEN.

the Will performed; and therefore, a much stronger case than that of *Cloudeley v. Pelham*, 1 Vern. 411. Note. This Decree was affirmed in Parliament." *Ambrey v. Middleton*, 2 Eq. Ca. Abr. 497, pl. 16. "As to all my worldly estate, I give and dispose thereof in manner following:" and then Testator gave several pecuniary legacies, and several annuities for lives, to be paid by his Executor; and next he devised all the rest and residue of his goods and chattels and estate, to his nephew, Middleton, (the Defendant, and heir at Law to the Testator.) and made him sole Executor. The question was, if the real estate be chargeable with the legacies and annuities, in default of the personal estate? And Cowper Ch. was of opinion, that by the devise of all the rest and residue of his goods, chattels and estate, all his lands did pass to his Executor, and that he took by the Will, and not by descent, as heir at Law; and that the lands so devised to him, were chargeable with the pecuniary legacies and annuities, when the personal estate fell short to satisfy the same, and decreed accordingly.

Compare the case before us with these. The Testatrix a single woman, having one brother, who would have been
591 *her heir and distributee, and having scarcely any personal estate, but real estate to the value of five or six thousand dollars, leaves to Mrs. Olivia Downman, in whose house she had lived, and to Miss Downman, her daughter, to the first \$400, and to the last \$200, to be paid by her Executor. All the rest of her estate, real and personal, she gives to her brother, and makes him her Executor. She certainly intended that these legacies, given as tokens of love and gratitude, should be paid. Out of what fund? Not the personalty, for she had none; certainly out of the land: and therefore, she devised it to her brother, that he might take it under the Will, and not by descent; and she made him Executor, and directed him to pay the legacies: and the rest of her estate, real and personal, she gave to him. I can have no doubt that under this Will, and the settled course of decisions, the land is chargeable with the legacies.

The second question, does the charge follow the land into the hands of the Defendant, Greenlaw? Was the one most strongly contested. It was not pretended that Greenlaw was a purchaser without notice, nor can he occupy that ground at all. A Defendant, who claims to be a purchaser without notice, must expressly deny notice in his Answer, though it is not charged in the Bill. This is settled Law. Here, it is charged in the Bill, that at the sale under the Deed of Trust, an Agent for the legatees attended, expressly forbade the sale, and gave notice, that the land would be held liable for the legacies; and neither of the Answers denies this allegation. We must consider the question then upon other grounds. Neither do I think this question turns upon the point of fraud, as was strongly contended by the Counsel for the Appellee. Let us first enquire whether the Defendant, Rust, is to be taken as a Trustee, and the land as trust property, so

far as relates to the legacies? In discussing the first question, we have come to the conclusion, that the legacies were (in defect of personal property) charges upon
592 the land. There seems *to have been at one time, a difference of opinion, whether a mere charge upon land created a trust, like a conveyance to Trustees, but it is now settled that it does. See *Bailey v. Ekins*, 7 Ves. 319; *Shiphard v. Lutwidge*, 8 Ves. 26. Those cases show that it is as much a trust as a direct conveyance or devise to Trustees for the same purpose: the only difference is, that in that case, the trust arises by construction of Equity; while in this, it is produced by the express declaration of the party; and when the trust is in esse, it seems wholly immaterial by what means it has arisen. See Sugd. 335-6. Considering the Executor a Trustee, and this land trust property, so far as the legacies were concerned, the doctrine on which the case of Orr turned has been relied on. 5 Rand. 195. In that case, the party was considered as contracting with Orr, first, in the character of Executor, and secondly, in the character of a full Trustee. In the latter character, it was shown from the cases of *Andrew v. Wrigley*, 4 Bro. Ch. Cas. 125; *Read v. Snell*, 2 Atk. 642; *Mabank v. Metcalf*, 3 Atk. 95, and *Ithell v. Beane*, 1 Ves. sen. 215, "that a Trustee cannot alien in payment of his own debt." The Deeds of Trust in the case before us, were made expressly and solely, to secure the debts of Rust, and the land was sold to raise those debts. But there was another aspect in which the question was more especially considered in the argument, that is, whether this be a case in which the purchaser, even supposing him to have notice, is bound to see to the application of the purchase money. It was acknowledged, that legacies enumerated, are like scheduled debts, so far as the question, whether the purchaser shall see to the application of the money is concerned. But it was contended, that in no case, either of debts or legacies, was a purchaser bound to look to application, where the charge was not express, but created by implication and construction. The Counsel referred to no case which took this distinction between an express and an implied charge, nor have I
593 been able to find any. All the cases (and there are many cited *by Sugden in 11th Ch.) go upon the distinction between a limited and a general trust. In the first (however created) the purchaser is bound, in the last, he is not. The Counsel placed it on the ground of fraud, and said it would be harsh doctrine, to pronounce it fraudulent in a purchaser to deal with Rust as owner of the land, when there was a clear devise of it to him, and the charge was so far from being clear, that none but a lawyer would detect it. But I see none of the cases, nor of the elementary writers, placing this doctrine on the foot of fraud. It seems to depend rather on the doctrine caveat emptor; he who purchases from another must look to the title, must know the authority of the seller. Whether the charge on the land be express, or implied, if it is a charge, it

equally binds, and must be equally protected. Upon the whole, I think that the Decree dismissing the Bill against all but the Executor, must be reversed, and the cause sent back, with directions to the Court below, that for so much as the personal estate shall fall short of paying the legacies, they constitute a charge upon the land.

JUDGES CABELL and COALTER concurred, and the Decree was reversed.

VENDOR AND PURCHASER.

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- M. Pleading and Practice.
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 3. Appeal.
- N. Evidence.

Cross References to Monographic Notes.

- Acknowledgments, appended to Talliaferro v. Pryor, 12 Gratt. 277.
- Adversary Possession, appended to Nowlin v. Reynolds, 25 Gratt. 137.
- Assumpsit, appended to Kennaird v. Jones, 9 Gratt. 183.
- Contracts, appended to Enders v. Board of Public Works, 1 Gratt. 364.
- Covenants, appended to Todd v. Summers, 2 Gratt. 167.
- Deeds, appended to Flott v. Commonwealth, 12 Gratt. 564.
- Deeds of Trust, appended to Cadwallader v. Mason, Wythe 188.
- Ejectment, appended to Tapscott v. Cobbs, 11 Gratt. 172.
- Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.

Fraud, appended to *Montgomery v. Rose*, 1 Pat. & H. 5.

Frauds, Statute of, appended to *Beale v. Digges*, 6 Gratt. 582.

Judicial Sales, appended to *Walker v. Page*, 31 Gratt. 636.

Landlord and Tenant, appended to *Mason v. Moyers*, 2 Rob. 606.

Liens, appended to *West v. Belches*, 5 Munf. 187.

Limitation of Actions, appended to *Herrington v. Harkins*, 1 Rob. 591.

Lis Pendens, appended to *Stout v. Vause*, 1 Rob. 169.

Mortgages, appended to *Forkner v. Stuart*, 6 Gratt. 197.

Recording Acts, appended to *Heron v. Bank of U. S.*, 5 Rand. 426.

Rescission, Cancellation and Reformation, appended to *Chamberlaine v. Marsh*, 6 Munf. 283.

Set-Off, Recoupment and Counterclaim, appended to *Anderson v. Bullock*, 4 Munf. 442.

Specific Performance, appended to *Hanna v. Wilson*, 8 Gratt. 248.

Subrogation, appended to *Janney v. Stephens*, 2 Pat. & H. 11.

Trust and Trustees, appended to *Lee v. Randolph*, 2 Hen. & M. 12.

Warranty, appended to *Wilson v. Shackelford*, 4 Rand. 5.

I. REQUISITES OF SALE AND PURCHASE.

Offer and Acceptance.—A mere proposal to sell land does not become a sale until accepted, and notice of acceptance given the proposer. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. Rep. 540.

Acceptance Must Be Unconditional and within Time Limit.—To convert a proposal to sell into a valid contract of sale, it is essential that the acceptance be unconditional, and that notice of the acceptance be communicated to the other party within the time limited, or that within that time some act be done by the plaintiffs which he has expressly or impliedly agreed to treat as notice of the acceptance. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. Rep. 743.

And if a condition is affixed by a party to whom the offer is made, or any modification or change in the offer be made or requested, it will in law constitute a rejection of the offer. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. Rep. 743.

So a court of equity will not enforce a parol contract for the sale or exchange of land, unless the terms of the contract are admitted or clearly proven. *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. Rep. 891. But by Virginia Code § 2840, no action shall be brought upon any contract, for the sale of real estate unless it be in writing and signed by the party to be charged thereby or his agent.

And where one by writing empowers another to sell land, implying a cash sale, and the agent simply transfers the writing to a third person, without payment of purchase money, it is not a sale. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. Rep. 540.

II. POWER TO SELL INSEPARABLE INCIDENT.

The general rule is that the power to sell is an inseparable incident of the ownership of property, which makes it liable to the owner's debts. *McClure v. Cook*, 39 W. Va. 579, 20 S. E. Rep. 612.

But where the sale is restricted in the exercise of power which is a part of the dominion of the grantor, not parted with, but retained and exercised for some purpose beneficial to the security of his own right, such as to keep the property bound by a charge created, and imposed upon it, and to hold the grantee to the personal performance of the

duties given him in charge, the general rule does not apply. *McClure v. Cook*, 39 W. Va. 579, 20 S. E. Rep. 612.

III. TITLE.

A. IN GENERAL.—Upon a sale of real estate, whether at a public or private sale, where nothing is said as to the contrary, the purchaser is entitled to have a clear title. *Goddin v. Vaughn*, 14 Gratt. 102; *Clarke v. Reins*, 12 Gratt. 98; *McCann v. Jones*, 1 Rob. 256; *Watts v. Kinney*, 3 Leigh 272; *Linkous v. Cooper*, 2 W. Va. 67; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. Rep. 249; *Tavener v. Barrett*, 21 W. Va. 657; *Rucker v. Lowther*, 6 Leigh 259.

But where the sale is of such a character, and made under such circumstances, as fully and sufficiently to make known to the purchaser the exact nature of the title he is to expect, as where the sale is made avowedly by an executor under the provisions of the will, or by a sheriff or commissioner under an order of the court, he can of course only demand such title as was in contemplation of the parties when the sale was made. *Goddin v. Vaughn*, 14 Gratt. 102.

Who Must Enter into Covenants for Title—Exceptions.—With respect to the persons who are bound to enter into covenants it may be observed in general, that all persons who convey lands whereof they are seized to their own use, are bound to enter into the usual covenants for the title of the land conveyed, but where the estate is sold by trustees under a will, a purchaser is not entitled to covenants for the title, and the same rule applies where an estate is sold under an order of a court of equity. *Tavener v. Barrett*, 21 W. Va. 681; *Goddin v. Vaughn*, 14 Gratt. 102.

And a person who is bound to make a title to lands, is bound to execute a deed in the presence of witnesses, or to acknowledge it in such manner, that the person to whom it is made, may have it recorded according to law. *Tapp v. Beverley*, 1 Leigh 80.

But if a vendor does not affect to have a perfect title, and expressly sells such as he has without special warranty, he is entitled to specific execution without being first required to show a clear title. *Broyles v. Bee*, 18 W. Va. 514.

"A Good and Indefeasible Title" by an Executor.—An executor selling the land of his testator, by virtue of a power given by the will, is not bound to convey with general warranty, without an agreement to that effect; but to that only with special warranty, against himself and all persons claiming under him; notwithstanding a written agreement, after the sale, that he would make "a good and indefeasible title" to the purchaser; for such agreement is to be understood in reference to the terms of the sale. *Grantland v. Wight*, 5 Munf. 295.

Defect of Title Cured by Lapse of Time.—Where a vendee of the real estate has had and held possession thereof under title from his vendor, until defect of title has been cured by lapse of time or the statute of limitations, he is not allowed to set up such pretended defect, however defective the title may have been at the time of the purchase. *Piedmont Coal & Iron Co. v. Green*, 3 W. Va. 55.

And if at the date of the decree of sale, the title, though originally defective, has become good by reason of the purchaser's possession under the statute of limitations, the court may go on to enforce the contract. *Core v. Wigner*, 32 W. Va. 277, 9 S. E. Rep. 36; *McLaugherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246.

Marketable Title.—A "marketable title" is one that is free from reasonable objection to a reason-

able purchaser. *Morrison v. Waggy*, 48 W. Va. 405, 27 S. E. Rep. 814.

Deed Conveying Title Not Revoked by Death.—A deed duly executed and delivered, which conveys the legal title to real estate to a vendee, although a mere power to sell, is not revoked by the death of the vendor. *McNeill v. McNeill*, 48 W. Va. 765, 28 S. E. Rep. 717.

Clouded Title Cleared before Decree.—Though the vendee of land has abandoned possession for a technical defect of title, yet upon a bill to enjoin the collection of the purchase money, if the vendor can make a good title at the time of the decree, the vendee is bound to take it. *Mays v. Swope*, 8 Gratt. 47.

But a purchaser of land being thoroughly informed of defects in the vendor's title, and agreeing nevertheless to pay interest on the purchase money from a certain day, shall not be relieved from paying such interest, on the ground that he could not get possession of part of the land, which he knew at the time of entering into the agreement, was held by another person. *Mayo v. Purcell*, 3 Munf. 243.

Vendee Not Compelled to Accept Clouded Title.—A vendee for value, purchasing a good title cannot be compelled to accept a litigious or clouded title, if there is reasonable ground to apprehend litigation with regard thereto, although the same may be satisfactory to a lawyer or speculator. Having paid a good price therefor, the vendee has the right to demand a quiet title. *Spencer v. Sandusky*, 46 W. Va. 582, 33 S. E. Rep. 221.

Vendor May Purchase Outstanding Title.—Where a party sells and conveys, without warranty, a particular claim or title to land, he is not thereby estopped from purchasing a superior adverse or outstanding title and holding the land under a superior title against the grantee of the particular claim or title where there was no fraud or concealment in the sale of the particular claim. *Kent v. Watson*, 23 W. Va. 563.

Contract to Make Good Deed Includes Good Title.—A contract to make "A good deed" is not confined to the form of the deed, but includes a good title. *Christian v. Cabell*, 22 Gratt. 82.

Vendor Sells Only Title Vested in Him.—A grant of land is a mere transfer of such title or right thereto as the grantor, at the time of the grant, may hold or have, absolutely or contingently. *Western M., etc., Co. v. Peytona, etc. Coal Co.*, 8 W. Va. 411.

And a grant does not imply an assertion of title in the grantor, or a covenant with the grantee to warrant the land. *Western M., etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 411.

1. **WHEN TITLE VESTS IN VENDEE.**—The purchaser of real estate is the owner from the date of the contract, when the vendor is in no default, and is prepared to convey a clear title, but he is not the owner till the vendor can make a title according to the contract. *Christian v. Cabell*, 22 Gratt. 83.

And any loss occurring to the property before the vendor is in a condition to convey a clear unincumbered title must fall on him, and not on the purchaser. *Christian v. Cabell*, 22 Gratt. 82.

2. **VENDOR'S LIABILITY FOR DEFECTS OF TITLE.**—The vendor of real estate is not responsible for any defects of title, unless he has bound himself by some covenant or warranty to protect the vendee, or has been guilty of some fraud or concealment. *Commonwealth v. McClanachan*, 4 Rand. 482; *Johnston v. Jarrett*, 14 W. Va. 238.

Vendor in Own Right Must Convey with General, and a Lienor with Special Warranty.—A vendor of land in his own right is bound to convey it with

general warranty, unless it be otherwise agreed between the parties. But a party who had sold to the vendor, and had retained the legal title, or had some interest in the land, is only required to convey with special warranty. *Hoback v. Kilgore*, 26 Gratt. 442.

And a trustee to sell, selling property, and such title only, as is vested in him, according to the terms prescribed, and without warranty or fraud, incurs no responsibility to the purchaser. *Sutton v. Sutton*, 7 Gratt. 234.

Mode of Ascertaining Defects.—In a suit by a vendor to enforce the payment of purchase money under an executory contract for the sale of land, and defendant alleges a defect of title in the vendor, he may have a reference to ascertain the character of the title, or the court may, where the proof raises a doubt as to title, make a reference; but unless the reference be asked by the vendee, or the doubt appears, it is not necessary, and the court may proceed to subject the land to sale for the purchase money. *Core v. Wigner*, 32 W. Va. 277, 9 S. E. Rep. 36.

What Purchaser Entitled to under Contract for Clear Title.—A contract for the sale of land which provides that the vendor shall convey to the purchaser a clear title, entitles the purchaser to a conveyance of the land with general warranty and free from incumbrances. *Kenny v. Hoffman*, 31 Gratt. 442; *Com. v. McClanachan*, 4 Rand. 482.

And a purchaser who has accepted a deed of general warranty, must generally pay the purchase money, and look to the warranty for indemnity against bad title; but if the grantor is insolvent, or the warranty not binding, he will not be compelled to pay, if the title is defective, though he has not yet lost from its defect. *Bennett v. Pierce*, 45 W. Va. 654, 31 S. E. Rep. 972.

But where the vendor has bound himself to convey the land with covenant of general warranty, he is responsible for defect of title to any part of the land so sold; and a court of equity will not compel the payment of the whole of the purchase money, until the defect is removed; although there has been a conveyance of such land to the vendee. *Koger v. Kane*, 5 Leigh 606; *Clarke v. Hardgrove*, 7 Gratt. 399; *Renick v. Renick*, 5 W. Va. 285; *Johnston v. Jarrett*, 14 W. Va. 238; *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. Rep. 874; *Worthington v. Staunton*, 16 W. Va. 242.

Effect of Waiving Defects of Title.—A purchaser of land having given bond and security for the price, without getting a good title, it is competent for him to bind his surety, as well as himself, by waiving such a title, as he might otherwise have insisted upon, as a condition precedent to the payment of the money. *Ross v. Woodville*, 4 Munf. 324.

Defect of Title Grounds for Abandonment.—A purchaser not informed at the time of his purchase of land at auction, that the title to one moiety thereof is vested in infants, and that it can only be obtained by a suit in chancery, may when informed of the fact, refuse to proceed with the purchase, and abandon it. *Goddin v. Vaughn*, 14 Gratt. 103.

And to sustain a vendee's allegation that the contract was abandoned by implication, the conduct of the vendor ought to be such, as to justify a reasonable man, in believing that he acquiesced. *Garnett v. Macon*, 6 Call 308.

Defect of Title Ground for Enjoining Collection of Purchase Money.—Equity will enjoin the collection of purchase money on land, on the ground of defect of title, after the vendee has taken possession under conveyance from the vendor, with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show

clearly that the title is defective. *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. Rep. 85; *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. Rep. 874; *Thompson v. Catlett*, 24 W. Va. 524.

When a vendor's title is not good, and he brings suit for the purchase money and the vendee sues for a deed, and the court decrees that the money be paid when the deed is delivered, the decree will not be enforced should the vendor's title prove worthless. *West v. Shaw*, 32 W. Va. 195, 9 S. E. Rep. 81.

Failure of Fiduciary to Pay Over Money Will Not Effect Title.—Where there is a charge upon land by will for the payment of debts, and a sale, which is fairly made, becomes necessary, the failure of the personal representative to pay over the proceeds to the creditors will not effect the title of the vendee. *Meeks v. Thompson*, 8 Gratt. 134.

3. REASONABLE TIME ALLOWED FOR MAKING TITLE.—As was said in *Dresel v. Jordan*, 104 Mass. 407: "It is not essential that the vendor had, at the time of the contract, such title and capacity to convey the property, or such means and right to acquire it, as would enable him to fulfill it on his part. It is sufficient if he is able to convey when he is required by the contract or the equities of the case; and, when time is not of the essence of the contract, the vendor will be allowed a reasonable time to obtain a perfect title." *Mays v. Swope*, 8 Gratt. 46; *Goddin v. Vaughn*, 14 Gratt. 125; *Rader v. Neal*, 13 W. Va. 374; *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. Rep. 415; *Reeves v. Dickey*, 10 Gratt. 138.

Vendor Chargeable with Rents and Profits on Failure to Make Title.—Where there is a contract for the sale of land, without any day specified for the delivery of the deed and possession, it is supposed to have been intended to be done without unreasonable delay, and in case of a disagreement after the contract the vendor is chargeable with rents and profits. *Hundley v. Lyons*, 5 Munf. 342.

Knowledge of Defects of Title Bars Relief.—In general, a contract will not be enforced by a court of equity, if the party asking the execution of it has been in default, and the other party will thereby suffer a serious loss, if compelled to carry the contract into effect. But, if the purchaser knew, when he made his contract, that there was a defect in the title, and that it would take a considerable time to remove it; or acquires this knowledge after his purchase, and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract; he has no ground of complaint. *Vall v. Nelson*, 4 Rand. 478; *Dodson v. Hayes*, 29 W. Va. 77, 2 S. E. Rep. 415.

Title Made Pendente Lite.—Where a vendee of land obtains an injunction to stay the sale thereof under a deed of trust securing a residue of unpaid purchase money thereon, and at the date of the deed therefor to the vendee, the vendor's title to a portion of the land is defective, and who after the injunction is granted procures a deed of release from a third party for such portion, an order granting the injunction is proper until the title is settled, but the procuring and having recorded a deed of release by the vendor is a sufficient settlement of the title to allow the vendor to proceed to collect the unpaid purchase money by a sale of the land, and the vendee ought to recover his costs in the court below. *Lovell v. Chilton*, 2 W. Va. 410.

4. KNOWLEDGE OF DEFECTIVE TITLE.—Where a purchaser knows, when he makes his contract, that there is a defect in the title, and that it will take a considerable time to remove it, or acquires this knowledge after his purchase, and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract, he cannot afterwards

complain. *Vall v. Nelson*, 4 Rand. 478, 481; *Goddin v. Vaughn*, 14 Gratt. 125; *Rader v. Neal*, 13 W. Va. 374.

But where the contract made between the parties compels the vendor to convey the land with covenant of general warranty, and to put the party in possession of the land, a court of equity will protect the vendee against a defect of title to any part of the land included in the contract, although that defect was known to the purchaser, when the contract was made, unless there has been a waiver by the purchaser of such objection to the title. *Jackson v. Ligon*, 8 Leigh 161. The parties must be bound by the contract they made, if it was free from fraud and mistake. *Johnston v. Jarrett*, 14 W. Va. 238.

IV. RECOVERY BY THE PURCHASER.

Where Vendee is Evicted.—Where land is sold with warranty, and the vendee is evicted, he ought to recover of the vendor, not the value of the land at the time of eviction, but the purchase money, with interest and costs. *Lowther v. Commonwealth*, 1 Hen. & M. 202; *Click v. Green*, 77 Va. 835; *Threlkeld v. Fitzhugh*, 2 Leigh 451; *Roller v. Emfinger*, 88 Va. 645, 14 S. E. Rep. 337; *Abernathy v. Phillips*, 82 Va. 769; *Emfinger v. Hall*, 81 Ga. 94; *Stout v. Jackson*, 2 Rand. 132.

Though a sale of land be made with covenant of general warranty, yet the purchaser cannot claim against the vendor for costs expended by the purchaser in defense of a suit by an adverse claimant of the land, which suit resulted in favor of the purchaser, and the title which he acquired by his purchase. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. Rep. 68. See *Threlkeld v. Fitzhugh*, 2 Leigh 451.

And if land be sold according to certain metes and bounds, and by a covenant under seal, the vendor agrees to warrant the title against all persons whatsoever; he is bound to include, in a conveyance with general warranty, and in case of eviction, to make compensation for all the lands within those bounds, which he held and claimed as his own at the time of the sale, and showed to the purchaser as part of the lands sold; notwithstanding his title thereto was defective. But he is not bound to convey lands which were not held and claimed by him at the time of the sale, nor shown as part of the lands sold; although his title papers may comprehend them. *Beverley v. Lawson*, 3 Munf. 317.

Vendee Cannot Recover from Assignee.—The vendee of land having paid a part of the purchase money to the assignee of his bond for the same, it turns out that the quantity of the land is deficient, and that the money already paid to the assignee is more than the vendee was bound to pay. *Held*, he has no equity to recover back the excess from the assignee. *Crawford v. McDaniel*, 1 Rob. 448.

Agreement to Refund on Eviction.—Where a vendor sells the land of his wife without a conveyance, and part of price is paid with the understanding expressed in the receipt for the sum paid, that if a third person's heirs (who were likewise the heirs of the wife), got a redivision of their ancestor's lands (whereof the land sold is part), the vendor is to pay the vendee his money back and wife dies intestate without having had issue, and the heirs get the land from the vendee by legal proceedings, the latter is entitled to have his money, so paid upon a consideration that failed, refunded by the vendor. *Ferguson v. Teel*, 83 Va. 690.

On Breach of Executory Contract.—The measure of damages on breach of contract for the sale and conveyance of real estate is the contract price, and not the difference between the contract price and the market value of the property at the time of the

breach; and the vendor can only recover the purchase money actually paid and interest thereon. *Stuart v. Pennis*, 100 Va. 612, 43 S. E. Rep. 667; *Thompson v. Guthrie*, 9 Leigh 101.

Where Lands of Public Debtor Sold by Commonwealth.—When the commonwealth sells the lands of a public debtor, and the purchaser is afterwards evicted by title paramount, the purchaser has no redress against the commonwealth; as the law authorizes a sale of all the estate and interest of the debtor. The rule *caveat emptor* applies in such case. *Commonwealth v. McClanahan*, 4 Rand. 482.

Where Vendee Buys Up Better Title.—If a vendee buys up a better title than that of his vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title. *Roller v. Effinger*, 88 Va. 645, 14 S. E. Rep. 337.

And where a vendor conveys with covenants of general warranty, and adverse titles are set up which the vendor buys in, it is no objection that the conveyances for such bought in titles are made to the vendor, in a suit by the vendee claiming an abatement of purchase money for defective titles. *Thompson v. Edwards*, 3 W. Va. 660.

Recovery for Improvements.—To entitle a party in equity to an allowance for improvements, he must have been a *bona fide* possessor under a defective title, supposed by him to be good. *Effinger v. Hall*, 81 Va. 102; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. Rep. 564.

Or the vendor must have been guilty of a fraud by permitting such improvements, without giving notice to the possessor, or of gross laches in asserting his claim after he was apprized of it. *Morris v. Terrell*, 2 Rand. 6.

But the compensation must not exceed the amount due for rents and profits. *Irick v. Fulton*, 3 Gratt. 198.

Cannot Recover under a Mistake of Law.—One having notice of facts rendering his title inferior to that of another, who by mistake of law regards his title as good, cannot claim for permanent improvements. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Effect of Notice on Recovery.—Persons who occupy lands under defective titles and make thereon permanent and beneficial improvements with notice, actual or constructive, of the infirmity of their titles, cannot, upon the recovery of the lands by the rightful owners, obtain compensation for improvements. *Lamar v. Hale*, 79 Va. 147; *Effinger v. Hall*, 81 Va. 95.

And under our statute, (ch. 91, Amend. Code of W. Va.), a claimant, who has been evicted from land by the true owner, is not entitled to compensation for permanent improvements placed by him upon the land, when it is shown that both the owner and such claimant derive title from the same grantor, and that, at the time of the conveyance to the claimant, the deed of the owner had been duly recorded in the proper county, although the claimant may not have had any actual notice of the better title, unless the owner had been guilty of fraud or laches in not notifying such claimant to desist, when he knew the improvements were being made by the claimant under a mistaken belief that his title was good. *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. Rep. 564.

Where Vendee Surrenders Property without Reservation He Cannot Recover.—When a purchaser of real property makes permanent improvements thereon attached to the freehold, and then being unable to pay for it surrenders the property to the vendor, without express reservation of the improvements and cancels the contract of purchase, the

improvements go with the property back to the vendor. *Patton v. Moore*, 16 W. Va. 428.

Vendee Not Chargeable with Rent or Improvements, Made or Land Cleared by Him.—Where the court of chancery is adjusting the mutual rights between the occupier of land, who has made improvements under the belief that he had a just claim, and the real owner of the land, it will adopt the rule which the Code prescribes in actions of ejectment, and will estimate against the occupant the annual value of such part of the premises, if any, as was improved and in a state fit and prepared for cultivation at the time he took possession thereof, and will credit him with the value of all improvements made thereon; but will not charge him for the use of any improvements made upon the land by him, or for the use of any part of the land cleared by him. *Fishack v. Ball*, 84 W. Va. 644, 12 S. E. Rep. 866.

V. SALE IN GROSS OR BY ACRE.

The law on this subject is so well settled, it will suffice to refer to the foot-notes in which the cases are collected and the subject fully treated. See foot-note to *Watson v. Hoy*, 28 Gratt. 698; *Caldwell v. Craig*, 21 Gratt. 132; *Crawford v. McDaniel*, 1 Rob. 448; *Blessing v. Beatty*, 1 Rob. 287; *Keyton v. Brawford*, 5 Leigh 39; *Quesnel v. Woodlief*, 6 Call 218; *Pendleton v. Stewart*, 5 Call 1; *Jolliffe v. Hite*, 1 Call 301.

A. PURCHASER ENTITLED TO ABATEMENT OF PRICE.—It is well settled that if a deficiency in quantity is found to exist where the contract is a sale by the acre, the purchaser will be entitled to an abatement for the value of the deficiency, and that a court of equity will, even after a conveyance is executed, abate the deficiency from the unpaid purchase money. *Thompson v. Catlett*, 24 W. Va. 524; *Koger v. Kane*, 5 Leigh 606; *Bartlett v. Bartlett*, 37 W. Va. 235, 16 S. E. Rep. 453; *Butcher v. Peterson*, 26 W. Va. 447; *Sergeant v. Linkous*, 83 Va. 664, 3 S. E. Rep. 295; *Watson v. Hoy*, 28 Gratt. 698; *Hoback v. Kilgore*, 26 Gratt. 442; *Nelson v. Matthews*, 2 Hen. & M. 164; *Bee v. Burdett*, 23 W. Va. 744; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. Rep. 461; *Board v. Wilson*, 34 W. Va. 609, 12 S. E. Rep. 778; *Grantland v. Wight*, 2 Munf. 179; *Fleet v. Hawkins*, 6 Munf. 188; *Humphreys v. McClanahan*, 1 Munf. 493.

But a purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, appearing, (also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken. *Hull v. Cunningham*, 1 Munf. 336.

And where a party, by an agreement in writing, contracts to sell a tract of land, describing it by a general local description, and as being the same land conveyed to him by a third party, the vendee has a right to look to the records for a description of the land; and if it there appears that the land is described by metes and bounds, and containing a certain number of acres, such vendor will be regarded as representing the land to contain the number of acres mentioned in said recorded deed. *Boggs v. Harper*, 45 W. Va. 551, 31 S. E. Rep. 943.

Though land be sold in gross, for so much, be it more or less, yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a court of equity will give relief for a deficiency. But if the purchaser do not (by eviction or otherwise), lose the land he expected to get; but make no entry for it as vacant, and obtain a patent, the measure of relief is only the

amount of his expenditure in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit. *Hull v. Cunningham*, 1 Munf. 380.

Principle on Which Abatement Allowed.—The principle upon which equity gives relief in cases of excess and deficiency in the estimated quantity upon the sale of lands, is where there is a mistake; whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other. *Nichols v. Cooper*, 2 W. Va. 347.

One Tract Not Liable for Deficiency of Another.—Land in the hands of a purchaser is not liable for a deficiency of quantity in another tract of land, for the title of which the mortgage is collateral security; there having been no stipulation, known to the purchaser, that the mortgaged premises should be liable for such deficiency. *Davison v. Waite*, 2 Munf. 527.

In Case of Excess Vendee Is Liable.—Whenever it does not clearly appear that land was sold by the tract, and not by the acre, the vendee ought to be responsible for the value of the surplus land found in the tract and if no circumstances appear to give a different rule, such value is to be estimated by the average value, per acre, of the whole purchase. *Hundley v. Lyons*, 5 Munf. 342.

Deficiency to Be Valued as at Time of Contract.—Where land is sold with warranty, and there is a deficiency in the quantity, the purchaser is entitled to compensation for the value of such deficiency, not at the time when it is discovered, but at the time of the contract. *Nelson v. Matthews*, 2 Hen. & M. 164.

Nature of the Demand.—A claim for compensation for deficiency in quantity of land conveyed by deed, where the purchase money has been paid, is a mere personal demand, not cognizable only in equity, but at law, and is subject to the statute of limitations. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. Rep. 1028.

Rule for Estimating Value of Deficiency.—In a case of mere deficiency in the quantity, the general rule of the compensation is according to the average value of the whole tract, but there may be particular circumstances requiring a departure from the rule, and it must be in conformity to the facts of the case. *Nichols v. Cooper*, 2 W. Va. 347.

Abatement for Reservation of Timber Privileges.—A reservation of timber privileges by a vendor, who covenants with general warranty, to his vendor, can be estimated in value and the amount abated from the purchase money due from the vendee. *Thompson v. Edwards*, 3 W. Va. 660.

Failure of Third Party to Pay No Ground for Abatement of Contract.—Where by consent of the vendor, the vendee sold a portion of land to a third party with the understanding that, if he paid for it to the original vendor at the price he sold it for, the deed should be made to him, and he fails to perform the contract, no abatement should be allowed on this ground. *McCoy v. Bassett*, 26 W. Va. 571.

Portion of Land Held by Adverse Claimant.—Where there is a sale of land under an executory agreement, providing for a conveyance with general warranty, and a portion of the land is at the time of the sale in the actual possession of an adverse claimant, and the purchaser buys the land held by the adverse claimant, and the vendor seeks to collect the purchase money from the purchaser, and the purchaser asks an abatement for the land held by the adverse claimant, and it does not appear whether the title of the adverse claimant is paramount or not, it is error to decree the purchase money against the purchaser and the land without

allowing any abatement. As doubt is cast upon the title by such possession of the adverse claimant, before decreeing there should be an inquiry by a commissioner to ascertain the character of the title of such adverse claimant. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. Rep. 68.

VI. WHEN PURCHASER ENTITLED TO RIGHT OF WAY.

The vendor granted land having no access save by private way over other land of his. This way was not named in the deed, but he told the vendee the law gave him that way as incident to grant. Later the vendor granted a tract lying beyond first vendee's land, granting the right of way over the same private way, which was used by both vendees. Subsequently vendor's lands were sold under decree, and purchaser received a deed granting the same right of way. *Held*, this purchaser cannot close this way against first vendee. *Bond v. Willis*, 84 Va. 796, 6 S. E. Rep. 136.

Presumption of Dedication.—Where, at the time of the purchase of real estate, there is a road or right of way, used by the public, such as a public highway, or a road used so long that there may be a presumption of a dedication to the public, the purchaser takes this land subject to such right; and he is not protected even by a deed of warranty against the incumbrances. *Jordan v. Eve*, 31 Gratt. 1; *Deacons v. Doyle*, 75 Va. 258.

Highway Not Embraced in Covenants against Encumbrances.—Where the vendor sells to a purchaser, and conveys with a covenant against incumbrances, it was held that a public highway through the land was not such an incumbrance as was intended by the instrument. *Jordan v. Eve*, 31 Gratt. 1.

VII. RIGHTS, DUTIES AND LIABILITIES OF PARTIES.

A. IN GENERAL.

Liable for Interest on Unpaid Purchase Money.—A vendee of land let into possession, and the purchase money remaining unpaid, shall pay interest thereon, though the vendor be in default, unless he has not only kept the purchase money idle, but given the vendor notice that he has so kept it. *Brockenbrough v. Blythe*, 3 Leigh 619.

Vendee in Possession Liable for Taxes.—Land is sold by executory contract in 1848, and conveyed absolutely in February, 1860; the vendee executing an obligation to pay a debt due for purchase money on the land from the vendor, and to sell the land and pay the vendor "one-third of the proceeds of the land when realized from any sale or sales thereof." The lands are not sold for thirty-four years. No part of the taxes paid by the vendee are chargeable to the vendor. *Caperton v. Caperton*, 26 W. Va. 479, 15 S. E. Rep. 267.

Not Duty of Purchaser to Prepare Deed.—A purchaser is not bound to prepare and tender a deed to the vendor, unless such an obligation can be inferred from the terms of the contract. *Fairfax v. Lewis*, 2 Rand. 20.

Purchaser May Have Unpaid Purchase Money Applied to Encumbrances.—Where a person buys land and obtains from his vendor a deed therefor with covenants of general warranty, and the land at the time it was so purchased and conveyed, was encumbered with a deed of trust executed by his vendor, the purchaser has the right to have the unpaid purchase money remaining in his hands applied in discharge of the trust debt. *Douglass v. Rutherford*, 25 W. Va. 708.

Where Purchase is Joint Each Entitled to Equal Share.—Where there is a joint purchase of land by two, to whom it is conveyed, and who give their

joint and several bond for the purchase money they are entitled to equal proportions in the absence of any agreement to the contrary. *Jarrett v. Johnson*, 11 Gratt. 327.

Land Bought at Tax Sale by One Cotenant Held in Trust for Other.—Where a cotenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his cotenants, or he will be held to be a trustee holding the legal title for their mutual benefit. *Parker v. Brast*, 45 W. Va. 399, 32 S. E. Rep. 299.

Where Purchaser Pays Encumbrance Only Entitled to Credit to Amount of Encumbrance.—If the purchaser agree to pay a certain sum, in discharge of an encumbrance, for which he is to have a credit in part of the purchase money; and it does not appear that the vendor deceived him with respect to the sum for which the removal of such encumbrance could be obtained, he is not to be credited for any larger sum than the encumbrances may compel him to pay. *Mayo v. Purcell*, 8 Munf. 243.

Purchaser Chargeable with Rents and Profits.—*Pendente lite* purchasers occupying the estate, when the record charges their grantor with fraud in fact in the acquisition of the property, are chargeable with rents and profits. *Stout v. Mfg. Co.*, 41 W. Va. 339, 23 S. E. Rep. 572.

When Purchaser Becomes Personally Liable.—A purchaser who has notice of the rights of another in a tract of land, and sells it to a third person without giving notice thereof to him, so as to place the subject in controversy beyond the reach of the right owners, becomes personally liable for the demand. *Tompkins v. Powell*, 6 Leigh 576.

Where Purchaser Liable to Pay Purchase Money Twice.—Where receiver collects the money from a purchaser at a judicial sale before giving the required bond, and fails to account, though he may afterwards give the bond, the purchaser may be compelled to pay the money a second time. *Woods v. Ellis*, 85 Va. 471, 7 S. E. Rep. 852.

Vendor Compelled to Receive Confederate Money.—Where a vendor filed a bill to enforce his lien and the defendant answered that it was intended by both parties that the purchase price was to be paid in confederate money, it was held that the vendor was compelled to accept it, there being nothing in the bonds reserving the title, indicating a contrary intention. *Harrison v. Farmer's Bank of Va.*, 4 W. Va. 393.

Vendor Entitled to Exoneration at Expense of Land.—When it is expressly or impliedly agreed that an incumbrance shall be deducted from the consideration, or paid by the purchaser, the vendor stands in the position of a surety, and is entitled to exoneration at the expense of the land. *Curry v. Hale*, 15 W. Va. 397.

So where B. purchases a tract of land of W. and takes a general warranty deed, and afterwards ascertains that judgments in favor of divers persons have been recovered and docketed against W., and to save his land from being sold to satisfy said judgment liens, B. pays off the judgments, he is entitled to be subrogated to the liens of such judgment creditors against any other land owned by W. *Beall v. Walker*, 26 W. Va. 742.

And where a vendor and vendee enter into a written contract for the sale of a tract of land at a stipulated price, which the vendee agrees to pay in future instalments, but fails to make the payments, or any of them, and then assigns the benefit of his contract or purchase to a third party, who takes possession of the land under the assignment, the third party, in the absence of a valid and bind-

ing agreement to pay the same, is not personally liable to the vendor for the unpaid purchase money due upon the land from his vendee. *Fisher v. Brown*, 24 W. Va. 713.

Purchaser Liable for Support in Planter Agreed.—When a father and mother enter into a contract with their son, whereby they sell to the son a small farm, and, as part of the consideration therefor, the son agrees to comfortably support his parents during their lives; and the contract stipulates that it is expressly understood by all parties that the parents are to reside on the farm, and occupy a portion of the dwelling house, and the son another portion of the house and that the son is to keep his parents in eating at his table the same as he has for himself. *Held*, that the son is bound to comfortably support his parents at the dwelling house on the farm, and not elsewhere. *Korne v. Korne*, 30 W. Va. 1, 8 S. E. Rep. 17.

Right of Survey.—Where there is a sale of land by the acre, a right of survey exists whether expressly reserved or not; and if no time is limited for making the survey, it may be made at any time before the whole business is closed between the parties. *McCoy v. Bassett*, 26 W. Va. 570.

Purchaser May Retain Enough Purchase Money to Indemnify Him against Dower.—Where a vendor sells a tract of land to his vendee, and executes to the vendee a deed, in which his wife joins, but the certificate of acknowledgment is so defective in form as not to release the contingent dower of the wife, part of the purchase money having been paid in cash, and time having been given for the residue, specific performance of the contract will not be enforced by compelling the payment of the residue of the purchase money, unless the defendant is allowed to retain a sufficient amount of such purchase money to adequately indemnify him against such contingent right of dower. *Thorn v. Sprouse*, 39 W. Va. 706, 20 S. E. Rep. 676.

When Purchaser Becomes Personally Liable for Purchase Money.—Where a debtor sells and conveys his land to a purchaser who assumes the payment of certain debts of the vendor in consideration of the conveyance, the purchaser becomes personally responsible for the payment of the debts, and, as between him and his vendor, is primarily liable. *Moore v. Triplett*, 96 Va. 603, 32 S. E. Rep. 50.

And an agreement between a vendee and a second purchaser, that he shall pay the debt of the vendee to the vendor for the land, must be understood as subject to the same limitations and exceptions, as if the contract had been to pay the money to the vendee himself. *Bumgardner v. Allen*, 6 Munf. 439.

Duty of Purchaser to See to the Application of Purchase Money.—Where a charge upon land by a will for the payment of debts is general, a purchaser from the personal representative is not bound to see to the application of the purchase money. *Meek v. Thompson*, 8 Gratt. 184.

And a purchaser from a trustee who is invested with a power of sale for the purpose of reinvestment is not bound to see to the application of the purchase money except where the sale amounts to a breach of trust on the part of the trustee, and the purchaser has notice of the breach, either from the face of the transaction itself, or otherwise. If he has such notice as makes him a party or privy to the trustee's misconduct, the property will be affected in his hands with the trusts which previously attached to it, otherwise not. *Redford v. Clarke*, 100 Va. 115, 40 S. E. Rep. 630.

B. DUTY OF VENDOR TO MAKE CONVEYANCE.—A purchaser entitled to good title need not pay

purchase money until he gets good title. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. Rep. 249; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. Rep. 255.

And it is error to decree payment of purchase money before the time fixed in the contract. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. Rep. 102.

But where a deed has been accepted, the purchaser cannot refuse to pay purchase money, unless his grantor is insolvent, or the title is proven to be bad, or a suit endangering it is actually pending or threatened, and in the last case the grounds of suit must be given, and they must be such as ought to cause a reasonable man to fear loss of his land. *McClagherty v. Croft*, 43 W. Va. 272, 27 S. E. Rep. 246; *Jackson v. Welsh*, 51 W. Va. 482, 41 S. E. Rep. 924.

Administrator Need Not Recite Authority in Deed.—Where a party, describing himself as an administrator, sold and conveyed a tract of land to a purchaser, reserving a vendor's lien upon the face of the deed to secure a portion of the purchase money, it is not necessary to the validity of the deed that he should recite his power and authority to sell said land on the face of the deed, but it is regarded as the better practice to do so. *Bartlett v. Bartlett*, 34 W. Va. 33, 11 S. E. Rep. 732.

Purchaser May Abandon Contract.—If a vendor fails to make good a general warranty deed, free from all incumbrances, at the fixed time agreed upon for the consummation of the sale, because of incumbrances, the vendees have the right to abandon their purchase and cancel their contract; and, if the vendor refuses to place them in *statu quo*, they may apply to a court of equity for relief. *Parsons v. Smith*, 46 W. Va. 728, 34 S. E. Rep. 922.

And if the terms of the agreement be, that the vendor binds himself to make the conveyance, and the vendee binds himself and his heirs to make payment, etc., on the day of the execution of the conveyance, and no conveyance be made or tendered by the vendor in his lifetime, the vendee is not bound to accept a conveyance from his heirs, but may waive the contract altogether. *Spindle v. Miller*, 6 Munf. 170.

When Impossible the Deed Need Not Be Made until Money is Payable.—When it is not in the vendor's power to make a deed before the purchase money is due then it is not a breach of contract in failing to make and tender a deed to the vendee before the money is payable. *Snodgrass v. Wolf*, 11 W. Va. 158.

Deed Fraudulently Obtained Not Available for Specific Execution.—When a contract in writing, for land, is delivered to a third party as an escrow, not to be delivered by the holder as a contract, but upon the order of the vendor, which is fraudulently obtained from the holder by the vendee upon false pretenses and withheld when demanded, he cannot make it available for the purposes of a specific execution. *Booth v. Hartley*, 3 W. Va. 478.

Definite Time Fixed for Payment of Money and None for Making Deed, Does Not Constitute Latter a Condition Precedent to Former.—Where there is a definite time stated for the payment of the purchase price and none fixed for making the deed the latter is not a condition precedent to the former. *Clarke v. Curtis*, 11 Leigh 559.

And in a suit upon a bond, executed as part of the purchase money for a tract of land, brought by the vendor, which contains the following condition: "This payment is to be made on condition that the title be made good for the interest the heirs of W. L. hold in said land."—a compliance with the condition must precede the collection of the amount of the bond from the vendee. *Hoke v. Jones*, 33 W. Va. 501, 10 S. E. Rep. 775.

Dividing Land into Several Tracts.—Where the land sold is to be laid off in one, two or three tracts, as the vendee may choose, the vendors are not in default for failing to convey until the vendee has made his election, and has caused the land to be surveyed. *Purcell v. McCleary*, 10 Gratt. 246.

Grantees' Satisfaction with Title Not Necessary.—A vendor covenants that on payment of first installment of price he will make title in fee to, and, by such conveyances as the grantees, or their counsel, may reasonably require, convey and release such land in possession to the grantees, free from incumbrances or demands. *Hild* vendor is required by his covenant to convey the land to vendees by deed with proper covenants of title, but the grantees' satisfaction with the title is not necessary as a condition precedent to make the acceptance of the deed obligatory on them. *Gish v. Moomaw*, 89 Va. 376, 17 S. E. Rep. 324.

When by Agreement the Money is to Be Paid and Deeds Delivered on Same Day Makes Delivery a Condition Precedent.—An agreement for the sale of land being, that the vendor shall make and execute deeds of conveyance, and the vendee shall pay, on the day of the execution of the deeds, part of the purchase money, and give bonds for the balance, as soon as the quantity, (supposed to be a certain number of acres,) can be ascertained by an accurate survey, the vendee is not bound to make the payment, nor give bonds for the balance, until the vendor shall first have made or tendered the conveyance; not, withstanding a survey ascertaining the quantity of the land has been made. *Spindle v. Miller*, 6 Munf. 170.

M. dies in November 1861, and by his will directs certain land to be sold. It is valued in December by commissioners at eight dollars per acre; and the administrator *c. t. a.* sells it within sixty days at a private sale, the greater part at ten dollars, and the rest at eight, and the purchaser pays the purchase money, some of it before it is due, and takes the receipts of the administrator for the payments; but the land is not conveyed to him. The parties act in good faith in the transaction. The sale is valid, and the purchaser is entitled to a conveyance of the land, without any conditions to be imposed upon him. *Moss v. Moorman*, 24 Gratt. 97.

VIII. PLEADING AND PRACTICE.

A. VENDOR'S REMEDIES.

1. ACTION OF EJECTMENT.—The action of ejectment is the proper remedy to recover real estate which has been granted by a deed containing a condition subsequent, upon a failure to perform which, the estate is to determine, and at common law it was necessary for a grantor to re-enter upon the estate in order to work a forfeiture, but the necessity for re-entry has been abolished by § 16, ch. 93, Code (1891, p. 709). *Martin v. Ohio R. Co.*, 37 W. Va. 349, 16 S. E. Rep. 589.

2. SPECIFIC PERFORMANCE.

Vendor Must Show Willingness to Perform Contract.—A bill for the specific performance of a contract may be resorted to in order to compel the payment of the purchase money, but the plaintiff must show ability and willingness to perform his part of the agreement. *Wood v. Walker*, 92 Va. 24, 22 S. E. Rep. 533.

B. PURCHASER'S REMEDY.

1. ACTION AT LAW.—Where a purchaser buys real estate the title to which proves bad he may sue for damages, or may abandon the premises, and when sued for the purchase money set up a defense the want of title, or if he has paid the price may sue to recover it. *Newberry v. Ruffin*, 102 Va. 73, 45 S. E. Rep. 733.

But where land is conveyed in consideration of a maintenance bond for the support of the grantors, by which the grantees bind themselves to support the grantors in their families on the land conveyed, no right of action accrues to the grantors, either against the grantees or the land, if any exists, until the grantees fail to perform their covenant and undertaking, as set forth and stipulated in their bond. *Crim v. Holsberry*, 42 W. Va. 667, 23 S. E. Rep. 314.

A vendee of real estate under an unwritten contract who has not paid any part of the purchase money, nor been let into possession, and who has refused to complete the purchase because the vendor has declined to make such a deed as the contract called for, has a full, adequate and complete defense at law to an action against him to recover the purchase money, and will not be entertained in a court of equity to enjoin the prosecution of such an action by the vendor. *Virginia Min. Co. v. Wilkinson*, 92 Va. 98, 23 S. E. Rep. 889.

Suit in Equity Not to Be Changed Into Action of Trespass.—The complainants are seeking by a suit in equity to set off against the unpaid balance of purchase money the unliquidated damages they have sustained by reason of the trespass or trespasses, which cannot be done. Their remedy, if they have been injured as they claim, is at law. A suit in equity cannot be changed into an action of trespass. Nor would the fact of the insolvency of the vendor give jurisdiction to a court of equity to enter such a decree as is prayed for, even if the injury complained of had been caused by the acts of the vendor himself. *Cleaver v. Matthews*, 83 Va. 804, 8 S. E. Rep. 439; *Robertson v. Hogsheads*, 3 Leigh 667; *Buzard v. Houston*, 119 U. S. 347.

B. agreed to convey to H. and N. certain land, they to give for half the price three bonds, with sureties. J. and three others promised to become the sureties, provided the vendees secured them by a trust deed. The bonds were executed and left with a third party until the conveyance and trust deed were given. B. gave possession to vendees but no conveyance, and they gave no trust deed. The bonds remained with third party. H. acquired the rights of his covenantee, and died indebted. B. filed a bill against N. and J. his associates, calling on the latter to answer whether the bonds had been delivered, and on N. whether he was willing to complete the purchase, and if not, then B. asked for a rescission. Defendants answered, denying the delivery, and took depositions sustaining the denial. B. filed amended bill, alleging that the allegations in the original bill were mistaken. He then brought an action at law on the bonds which was enjoined. *Held*, B. could not maintain the action at law, and much less both that action and the suit in equity. *Jones v. Bond*, 86 Va. 81, 9 S. E. Rep. 503.

Action of Assumpsit.—Where a contract of sale of real estate is not by deed, and no conveyance has been made, a vendee can recover back in action of assumpsit what he has paid on the contract, when the conditions have failed, or the contract has been rescinded, or the vendor refuses to comply with his part of the contract. *Bier v. Smith*, 25 W. Va. 830.

Before Title Passes Action Is on Contract.—Before the legal title passes from the vendor on a contract for the sale of land there is no lien and the vendor's remedy in such a case is on the contract, nor can the vendee compel a relinquishment of the title until he clothes himself with equity by the payment of the purchase money. *Yancey v. Mauck*, 15 Gratt. 300.

What Vendor Must Show to Maintain Action.—In 2 Minor's Institutes (4th Ed.) at page 864, it is said:

"The purchaser can maintain no action at law, any more than the vendor, unless he can show that he has performed on his side every condition precedent stipulated for in the contract, and it will be remembered that in the case of mutual and dependent covenants they are looked upon as respectively conditions precedent so that, if the title is to be conveyed, and the purchase money paid at the same time, as the vendor cannot, on his side, as we have seen, recover the purchase money without showing that he was at that time able and offered to convey a good title, so the purchaser cannot recover unless on his side he is able to show a payment or tender of the purchase money at that time (unless he has been discharged from so doing by the vendor), and also a demand duly made of a conveyance, with an allowance of a sufficient time afterwards to prepare it. *Newberry v. Ruffin*, 103 Va. 73, 45 S. E. Rep. 734.

2. SUIT IN EQUITY.—A claim for a deficiency in the quantity of land sold, gives jurisdiction to a court of equity. *Castleman v. Veitch*, 3 Rand. 598.

And the fact that the plaintiff has adequate remedy at law, does not oust a court of equity of its jurisdiction, where relief is sought on the ground that the vendor fraudulently misrepresented the quantity of land sold. *Meek v. Spracher*, 87 Va. 162, 12 S. E. Rep. 397.

But, where a lot is sold which afterwards depreciates in value, and there is no misrepresentation or fraud on the part of the vendor, the vendee cannot enjoin the collection of the purchase money. *Price v. Ayres*, 10 Gratt. 575.

A purchaser, having taken possession of the estate, is not entitled to relief in equity, against a judgment for the purchase money, on the ground, that the title of the vendor is not clearly shewn to be good; but is bound on his part, to prove it bad. *Grantland v. Wight*, 5 Munf. 295.

C. PARTIES.

Previous Agreement to Convey.—In a suit in chancery to recover a tract of land against a vendee on the ground that he had previously agreed to convey the same land, in a certain event, to the plaintiff it seems, that the vendor or his legal representative, ought to be parties. *Lewis v. Madisons*, 1 Munf. 303.

And where necessary parties are not before the court, the statute does not protect the purchasers' title, but it falls with the reversal. *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. Rep. 561; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. Rep. 102.

Suit against Subsequent Purchaser.—The vendee, or his legal representatives, ought to be parties to a suit in chancery brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee. *Duval v. Bibb*, 4 Hen. & M. 113.

And where a vendor files his bill to subject land for the payment of the purchase money, and the vendee answers and says that several portions of the land are held by others, naming them, by title paramount, and shows, in his answer, that the grounds on which such third persons claim portions of the land are such as will put a reasonable man in just apprehension of losing his land, the plaintiff, if he does not concede this, must amend his bill, and set out specifically all the facts within his knowledge with reference to the claim of the third parties; and if he insists that his own title is good, and the land is his, then he must make the third parties whose claims he disputes defendants to the bill, so that a proper decree may be entered, protecting the rights of all parties interested. *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. Rep. 406.

Vendee Purchasing Land in His Own Right and That of Others.—Where a vendee purchased land for himself and as trustee for others whose interest

appears on the face of the title bond executed by the vendor, for the conveyance of the legal title, such beneficiaries were necessary parties to any suit instituted for the sale of the land to satisfy unpaid purchase money, and if not parties they are not bound by the decree. *Grinnan v. Edwards*, 21 W. Va. 347.

Suit for Abatement of Price—Persons Not Named in Contract.—So where a vendee sues for an abatement of the purchase price for deficiency in quantity of land, a person, not named in the contract, but known to vendee to have given his bond for a part of the purchase money, and to be entitled to part of the land, is a proper party defendant. *Meek v. Spracher*, 87 Va. 162, 12 S. E. Rep. 397.

Vendee May Maintain Action in His Own Name Though Others Entitled to Share in Recovery.—Under a written contract between the defendants and plaintiffs for the sale of lands, the latter paid part of the price upon condition the money be refunded if the title, upon examination, proved unsatisfactory. Others, including one defendant, shared the purchase with plaintiff. The title proving unsatisfactory to the plaintiff upon examination, he required the sum paid to be refunded. The defendants claimed a reasonable time to make good the title. *Held*, plaintiff was entitled to abandon the purchase upon the title proving unsatisfactory, and to maintain, in his own name, an action for the sum paid, though others might be entitled to share the money with him. *Averett v. Lipscombe*, 76 Va. 404; *Watts v. Holland*, 86 Va. 999, 11 S. E. Rep. 1015.

D. THE BILL.

Must Allege Tender or Performance.—It may be said that the vendee in his action at law against the vendor for failure to perform his contract must make his part of the contract a condition precedent, as well as must the vendor in his action against the vendee for failure to perform his part of the contract, and each must aver performance of his part of the contract, or tender of performance. *Barrett v. McAllister*, 38 W. Va. 738, 11 S. E. Rep. 224.

And where the answer in a suit alleges defect in title to property received in exchange for land sold, but does not allege that his possession has been disturbed, or file a cross bill, he cannot complain if exceptions to that part of answer is sustained, especially when final decree is without prejudice to his right to sue for such defect. *Meek v. Spracher*, 87 Va. 162, 12 S. E. Rep. 397.

Must Allege Fraud or Mistakes.—Where parties have made a settlement in regard to a transaction, and struck a balance, which has been adjusted by cash or note, it is incumbent on the party complaining of fraud or mistake, by suit in equity, to allege it especially in his bill, and establish it by proof. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. Rep. 897.

Grounds on Which Suit is Based to Be Alleged.—By the words "if the title is questioned by a suit either prosecuted or threatened," is not meant that it is sufficient to allege in the bill that a "suit is threatened" merely, but the bill on its face must allege the grounds upon which the "threatened suit" is based, and which must be such as will put a reasonable man in just apprehension of the loss of his land. *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. Rep. 85.

Sufficiency of Allegations.—In an action upon a written agreement for the sale of a tract of land, setting forth that the vendor agreed to give vendee possession, and a conveyance free of incumbrances, on or before a certain day, for which the vendee agreed to pay to the vendor part of the purchase money on the same day, and to give him for the balance a deed of trust, or such other security as

he might require; and that the conveyance was not to be executed until the first payment was made and security given; the declaration, in behalf of the vendor, sufficiently charged a breach, by stating that the plaintiff was, on that day, in lawful and peaceable possession of the land, and ready to give the defendant possession, with a proper conveyance, clear of all encumbrances; but that the defendant failed to make the payment and give the security. *Moss v. Stipp*, 3 Munf. 159.

When Deed Required to Be Filed.—Upon a bill filed for the payment of the purchase price of land, on a contract which provides that the vendee shall make a deed when price is paid, the court should when entering a decree of sale require the vendee to file such deed as is provided for in the contract. *Hempfield R. Co. v. Thornburg*, 1 W. Va. 361.

E. PLEA.

Plea of Failure of Consideration Not Permitted.—In an action on a bond given for the purchase money of land, the act of 1831 does not authorize a plea of failure of consideration upon equitable grounds which would require a rescission of the contract out of which the bond originated, and a reinvestment of the obligee with the interest in the land alleged to have been sold to the obligor. *Shiffett v. Humane Society*, 7 Gratt. 297.

F. ANSWER.

Amendment of.—If the proofs show that the plaintiff has a cause which entitles him to relief, that it is of a similar nature to that alleged in his bill, and such as might be made available by proper amendment of his bill, the court on the hearing should not dismiss the bill without giving him an opportunity to amend it within a reasonable time. *Doonan v. Glynn*, 26 W. Va. 235.

G. DECREE.

Decree Not to Be Personal.—If in a suit against a vendee and assignee, the proceeds of the sale of the land prove sufficient to satisfy the whole of the purchase money remaining unpaid, and the plaintiff afterwards obtains a personal decree against the assignee for the amount of other instalments of the purchase money, which have become due since the institution of his suit, such personal decree is erroneous and will be reversed. *Fisher v. Brown*, 24 W. Va. 714.

And in a suit to charge land in the hands of a fraudulent purchaser with money, he yet holding the land, that must be subjected; and there cannot be a personal decree against him for the money, though there may be for costs, if the land does not pay the money and costs. If he has sold, he may be charged with the proceeds. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. Rep. 176.

IX. EVIDENCE.

Must Prove Actual Eviction or Superior Title.—Where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of a defect in the vendor's title to part of the tract of land purchased, it is not enough for him to allege such defect or want of title; he must prove an actual eviction, or superior title in some other person. *Yancey v. Lewis*, 4 Hen. & M. 390.

Parol Evidence.—The burden of proof that the proposal has been accepted, and that notice thereof within the time limited has been communicated to the proposer, rests upon the party claiming to have accepted the same. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. Rep. 743.

And in suit by vendors of land sold at public auction, against a purchaser to compel him to comply with the contract, parol evidence is admissible to prove that the written memorandum of contract signed by the auctioneer, does not contain the stip-

ulation relied on as a condition. *Averett v. Lipscombe*, 76 Va. 404.

Evidence Must Be Clear to Sustain Parol Contract.—The evidence must be clear, full and free from suspicion to enable a court of equity to enforce an oral contract for the sale of land. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. Rep. 176.

Declaration of Grantor.—It is well settled that the declarations of a grantor, made subsequent to the conveyance, are not admissible to affect the title of his grantee; and certainly if made a year subsequent. *Casto v. Fry*, 33 W. Va. 449, 10 S. E. Rep. 799.

X. VENDOR'S LIEN.

A. IMPLIED LIEN.

1. **NATURE AND ORIGIN.**—The implied lien of the vendor, as the law formerly stood, was the mere creation of the equity courts according to some authorities, having its origin in the presumed intention of the parties; according to others, in the idea there is a natural equity that the land shall stand charged with the unpaid purchase money. This implied lien has sometimes been described as a kind of equitable mortgage, inherent in the contract of sale; sometimes as a trust attaching to the estate, the vendee being regarded as a trustee for the unpaid purchase money. But whatever may have been the origin and nature of this implied lien, it was never considered as constituting an interest in the land conveyed, or as conferring upon the vendor anything beyond the mere right to charge the property with the payment of his debt. *Gordon v. Rixey*, 76 Va. 699; *Little v. Brown*, 2 Leigh 353.

And *prima facie* the purchase money is a lien on the land, and the burden is on the vendee to show the contrary, and the death of the vendee does not alter or defeat the lien. *Tompkins v. Mitchell*, 3 Rand. 428; *Poe v. Paxton*, 26 W. Va. 607.

2. PROPERTY SUBJECT TO LIEN.

Land.—A vendor of land, not having conveyed the same, or taken a security for the purchase money, has a lien upon the land for satisfaction thereof. *Cole v. Scott*, 2 Wash. 141; *Cole v. Smith*, 24 W. Va. 290; *Williams v. Price*, 5 Munf. 507.

But the implied equitable lien of a vendor upon the subject sold, for the purchase money, does not give the vendor asserting the lien, any claim for the profits of the subject. *Little v. Brown*, 2 Leigh 353.

Equitable Interest.—The vendor of an equitable right or title to land retains an implied lien on it for the consideration, whenever under the same circumstances the vendor of the legal title would hold an equitable lien. The same principle and reason apply to both cases, except that our statutes—§ 1, ch. 75 of Code—qualifies the latter, while it has no effect upon the former. *Poe v. Paxton*, 26 W. Va. 607; *Board v. Wilson*, 34 W. Va. 609, 12 S. E. Rep. 778.

Right of Way.—Where a right of way is sold to a railroad company, the vendee has a lien on the way for the purchase price. *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261.

Leasehold Estates.—By chancery practice implied equitable liens existed for the purchase money of the sale of a leasehold estate as well as for a freehold, and they are still good, if reserved on the face of the deed by which they are conveyed. Code, ch. 75, § 1, p. 475. *Cole v. Smith*, 24 W. Va. 290.

3. **LIEN BY IMPLICATION ABOLISHED.**—The statute of 1849, ch. 119, § 1, provides that the vendor shall have no lien for unpaid purchase money, unless it be reserved on the face of the deed, thus abolishing the lien by implication of law, and substituting in its place a lien by express contract, but this provision was not intended to impart any new quality to the vendor's lien, but to end the vexatious litigation

growing out of the claims for the unpaid purchase money against *bona fide* purchasers of the legal title. *Gordon v. Rixey*, 76 Va. 700; *Stoner v. Harris*, 81 Va. 459; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. Rep. 181. See also, Virginia Code 1887, § 2474.

4. **AGREEMENT TO SUPPORT PAY, ANNUITY DOES NOT CONSTITUTE LIEN.**—The law is well settled that an implied equitable lien does not exist in favor of a vendor of real estate to secure the consideration therefor when such consideration is the maintenance and support of the grantors during life. *McCandlish v. Keen*, 13 Gratt. 615; *Brawley v. Catron*, 8 Leigh 522; *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. Rep. 314.

And where a conveyance is in consideration of a covenant by the grantee that his estate shall pay an annuity, the vendor's lien does not attach upon the property. *McCandlish v. Keen*, 13 Gratt. 615.

But a person conveying real estate may create a lien thereon, and charge the same with his support and maintenance by express words showing his intention to charge the land. *McClure v. Cook*, 39 W. Va. 579, 20 S. E. Rep. 612; *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. Rep. 314.

5. INSTANCES OF LIENS.

Lien on Equitable Title after Acquired Legal Title.

Where land is conveyed by deed of bargain and sale without warranty, in trust to secure a debt by one who has only an equitable, who subsequently obtains the legal title which he sells to D. to whom he conveys it with warranty, it was held that the creditor whose debt was secured by the trust deed only had a lien on the equitable interest. *Doswell v. Buchanan*, 3 Leigh 365.

But a court will enforce the payment of the purchase money and the lien thereof against realty, when the vendor at the time of the sale and conveyance thereof, by deed of general warranty, did not have the title thereto, but who afterwards by arrangement and with the assent of his vendee, procured the legal title to be conveyed to the vendee, the vendee at the time of sale and deed being put in actual possession of such realty by the vendor, and never having been evicted of his possession. *Schilling v. Short*, 15 W. Va. 780.

Lien an Equitable Title.—An implied equitable lien of the vendor of an equitable title or estate, where the contract of sale is unrecorded, will be enforced by a court of equity against the vendee, his heirs, purchasers with notice and his unsecured or general creditors, but not against purchasers for value without notice, nor against mortgage, or trust creditors with or without notice. *Poe v. Paxton*, 26 W. Va. 608.

Lien When Receipt Given for Purchase Money.—A vendor having conveyed a tract of land by an absolute deed of bargain and sale, in which and by receipt at the foot whereof, he acknowledged that the consideration expressed was fully paid, having nevertheless taken the vendee's bonds for the amount thereof and continued to live on the land, by virtue of a parol agreement, that he should retain possession until the contract on the part of the vendee should be fully complied with, retained an equitable lien on the land against a purchaser from the vendee having actual notice of such agreement. *Duval v. Bibb*, 4 Hen. & M. 113.

Void Contract of Married Woman—Purchaser Entitled to Lien for Money Paid under Lands.—A married woman, for her separate use, purchased from a commissioner of a court a tract of land, the sale whereof was confirmed and the title retained to secure the payment of the purchase money. She and her husband, by written contract with M., agreed that in consideration that he would pay for her the purchase money which she had agreed to pay for the land, she would sell and transfer to him her

purchase, and substitute him for herself as purchaser of the land, excepting a specified 20 acres thereof. In compliance with the contract M. was placed in possession of the land sold to him, and he paid for her to the court all her purchase money. Five years afterwards she refused to comply with her contract and reclaimed her land. On a bill filed by M. against S. G. L. and her husband, praying for a specific execution of the contract, and, in case that relief could not be had, then praying that he might be reimbursed the purchase money so paid by him by a sale of the land, it was held (1) that the contract for the sale of her land was not binding upon the married woman. *Held* further, that the purchase money so paid to the court by M. was an equitable charge upon the land, which a court of equity would enforce for his benefit by a sale of the land, unless otherwise paid. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. Rep. 572.

First Vendor May Subject Land after Second Vendee Has Paid Whole Purchase Price to First Vendee.—

Where a vendor, by an executory contract, sold lands on credit, and placed the vendee in possession, and the vendee, without obtaining the legal title from his vendor, or paying all his purchase money, sold and conveyed the land by absolute deed, and collected all the purchase money due from his vendee. *Held*, that the first vendor might subject the land for sale for the unpaid purchase money due to him, notwithstanding the second vendee has paid all he agreed to pay for the land, and received an absolute deed for it from his vendor. *Fisher v. McNulty*, 30 W. Va. 186, 3 S. E. Rep. 593; *Richards v. Fisher*, 8 W. Va. 55.

Money Deposited with Surety Not Secured by Lien—Reservation for Dower.—G. by S. his attorney, sells and conveys land to W.: the conveyance expresses, on its face, that purchase money is all paid; but, in fact, 800 dollars thereof having been paid on day of conveyance, S. on same day, deposits the same in W.'s hands, to indemnify him against a suretyship in certain bonds taken upon *no exerts* against S. as attorney in fact of G. which *no exerts* are afterwards discharged; and 400 dollars are, by the contract, retained in W.'s hands to meet the possibility of dower of G.'s wife, and she is now dead; W. sells and conveys the land to R. *Held*, G. has no lien on the land for the 800 dollars, but has a lien for the 400 dollars with interest. *Redford v. Gibson*, 12 Leigh 882.

Joint Purchaser Entitled to Lien for Surplus on Paying More than His Share.—A and B are joint purchasers of real property. They give their notes for the payment of the purchase money, and receive a conveyance from the vendor. B becomes insolvent, and A pays more than a moiety of the purchase money. A has a lien on the property to reimburse him all that he has paid above one moiety of the purchase money, in preference of the creditors of B claiming under a deed of trust from B, unless they appear to be purchasers without notice. *Tompkins v. Mitchell*, 2 Rand. 428.

B. RESERVED LIEN.

1. **IN GENERAL.**—All vendor's liens for the purchase money of property, unless expressly reserved on the face of the instrument, are abolished by Code 1849, c. 119, § 1. *Roanoke Brick & Lime Co. v. Simmons*, 2 Va. Dec. 70; *Stoner v. Harris*, 81 Va. 460. See also, *Virginia Code 1887, § 2474*.

And a vendor who does not expressly retain a lien for the purchase money in a deed made by him for land has no implied lien thereon on the land, even as against his immediate vendee. *Scraggs v. Hill*, 43 W. Va. 162, 27 S. E. Rep. 310; *Roe v. Paxton*, 26 W. Va. 610.

What Led to Enactment.—The uncertainty in the

state of the law, and the perplexing litigation growing out of it, led to the statute passed by our legislature, which provides, that when a conveyance is made, the vendor should not thereby have a lien for the unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance. *Coles v. Withers*, 33 Gratt. 186.

Extent of the Lien.—The extent of the lien reserved on the face of a deed does not depend upon the extent of the vendor's interest in the land conveyed, but upon the contract of the parties as gathered from the deed itself, in reserving the lien. *Patterson v. Grottoes Co.*, 93 Va. 578, 25 S. E. Rep. 602.

When Vendor May Insert Clause Reserving Lien.—

A vendor in writing agrees to sell to a vendee a tract of land, for which the vendee is to pay a certain price, a portion of which is to be paid in cash at a future day, and then the vendee is to give his notes for the balance of the purchase money payable on time, and when these notes are given, the vendor is to make to the vendee a deed with covenants of general warranty of title, but nothing is said about a reservation in the deed of the vendor's lien or about any security being given for the deferred payment of the purchase money. *Held*, when the deed is executed, the vendor has a right to insert in it a clause reserving a vendor's lien for the unpaid purchase money. *Findley v. Armstrong*, 23 W. Va. 113.

Debt Must Be Described.—A deed for land, retaining a lien for purchase money, must in some way describe the debt, so as to identify it. Literal accuracy is not required. Substantial accuracy, reasonably describing, is sufficient. The description of the charge must be correct as far as it goes, so as to inform creditors and subsequent purchasers what amount is charged on the land, and must be full enough to direct attention to the sources of correct information, and be such a description of the debt as not to mislead or deceive as to its nature and amount. *Goff v. Price*, 42 W. Va. 384, 26 S. E. Rep. 287.

Vendor May Surrender Bond and Still Retain Lien.—

A vendor of land who retains a lien for the purchase price may surrender to the vendee his bond for such purchase price, and accept the bond of another for the amount, and at the same time retain the benefit of his lien, if the parties plainly so agree. *Carper v. Marshall*, 98 Va. 438, 36 S. E. Rep. 526.

Advantages of a Specific Lien.—The advantage of a specific lien is that the holder may subject the property without being involved in a settlement of the general estate of the debtor among his creditors. *Armentrout v. Gibbons*, 30 Gratt. 632.

And a charge reserved upon land may be enforced against it just as a deed of trust or mortgage, without first resorting to the personal property. *Armentrout v. Gibbons*, 30 Gratt. 632.

Court May Decree Payment of Interest on Installments Not Due.—Where there is a vendor's lien reserved and notes given for the purchase money there may be a decree for the payment of annual interest due on the deferred installment of purchase money in accordance with the contract of purchase. *Bowman v. Duling*, 39 W. Va. 619, 30 S. E. Rep. 567.

Lien May Be Reserved on Equitable Estates.—A vendor's lien may be reserved on the face of a deed conveying an equitable as well as a legal estate, and, in the absence of fraud or injustice, the vendor may take a reconveyance of the property conveyed in discharge of the balance of the purchase price. If, however, such reconveyance be set aside, the vendor's lien, in the absence of such fraud or injustice, will be revived and enforced

for the benefit of the vendor. *Dingus v. Minneapolis Improvement Co.*, 98 Va. 737, 37 S. E. Rep. 353.

When Note Payable to Third Party He Is Entitled to Lien.—Where deed conveying land reserves a lien for purchase money, not declaring in whose favor it is reserved, and a note or bond for the purchase money is, at the time of the conveyance, executed by the purchaser payable to a third party, he has a right to the debt, and the right to enforce the lien. *James v. Burbridge*, 33 W. Va. 272, 10 S. E. Rep. 396.

Lien Good Though Other Property Conveyed as Security.—A vendor of land retains the title in accordance with the contract. He has a lien on the land for the purchase money, as against creditors or incumbrancers of the vendee; and this though the vendee has subsequently executed a deed by which he conveys the other property to secure the purchase money. *Lewis v. Caperton*, 8 Gratt. 148.

2. LIEN ON BOTH PERSONAL AND REAL PROPERTY.—A lien cannot be enforced on the land, only when there is one given for both land and personally unless it be ascertained precisely how much of the note represents the price of the land. *Clarke v. Curtis*, 11 Leigh 589.

But where a lease is sold with certain personal property thereon for a gross sum for both, and in the writing transferring the lease and the personal property a lien is reserved for the payment of the purchase money, as between the parties to the contract of sale and those having actual notice of it, the lien will be declared valid and will be enforced by a sale of both real and personal property for the purchase money of both. *Cole v. Smith*, 24 W. Va. 287.

3. ON PROPERTY OF MARRIED WOMAN.—The corpus of a married woman's separate real estate can be affected or charged, by the vendor's lien when it has been reserved, or by a conveyance or specific lien created by deed, in which her husband has united with her, and which she executed after privy examination, whether her trustee has in any way united in the deed creating the specific lien on the separate real estate or not, unless she is restrained by the instrument creating the separate estate from so doing by express words, or by an intent so clear as to be the equivalent of express words. *Weinberg v. Rempe*, 15 W. Va. 831.

Corpus May Be Sold to Satisfy Lien.—Where a deed conveying land to a married woman as separate estate reserves a lien or charge upon it for money, the fee or corpus may be sold for its payment. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. Rep. 1028.

C. LIEN BY RETENTION OF TITLE.—A vendor retaining the title retains a lien on the land for the purchase money in the hands of a second purchaser. *Stuart v. Abbott*, 9 Gratt. 252.

And a vendor retaining the legal title occupies a position different from and higher than one who has parted with the legal title and relies on the mere implied equitable lien. *Yancey v. Mauck*, 15 Gratt. 300.

Statute of Limitations Not Applicable.—Where a vendor of land retains the title for the purchase money, his lien is not affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Hanna v. Wilson*, 3 Gratt. 243.

Binding Although Vendee Conveyed Other Property in Trust to Secure Debt.—In the case of *Lewis v. Caperton*, 8 Gratt. 148, it was held that the vendor retaining the legal title may resort to the land as against creditors and incumbrancers of the vendee, although the vendee had subsequently executed a deed by which he conveyed other property to se-

cure the purchase money. *Stoner v. Harris*, 81 Va. 460.

Y sells land to M and is to convey it when the first payment is made. Before this payment falls due they make an arrangement by which M executes his bond, with Y as his surety, to S for a debt due from Y to S equal to the whole purchase money of the land; and the bonds of M are surrendered to him and destroyed. M becomes insolvent and conveys the land to secure creditors; and afterwards Y is compelled to pay the bond to S. Y not having parted with the title, may subject the land in equity to the payment of the purchase money. *Yancey v. Mauck*, 15 Gratt. 300.

D. ASSIGNMENT.

Nature of Interest Assigned.—An assignee of a vendor's lien is an assignee of a mere chose in action, and the assignment carries no interest in the land upon which the debt is secured. *Gordon v. Rixey*, 76 Va. 694, and the assignor of such a debt therefore has merely a barren legal title, while the beneficial interest is in his assignee, who must be a party to the suit. Equity deals with the real parties in interest and if they are not before the court no proper decree can be made. *Castleman v. Berry*, 86 Va. 604, 10 S. E. Rep. 884; *Campbell v. Shipman*, 87 Va. 655, 13 S. E. Rep. 114; *Grove v. Judy*, 24 W. Va. 294; *Kellam v. Sayre*, 30 W. Va. 198, 8 S. E. Rep. 589; *Penn v. Hearon*, 94 Va. 774, 27 S. E. Rep. 599.

Lien Follows Debt—Priorities.—Where land is sold and notes or bonds which are secured by lien on the land are given for the purchase money, and are assigned, the lien goes with the bond or note. *Page v. Booth*, 1 Rob. 161; *McClintic v. Wise*, 25 Gratt. 448; *Grubbs v. Wysors*, 32 Gratt. 127; *Board v. Wilson*, 34 W. Va. 609, 13 S. E. Rep. 778; *Briggs v. Enslow*, 44 W. Va. 499, 29 S. E. Rep. 1008. And although the evidence of debt is subsequently due to one held by the vendor it will take priority over it. *Briggs v. Enslow*, 44 W. Va. 499, 29 S. E. Rep. 1008.

And a vendor may pursue land in the hands of a purchaser with notice, for the balance of the unpaid purchase money. *Graves v. McCall*, 1 Call 414.

Assignee Takes Subject to Equities of Assignor but Not to Third Parties of Which He Has No Notice.—Though an assignee of a bond given for the purchase price of land takes it subject to any equity of the obligor, that attached to it in the hands of the obligee, he does not take it subject to any of a third person not a party to the bond of which he has no notice. *Moore v. Holcombe*, 3 Leigh 597.

Debts to Be Satisfied in Order of Assignment.—Bonds secured by the vendor's lien assigned at different times to different persons, must be satisfied out of the proceeds of the land upon which they are secured in the order of their assignment. *McClintic v. Wise*, 25 Gratt. 448; *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 581.

In 1859, by written contract, H. and B. exchanged lands, B. giving bonds for boot. H. sold his tract to G. and I., taking their bonds. No conveyances. H. assigned some of the bonds to plaintiff. Then H. G., I. and B.'s widow assayed to annul the exchange the sale, and the bonds. H. took his former land back, and sold it to L. on condition he would assume payment of B.'s bonds, and the widow took possession of B.'s former land; but no care was taken of the assignee's interests. Held, the assignee can subject H.'s former land to the lien of B.'s bonds, and B.'s former land to the lien of the bonds of G. and I. *Ginter v. Breeden*, 90 Va. 565, 19 S. E. Rep. 656.

E. WAIVER OF LIEN.

1. IN GENERAL.—A court of equity will never compel a vendor to part with the legal title until the purchase money has been paid, or the lien therefor

has been waived or extinguished. It has been said to be a natural equity, that when land has been sold it should stand charged with unpaid purchase money, and that a court of equity considers a debt as never discharged until it is paid to the proper person and by the proper person. *Watts v. Kinney*, 3 Leigh 272; *Knisely v. Williams*, 3 Gratt. 265; *Yancey v. Mauck*, 15 Gratt. 300; *Coles v. Withers*, 33 Gratt. 186; *Frazier v. Hendren*, 80 Va. 265.

A lien is generally presumed, and the burden is on the personal purchaser to show that it is waived which must be clearly proved. *McCandlish v. Keen* 13 Gratt. 615.

Under the old law giving an implied lien for purchase money on conveyance of the legal title, as under the present law, where a lien is reserved, it is a difficult matter to show a waiver of a lien; it must be clear. But it is more so where the title is reserved. First, because the very retention of title plainly manifests an intention to still hold the land liable; and, second, a court of equity is so unwilling to make a man give up his land for nothing. The force of this fact the retention of the legal title—will be found often emphasized as of controlling influence. *Cole v. Withers*, 33 Gratt. 186, 193; *Lewis v. Caperton*, 8 Gratt. 148; *Hess v. Dille*, 23 W. Va. 90; *Warren v. Branch*, 15 W. Va. 38. See JUDGE ALLEN's opinion in *Yancey v. Mauck*, 15 Gratt. 300; *Mansfield v. Dameron*, 42 W. Va. 794, 25 S. E. Rep. 527.

Waiver by Releasing Tract Ultimately Liable.—If a person holding a lien on two separate tracts of land releases the tract which is ultimately liable therefor, such release operates in equity to release the other tract, also, if in the hands of a *bona fide* purchaser for value. *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. Rep. 497.

Manner of Waiving.—A vendor's lien may be extinguished by the payment of the purchase money, or it may be waived or surrendered by the voluntary act of the vendor. *Frazier v. Hendren*, 80 Va. 265.

And where land is sold on credit and the title retained, and the vendors bring suit and sell the land under a decree, such sale releases the lien for the purchase money. *Woods v. Ellis*, 85 Va. 471, 7 S. E. Rep. 852.

An Agreement to Rescind.—Where a contract was entered into for the sale of land, the purchase price agreed on and notes given, deed delivered and lien reserved, but subsequently an agreement was made, to rescind the sale at future time, and the deed and notes were to be returned, but before the time for the return of the deed and notes, the vendor filed a bill to enforce his lien, the court held, that by the agreement to rescind the lien was released. *McCutcheon v. Ingraham*, 33 W. Va. 378, 9 S. E. Rep. 260.

Payment of Money Into Court.—Where a father deeds a son land in consideration that he pay his sisters a certain amount of money, which is tendered one of them before the end of a year after the father's death, and which is refused by the sister to which it is tendered and not again demanded, it may be paid into court after proper notice, which will amount to a release of the vendor's lien, so far as it secures that sum. *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. Rep. 812.

Reserving Rent Not Waiver.—Where a tenement was sold and the vendor reserved the rent, the reservation was not a waiver of his lien for the unpaid purchase money. *Kyles v. Talts*, 6 Gratt. 44.

Transfer or Discharge Need Not Be Recorded.—A transfer or discharge of a lien for purchase money need not be recorded to bind a subsequent assignee, it being good as to him though he have no notice of the transfer or discharge, however necessary

notice to the debtor may be. *Tingle v. Fisher*, 20 W. Va. 498; *Fleshman v. Hoylman*, 27 W. Va. 728; *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. Rep. 234.

Release by One Executor.—If one of the executors contracted to release a lien, it being the only security for the debt, would not be enforced in a court of equity against the other executors. *Stuart v. Abbott*, 9 Gratt. 252.

2. BY ACCEPTING NEW NOTE OR TAKING RECEIPT.—Giving a receipt or taking a note, with security, from the purchaser, or taking the note of a third party, specifying in either case that it is for the purchase money, will not, while the title remains in the vendor, be an extinguishment of the vendor's lien, unless the purchase money has been actually paid. And taking a note from the debtor, or a note of a third party, is no discharge of the debt, unless it is expressly agreed between the creditor and debtor that it is in absolute payment thereof. *Dunlap v. Shanklin*, 10 W. Va. 663; *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Hess v. Dill*, 23 W. Va. 90; *Mansfield v. Dameron*, 42 W. Va. 794, 25 S. E. Rep. 527; *James v. Burbridge*, 33 W. Va. 272, 10 S. E. Rep. 396.

Executing New Note to Third Party.—Where the note or bond were originally payable to the grantor in the deed, but afterwards, with his assent, the purchaser takes up that note or bond, and, in place of it, executes one to the third party, this does not extinguish the lien, but the third party becomes entitled to the debt, and to the lien as its incident. *James v. Burbridge*, 33 W. Va. 272, 10 S. E. Rep. 396.

3. BY OBTAINING JUDGMENT.—A vendor does not lose his lien by obtaining a judgment against the vendee for the purchase money of land. *Kane v. Mann*, 98 Va. 239, 24 S. E. Rep. 688.

4. BY ACCEPTING PERSONAL SECURITY.—A purchases a tract of land and gives bonds with B as his surety for the purchase money, but never takes a conveyance, nor pays the money. The vendor does not lose his lien upon the land, by having taken personal security. And in such case, the surety may go into a court of equity to subject the land to the payment of the debt, before he has been compelled to pay it himself. *Hatcher v. Hatcher*, 1 Rand. 53. But see *Warren v. Branch*, 15 W. Va. 21.

But if a contract is made for the sale of land, and nothing be said in the contract about the vendor's lien being reserved, and bond and personal security be taken for the purchase money, this alone will not amount to a waiver of the vendor's lien; but if it be shown by direct evidence, or by the circumstances of the case, that the vendor relied only on the bond and personal security, the vendor's lien is waived, and he would be required to execute a deed without reserving the vendor's lien. *Warren v. Branch*, 15 W. Va. 22.

Executing Conveyance, Taking Bond and Security.—A vendor of land, by executing a conveyance and taking bond and security for the purchase money, discharges the land from his equitable lien; even while it continues the property of the purchaser. *Wilson v. Graham*, 5 Munf. 297.

Surrendering a Bond and Taking an Order Which is Dishonored Not Surrender of Lien.—A vendor of land takes a bond and retains the title, and afterwards he agrees with the vendee to receive an order on a third person for the amount of the bond, the bond is surrendered and the order taken, but when presented the drawee refuses to accept it, the surrendering of the bond does not release the land from the vendor's lien for the purchase money, nor is the vendor bound to wait until the time when the order would have been payable before enforcing his lien. *Knisely v. Williams*, 3 Gratt. 253.

5. BY LACHES.

Laches Must Be Gross and Unexplained.—Laches,

and even gross laches, is not enough to raise a presumption of the payment or the abandonment of a vendor's lien; it must be gross laches unexplained, together with evidence affording the presumption of abandonment of the right. *Ginter v. Breeden*, 90 Va. 573, 19 S. E. Rep. 656.

A party holding a title bond for a track of land assigned to another party in consideration of the assignment of a debt of \$300 on a third party, \$225 of which is conceded to have been paid to the person who assigned the title bond in her lifetime. She lived 17 years after its assignment without asserting any claim for any balance unpaid to her. Her administrator sued to enforce a vendor's lien for a balance of \$75 and interest thereon. He does not produce any note or bond on the third party, and the third party is also dead. The widow of the third party swears that he was able to pay, and did pay, the debt. Under these circumstances, it is proper to treat the debt as paid, and to refuse the relief prayed for. *Duffield v. Butler*, 34 W. Va. 624, 12 S. E. Rep. 776.

6. BY ACCEPTING MORTGAGE OR DEED OF TRUST.—A vendor taking a mortgage of the subject sold to secure the purchase money, can only claim under the mortgage, and according to its terms: the mortgage supersedes the implied equitable lien for purchase money, which but for the mortgage would have attached to the subject. *Little v. Brown*, 2 Leigh 353; *Hunton v. Wood* (Va.), 43 S. E. Rep. 186; *Warren v. Branch*, 15 W. Va. 21.

And where the holder of a vendor's lien joins with the owner of the land charged with such lien in a deed of trust granting the land by the words, "grant, bargain, sell, and confirm," to a trustee in trust to secure a debt to a third party, and to pay the balance of proceeds of sale under it to the owner of the land owning the vendor's lien. Such deed of trust will discharge the vendor's lien as to both the debt secured by the deed of trust and the owner of the land. Such deed of trust is as to the owner of the land a grant, and as to the holder of the lien a confirmation. *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. Rep. 234; *Taylor v. Adams*, *Gilmer* 329.

Additional Property.—A vendor of land retains the title in accordance with the contract. He has a lien on the land for the purchase money as against creditors or incumbrancers of the vendee; and this though the vendee has subsequently executed a deed by which he conveys other property to secure the purchase money. *Lewis v. Caperton*, 8 Gratt. 148.

F. SUBROGATION.

Purchaser under a Void Decree.—A purchaser of land under a void decree, whose money has been applied upon liens on the land valid against the owner of the land, will be entitled to charge such money upon such land by substitution to the right of the creditor, upon disaffirmance of the sale. *Hull v. Hull*, 35 W. Va. 155, 18 S. E. Rep. 49.

Surety Paying Debt.—A owes B a debt evidenced by a note secured by a lien on A's real estate. C executes to B a note of like amount as collateral security for A's debt. If C pays the note executed by him as collateral security, he is entitled to be substituted to the benefit of the lien on A's real estate given to secure the original debt. *Hevener v. Berry*, 17 W. Va. 474.

Where A purchased a tract of land from B and executed his notes for the purchase money and a deed of trust on the land to secure B, and then sells the land to C with the agreement, that C shall take up the notes as they become due, and C does take up the first note, he stands in the shoes of A and not B, and cannot be subrogated to the rights of B in the trust deed. *Bier v. Smith*, 25 W. Va. 830.

Purchaser Paying Lien without Assignment.

Where a purchaser of land, pursuant to his contract, pays a lien on the land, binding his vendor's estate in it, and the contract is abandoned by the parties, and the vendor becomes unable to execute it, though the purchaser took no assignment when he paid the lien, yet he is entitled to be substituted to such lien, and equity keeps it alive for his indemnity. *James v. Burbridge*, 33 W. Va. 272, 10 S. E. Rep. 396; *Hoke v. Jones*, 33 W. Va. 501, 10 S. E. Rep. 775.

Commissioner Advancing Money to Purchaser.—A purchaser executed ten bonds for deferred payments on land purchased of complainant as commissioner. When five were paid a new commissioner replaced him. The new commissioner subsequently reported all the bonds paid, and a deed was made to the purchaser. Complainant filed his bill against purchaser, alleging he had furnished him money to pay the sixth bond, and had obtained judgment for same, and prayed that the vendor's lien reserved on the land when sold be enforced for his benefit. *Held*, he was entitled to the relief prayed for. *Price v. Davis*, 88 Va. 939, 14 S. E. Rep. 704.

Surety Cannot Compel Payment by Principal Debtor before Paying Debt Himself.—Where a vendor's lien is retained to secure the payment of several bonds given for the purchase money of lands, and a judgment is obtained at law by the assignee of one of the bonds against the principal on the bond and his surety, the surety cannot come into a court of equity and compel such assignee to exhaust his vendor's lien before enforcing the collection of his judgment by execution against the surety, although it is shown that the principal debtor is insolvent. *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. Rep. 267. See further, monographic note on "Subrogation" appended to *Janney v. Stephens*, 2 Pat. & H. 11.

G. PRIORITIES.

1. DOWER.

Vendor's Implied Lien.—A vendor's implied lien is paramount to widow's right of dower, although the husband was actually seised of the land during coverture. *Wilson v. Davison*, 2 Rob. 384; *Robison v. Shacklett*, 29 Gratt. 99. But see *Blair v. Thompson* 11 Gratt. 441.

Vendor's Express Lien.—When the legal title is retained until the payment of the purchase money, there is a lien on the land, which is paramount to the dower of the purchaser's widow. *Roush v. Miller*, 39 W. Va. 638, 20 S. E. Rep. 663; *Sinnett v. Cralle*, 4 W. Va. 600; *Hunter v. Hunter*, 10 W. Va. 321; *Holden v. Boggess*, 20 W. Va. 63; *Martin v. Smith*, 25 W. Va. 579.

And the lien remains as long as the legal title is retained. *Roush v. Miller*, 39 W. Va. 638, 20 S. E. Rep. 663; *Poe v. Paxton*, 26 W. Va. 607; *Findley v. Armstrong*, 28 W. Va. 113.

And it is error to decree the sale of the whole of a tract of land, subject to the widow's dower, when it appears that there is a vendor's lien on a one-twelfth interest thereof. The one-twelfth interest should have been sold free from dower. *Sinnett v. Cralle*, 4 W. Va. 600.

Mrs. W. permitted M. to buy, at a sale under a decree, their deceased father's land for much less than its value, on condition he settled part on her. After buying it, he gave her possession of part. After that, he agreed to hold the land in partnership with others. Later, he sold a portion, including what she possessed, receiving, as part payment, another tract, whereof he gave her possession, agreeing to convey it to her, in consideration of money he owed her and her balance of all interest

in the former tract. *Held*, she was a purchaser of the latter tract, and her title is paramount to the interest of M.'s partners and to the dower right of his widow. *Walker v. Grayson*, 86 Va. 337, 10 S. E. Rep. 51.

Conveyance by Husband and Wife to a Purchaser with Notice.—The lien of a grantor for the purchase money is prior to the widow's dower, and a conveyance by the husband and wife to a purchaser with notice will not effect the vendor's lien. *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. Rep. 607.

2. **MECHANICS' LIEN.**—The vendor's lien in this state is superior to the mechanic's lien. *Charleston Lumber & M. Co. v. Brockmyer*, 18 W. Va. 586.

3. **MORTGAGE.**—Where a part of a tract of land is sold subject to a vendor's lien, and the purchasers sell to a subvendee, who executes his bond for the purchase money which is assigned by the vendee to the vendor, the subvendee executes a mortgage on the land informing the mortgagee at the time that he is indebted to the original vendor but failing to state in what way, it was held that the vendor's lien was prior to the mortgage. *Yancey v. Blakemore*, 95 Va. 263, 28 S. E. Rep. 336.

4. JUDGMENTS.

Unrecorded Contract for the Sale of Land.—Land sold and purchased under a written contract which has not been recorded, though the purchasers have paid all the purchase money and have been for years in possession under their contract before a judgment has been recovered against their vendor, is liable to satisfy the judgment. *Young v. Devries*, 31 Gratt. 304. But see *Shipe v. Repass*, 28 Gratt. 716; *Whitehill v. Bassett*, 24 W. Va. 142.

But land sold and purchased under a parol contract, the purchaser having been put in possession, and holding the possession under the contract before a judgment has been recovered against their vendor, is not liable to satisfy the judgment. *Young v. Devries*, 31 Gratt. 304; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. Rep. 591.

Court May Provide for Judgments to Be Paid First.—Upon a bill filed to enforce a vendor's lien the decree may provide for a sale, and that judgments against the vendor amounting to only a small portion of the amount due him shall be paid out of the cash payment at the sale. *Carper v. Marshall*, 98 Va. 438, 36 S. E. Rep. 526.

Balance May Be Applied to Judgment.—A vendor of land, who has retained the title, files a bill against the widow and infant children of the vendee, for a sale of the land to satisfy his debt. The widow answers, claiming dower in the land subject to the vendor's lien. Judgment creditors of the vendee may make themselves parties to the cause, and have the land, subjected to the vendor's lien and the widow's dower, and the balance if any applied to the payment of their debts. *Simmons v. Lyles*, 27 Gratt. 922.

Purchaser by Parol Contract.—A purchaser of land by parol contract which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity has an equitable right in the land purchased, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor. *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. Rep. 591.

5. **PURCHASE UNDER QUITCLAIM DEED.**—The grantee in a quitclaim deed, with covenant of special warranty, which purports to convey "such interest only as they (the grantors) now have, whatever that may be" takes in subordination to a prior unrecorded deed, and such quitclaim deed cannot be introduced in evidence to defeat the title deduced

under the prior unrecorded deed. *Va. & Tenn. Coal & Iron Co. v. Fields*, 94 Va. 102, 26 S. E. Rep. 423.

H. PLEADING AND PRACTICE.

1. ENFORCEMENT OF VENDOR'S LIEN.

a. **Jurisdiction.**—A court of equity has jurisdiction to enforce a vendor's lien on land for the unpaid purchase money. *Robinson v. Dix*, 18 W. Va. 528; *Moore v. Smith*, 26 W. Va. 379.

Even though the bond has been lost, and a copy of the deed cannot be produced by the vendor. *Moore v. Smith*, 26 W. Va. 379; *Robinson v. Dix*, 18 W. Va. 528.

But equity will not sanction the bringing a number of suits to enforce liens against the real estate of a debtor, and thus unnecessarily harass or oppress him. *Peery v. Elliott (Va.)*, 44 S. E. Rep. 919.

Enforcement Matter of Right.—The enforcement of a lien is a matter of right; the specific execution of a contract is a matter of sound judicial discretion. *Smith v. Henkel*, 81 Va. 524.

So on principles of *quia timet* chancery will entertain a bill by a vendee of land against his vendor to compel the vendor to pay out of his own land liens binding the lands of both, where the vendor is insolvent except as to his land, and that may prove inadequate security. *Weekly v. Hardesty*, 48 W. Va. 30, 35 S. E. Rep. 880.

Enforcement Where Vendee Has Sold Land.—Where a lien is reserved for the purchase price of land, and the vendee has sold it, the proper method to enforce the lien is by an independent suit against the original vendee. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. Rep. 565.

Apparent Remedy at Law Not to Effect Jurisdiction.—A vendor seeking to enforce his lien in equity cannot be deprived of his right therein, because of the fact that there is an apparent remedy at law. *Ayres v. Robins*, 30 Gratt. 106.

Property under Control of Bankruptcy Court.—When the bankruptcy court orders the property sold subject to the liens, there is no reason why the state court should not proceed to enforce the liens. *Beall v. Walker*, 36 W. Va. 741.

And where neither the bankruptcy court, the assignee nor any creditor objects, the state court has jurisdiction to proceed with such suit to enforce the liens. *Beall v. Walker*, 36 W. Va. 741.

b. **Venue.**—Where a bill was filed to enforce a vendor's lien on land, a portion of which was in Maryland and a portion in West Virginia, it was held that the Maryland court could proceed to a decree and have land in Virginia sold to satisfy the lien and such proceedings were not subject to the Virginia court unless the Maryland court was mistaken in the law of Virginia applicable to the case. *Piedmont C. & I. Co. v. Green*, 3 W. Va. 54.

2. PARTIES.

a. **In General.**—In a suit to enforce a vendor's lien on land it is not necessary to make persons having subsequent liens thereon parties, nor to have an account taken to ascertain the priorities of the liens. *Arnold v. Coburn*, 32 W. Va. 272, 9 S. E. Rep. 31; *Linn v. Patton*, 10 W. Va. 187; *Neeley v. Rulesy*, 26 W. Va. 686.

But our cases before and since the statute, § 7 p. 139, Code 1891, require owners of all judgment and all other liens to be brought in up to the date. If the institution of the suit apparent on the judgment lien docket or records of the courts of the county or counties in which the land lies, or apparent in deeds of trust, or other deeds or papers constituting specific liens on record or existing, recorded or not. *Hoffman v. Shields*, 4 W. Va. 490; *Neely v. Jones*, 18 W. Va. 625; *Norris v. Bean*, 17 W. Va. 655; *Marling v. Robrecht*, 13 W. Va. 440; *Bilmyer v. Sherman*, 23 W. Va. 656; *Bansimer v. Fell*, 39 W. Va. 448.

19 S. E. Rep. 545; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. Rep. 227; *Bank v. Watson*, 39 W. Va. 342, 19 S. E. Rep. 413; *Livesay v. Fearnster*, 21 W. Va. 83.

Trustee and *Cestui Que Trust* Must Be Parties.—If land on which a vendor's lien exists is to be conveyed by a trust deed to secure debts it is proper in suit to enforce the lien to make the trustees parties, but unnecessary to make the *cestui que trust* a party before decreeing in favor of the person entitled to the vendor's lien. *Arnold v. Coburn*, 32 W. Va. 272, 9 S. E. Rep. 21.

Trustee Need Not Be Party When Trust Is Released.—Though, when suit was brought to enforce a vendor's lien, the land was under a prior lien by deed of trust, making the trustee and creditor necessary parties, yet where, pending it, the trust has been released by release, revesting legal title in the owner, decree may be made, without making such trustee and creditor parties. *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246.

Original Vendee Who Has Alienated Must Be Party.—Though the original vendee has alienated land conveyed to him with lien for purchase money reserved, yet he must be a party to any suit to enforce the lien. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. Rep. 565.

Assignor Need Not Be Party.—An assignor of a chose in action, though secured by a vendor's lien reserved on real estate, cannot sue in equity for the benefit of his assignee to collect the debt, the assignee must be a party and the reason for the rule is that equity deals only with the real parties in interest, and if they are not before the court no proper decree can be made in the cause. *Penn v. Heaton*, 94 Va. 773, 27 S. E. Rep. 599; *Hurt v. Miller*, 95 Va. 37, 27 S. E. Rep. 831; *Castleman v. Berry*, 86 Va. 604, 10 S. E. Rep. 884; *Campbell v. Shipman*, 87 Va. 655, 13 S. E. Rep. 114; *Grove v. Judy*, 24 W. Va. 294; *Kellam v. Sayre*, 30 W. Va. 198, 3 S. E. Rep. 589.

When Administrator Should Be Party.—In enforcing a vendor's lien against the estate of the vendee after his death the court ought to require the personal estate in the hands of the administrator to be first ascertained, and should ascertain how much of it is applicable to the payment of the purchase money due, and should require the personalty to be so applied, before it decrees a sale of the land to pay the lien. In such case or course the administrator is a necessary party to the suit. *Bierne v. Brown*, 10 W. Va. 748; *Sommerville v. Sommerville*, 26 W. Va. 482.

And in a suit to subject lands descended to the heir, to the payment of the debts of the ancestor, the personal representative of the ancestor is a necessary party. *Sommerville v. Sommerville*, 26 W. Va. 482.

Heirs Should Be Parties.—Where a bill is filed by the administrator of the vendor against the vendee, to subject the land to pay the balance of the purchase money, and vendee answers, and insists that the heirs of the vendor should be made parties; but the court below, without requiring this to be done, makes a decree for the sale of the land. Upon appeal this court amends the decree, and directs that the heirs shall be made parties before a sale of the land. *Mott v. Carter*, 26 Gratt. 127.

Prior Lienors Should Be Parties.—In a suit in equity, to sell land to enforce the payment of the purchase money, if it appears that there is a prior lien for unpaid purchase money on the land, those entitled to the benefit of such prior purchase money lien, should be made parties to the suit. *Dickinson v. Railroad Company*, 7 W. Va. 390.

When Not to Be Parties.—In a suit to enforce a purchase money lien reserved in a deed conveying legal

title, with only a covenant of general warranty, it is not necessary to make prior lienors, holding liens against the property, parties, nor to refer the case to ascertain such liens, unless it appear that the vendor is insolvent. But if the plaintiff in his bill shows such liens, and proposes to have the purchase money go to discharge them, the owners of such prior liens must be parties. *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246.

Judgment Lienors Not to Be Parties.—In a suit by a vendor to enforce a vendor's lien, other lienors having judgment liens on the vendee's lands ought not to be made parties to such suit, nor should a notice to all persons holding liens on the real estate of the debtor be published under § 7, ch. 126 of Acts of 1882, this section having no application to a suit brought to enforce a vendor's lien. *Moreland v. Metz*, 24 W. Va. 119.

Wife Need Not Be Party.—It is not necessary to make the wife a party to a suit in equity brought to enforce the payment of an ordinary purchase money lien debt against the husband in his lifetime where the land was purchased by him. *Holden v. Bogges*, 20 W. Va. 78.

Note Payable to Third Party.—When a note or bond were originally payable to the grantor in a deed, but afterwards, with his assent, the purchaser takes up the note or bond, and, in the place of it, executes one to a third party, he becomes entitled to the debt, and, in a suit by him or his assignees to enforce it, the grantor, or, after his death, his heirs or personal representative, are not necessary parties. *James v. Burbridge*, 33 W. Va. 272, 10 S. E. Rep. 595.

b. Effect of Want of Proper Parties.—Where an order is obtained for the sale of land by one party without notice to other parties interested, and also without their knowledge, it is null and void as to them, and the purchaser is liable for the purchase money, and a lien exists on the land. *Beery v. Irick*, 23 Gratt. 614.

3. STATUTE OF LIMITATIONS.—This court has repeatedly decided that although the remedy on a claim secured by a mortgage, deed of trust, or vendor's lien may be barred at law, yet the remedy in equity to enforce the lien is not affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 531; *Hanna v. Wilson*, 3 Gratt. 243; *Smith v. Washington, etc., R. Co.*, 33 Gratt. 617; *Bowie v. Poor School Society of Westmoreland*, 75 Va. 300; *Stimpson v. Bishop*, 82 Va. 190; *Hull v. Hull*, 35 W. Va. 155, 18 S. E. Rep. 49; *Morehead v. Horner*, 30 W. Va. 548, 4 S. E. Rep. 448; *Wayt v. Carwithen*, 21 W. Va. 516; *Coles v. Withers*, 33 Gratt. 187; *Pitzer v. Burns*, 7 W. Va. 63.

And the personal obligation of a debt is one thing, and a lien for its security another; and the lien is enforceable in equity, although the remedy at law is barred. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. Rep. 565.

4. ORDER OF SUBJECTING LAND CLAIMED.—The law is well settled that where land is subject to the lien of a judgment or other encumbrance, is sold in parcels to different persons by successive alienations, it is chargeable in the hands of the purchaser in the inverse order of such alienations. *Whitten v. Saunders*, 75 Va. 553; *Henkle v. Allstadt*, 4 Gratt. 284; *Jones v. Myrick*, 8 Gratt. 179; *Alford v. Helms*, 6 Gratt. 90; *Miller v. Holland*, 84 Va. 652, 5 S. E. Rep. 701; *Litchfield v. Preston*, 98 Va. 530, 37 S. E. Rep. 6; *Gracey v. Myers*, 15 W. Va. 202.

5. THE BILL.

Original or Supplemental Bill.—Where a judicial sale is confirmed, and the court directs the com-

missioner to convey the land to the purchaser, retaining in the deed a lien for the purchase money, and such conveyance is made, and the purchaser sells the land and conveys it to a third party, and such third party sells and conveys it to others, and the purchaser from the commissioner fails to pay the balance of the purchase money, the lien should be enforced by original bill. If the original cause is ended, or if still pending for any purpose, by supplemental bill filed in such cause. *Glenn v. Blackford*, 23 W. Va. 182.

Not to Be Verified by Affidavit.—Where a bond given for the purchase money for land sold has been lost, though a copy of the deed cannot be produced, a bill properly alleging these facts filed to enforce the vendor's lien should be sustained on demurrer even though it be not sustained by affidavit. *Moore v. Smith*, 26 W. Va. 379.

Accounting and Sale Does Not Render Bill Multifarious.—A bill is not multifarious because it pays for an accounting, and for a sale of land. *Carskadon v. Minke*, 26 W. Va. 729.

Administrator Need Not Show His Authority in Bill.—To a bill filed by an administrator to enforce a vendor's lien, in which he alleges the sale and conveyance of a tract of land to a purchaser, and that there is a balance of the purchase money for the land remaining unpaid, to secure the payment of which a vendor's lien was reserved by him on the face of the conveyance, which was with general warranty, which deed of conveyance and the bond evidencing the amount of purchase money remaining unpaid are exhibited and made part of the bill, a demurrer filed by the defendant will not be sustained, for the reason that the plaintiff does not show by his bill under what authority he sold, and in what right he became invested with the title to land. *Bartlett v. Bartlett*, 34 W. Va. 33, 11 S. E. Rep. 732.

Must State Interest of Parties.—When suit is brought to enforce a vendor's lien, and sales have been made by the vendee of portions of the land against which the lien is sought to be enforced, and the plaintiff files an amended bill, making the purchasers of such portions parties defendant, but fails to set out in such amended bill the interests of such parties, and the dates of their respective purchases, by exhibiting copies of the conveyances to them, or otherwise, such amended bill is demurrable. *McGlaughlin v. McGraw*, 44 W. Va. 715, 30 S. E. Rep. 64.

6. ANSWER—WITHDRAWAL OF.—Where the defendant is entitled to an abatement because of the fraud of the plaintiff in misrepresenting the quantity of the land in the tract sold, the court ought to permit the defendant to withdraw his answer and file a another corresponding with the facts proven. *Depue v. Sergeant*, 21 W. Va. 327.

Relief May Be Asked for in Answer.—If the bill of injunction sets out a deed, in which the vendor's lien is reserved, and alleges, that it is fatally defective in not effectually conveying the contingent right of dower of a wife, who signed it, and alleges that more is for this and other reasons claimed to be due under the deed of trust than is really due, and such bill asks general relief, affirmative relief by the enforcement of the vendor's lien may be asked in the answer; for such relief is confined to matters involved in the original bill. *McMullen v. Eagan*, 21 W. Va. 234.

7. REPLICATION OR REPLY.

Where Answer Sets Up Defenses of Deficiency the Replication Should Be General.—When a bill is filed to enforce a vendor's lien, and the answer asks an abatement of the price on account of a deficiency in the quantity of the land, because of fraud in the vendor misrepresenting in the deed the quantity of

the land, such answer in either case alleges no new matter, which constitutes a claim for affirmative relief within the meaning of § 35, ch. 125 of the Code of West Virginia, but presents simply a defense to the plaintiff's demand, and therefore the court should not permit a special replication to such answer to be filed, but only a general replication. *Depue v. Sergeant*, 21 W. Va. 326.

And where there is an answer calling for a special reply, and there is a general replication to it, and the party filing it has gone on and taken depositions as if there were a special reply denying it, and there has been a full hearing of the merits, as if there had been a special reply, a decree will not be reversed for want of such special reply. *Long v. Perine*, 41 W. Va. 314, 23 S. E. Rep. 611.

8. DEMURRER.

Not Demurrable for Want of Parties.—In suit by vendors to recover price of land, a demurrer will not lie for want of proper parties on the ground that the money, when collected, has been appropriated to pay claims against the vendors. *Woods v. Ellis*, 35 Va. 471, 7 S. E. Rep. 362.

Demurrer Should State Name of Parties.—A demurrer to a bill for want of parties should properly name the necessary parties defendant, who have been omitted so as to enable the plaintiff to amend his bill and call the attention of the court to this defect; and if it does not, the demurrer cannot complain that the demurrer is not sustained; but the court ought in the final hearing of the cause, though the demurrer has been overruled, to decline to determine the cause on its merits, until the necessary parties defendant have been brought before the court by an amendment of the bill and have been given the opportunity to be heard. *Robinson v. Dix*, 18 W. Va. 528.

9. COMMISSIONS AND ACCOUNTS.

Answer Averring Liens but Not Insolvency Does Not Make It Necessary to Refer to Commissioner.—Where a bill was filed to enforce a vendor's lien and the answer averred that there were many judgment liens against the plaintiff's land, and that he did not have other lands beside the tract sold the defendant sufficient to discharge the liens, but did not aver that the plaintiff was insolvent, it was held that this would not justify an order setting aside the order for sale, nor was it necessary to send the cause to a commissioner to inquire into the matters set up in the answer. *Neeley v. Rukeys*, 26 W. Va. 686.

Commissioner Should Retain Title Until Money Paid.—It is bad practice upon the confirmation of a sale of land to order the commissioner to convey the legal title to the purchaser; the title should be retained until the purchase money is all paid. *Glenn v. Blackford*, 23 W. Va. 182.

Where Demurrer Sustained Bill Amended and New Parties Commissioner's Report Should Be Confirmed, and New Reference Ordered.—If a report be made showing the liens on a debtor's land and their priorities, which the bill asks may be sold, and afterwards a demurrer to the bill is sustained and an amended bill filed making a large number of lienors parties, who were not parties to the suit originally, such commissioner's report ought not to be confirmed but a new order of reference should be made by the court to ascertain the liens. *Tavener v. Barrett*, 21 W. Va. 658.

Wherewith Endorsements Bond Filed No Account Necessary.—Where in a suit to enforce vendor's lien the purchaser's bonds with credits endorsed thereon, are filed with the bill, and the answer does not claim additional credits, an account is not required before decree of sale. *Smith v. Henkel*, 31 Va. 534.

Account of Rents and Profits Not Necessary.—In suit to enforce liens reserved in favor of grantor in his conveyance of land, as provided by Code 1873, ch. 115, § 1, the court may decree sale of the land to satisfy the lien, with any previous account of rents and profits. Section 9, ch. 182, Code 1873, applying only to suits for the enforcement of judgment liens. *Neff v. Wooding*, 83 Va. 432, 2 S. E. Rep. 731.

Sale under Decree When Judgment Liens Attach Render Accounting Necessary.—Land which was under a lien for the benefit of the vendor was sold under an executory agreement, and was also sold under a decree for the satisfaction of the lien, but the price received when sold under the decree was not sufficient to pay the debt. The original vendor obtains judgment on one of the purchase money notes and the first purchaser obtains an injunction restraining the execution of the judgment and claiming damages for failure of vendor to make him a deed. *Held*, that it was error to dissolve the injunction, dismiss the bill, without ordering the account between parties. *Nelson v. Phares*, 33 W. Va. 270, 10 S. E. Rep. 308.

Where Lien Reserved.

Accounting Not Necessary.—In a suit to enforce the vendor's lien, the court may decree a sale of the land, on which the lien for the purchase money is reserved, without the amount and priorities of their liens being settled. *Neeley v. Ruleys*, 26 W. Va. 686; *Arnold v. Coburn*, 32 W. Va. 272, 9 S. E. Rep. 21; *Cunningham v. Hedrick*, 23 W. Va. 579; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. Rep. 181. See *Long v. Perine*, 41 W. Va. 314, 23 S. E. Rep. 611.

But in the case of *Payne v. Webb*, 23 W. Va. 558, which was a suit brought to enforce a vendor's lien, the court held: "It is the duty of the court, before it decrees a sale of land, to fix definitely both the amounts and priorities of the liens on it, and the failure to do either will be ground for the reversal of the decree." *Triplett v. Lake*, 43 W. Va. 428, 27 S. E. Rep. 363.

Although a decree of sale is entered, which from the facts then appearing is proper, and a sale is made thereunder, it will still be error for the court by a subsequent decree, which sets aside such sale, to order a resale of the land, if the facts, then appearing in the cause, show the existence of liens, the amounts and priorities of which have not been ascertained and fixed. In such case the court should set aside the former decree of sale and refer the cause to a commissioner or otherwise determine the amounts and priorities of the liens before ordering a resale. *Payne v. Webb*, 23 W. Va. 558.

And in the absence of evidence of record that other liens exist, a court of equity may in a suit to enforce a vendor's lien enter a decree of sale before ordering an account of the liens to be taken. *Shickel v. Berryville, etc., Co.*, 99 Va. 88, 37 S. E. Rep. 818; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. Rep. 246.

10. DECREE.

Decree May Be Personal.—Upon a bill filed by a vendor to enforce a lien reserved for the purchase price of land, the complainant is entitled to a personal decree for the amount of his debt, and also to a decree for the sale of the land if the personal decree be not satisfied. But, in ordinary cases, the better practice is not to allow any execution on the decree until the land has been sold and the proceeds applied to the debt, and then to issue execution for the balance of the debt remaining unsatisfied. *Fayette Land Co. v. Louisville & Nashville R. Co.*, 93 Va. 274, 24 S. E. Rep. 1016; *Delinger v. Foltz*, 93 Va. 729, 25 S. E. Rep. 998; *Ayers v. Robins*, 30 Gratt. 106.

But in the discretion of the court to authorize the

plaintiff to enforce such personal decree without waiting for the collection of the proceeds of the land subject to such lien. *Carskadon v. Minke*, 26 W. Va. 730.

Decree May Be Made without Making Provisions for Future Notes.—In a suit to enforce the lien for one of several notes for purchase money of land, the court may decree a sale of it, without provision for other notes held by the plaintiff, not matured when the suit began, as this may be done in a further decree. *Long v. Perine*, 41 W. Va. 314, 23 S. E. Rep. 611. See also, *Moore v. Green*, 90 Va. 181, 17 S. E. Rep. 872.

But if the court, in enforcing such vendor's lien, aggregates the amount of principal and interest to the date of the decree, and then decrees that the defendants pay interest on such aggregate amount for several months prior to the date of the decree, this is such a mistake as may be safely amended on motion, under § 5 of c. 134 of the Code, and which should be amended on motion in the circuit court. *Triplett v. Lake*, 43 W. Va. 428, 27 S. E. Rep. 363.

11. SALE.

Interest Allowed from Date of Decree.—In enforcing a vendor's lien for purchase money, the court, in rendering its decree, will ascertain the aggregate amount of principal and interest due on the notes executed for such purchase money, for which the vendor's lien is retained, to the date of the decree, and decree that interest be paid on such aggregate from the date of the decree. *Triplett v. Lake*, 43 W. Va. 428, 27 S. E. Rep. 363.

Decree Shall Give a Day for Redemption.—Upon a decree to enforce the lien of a vendor for unpaid purchase money, the decree should give a day to the defendants to redeem the property, by paying up the amount charged upon it. *Kyles v. Tait*, 6 Gratt. 44. And as a general rule, the decree in such a case, should direct a sale on a reasonable credit. *Pairo v. Bethell*, 75 Va. 825; *Brien v. Pittman*, 12 Leigh 579; *Haffey v. Birchetts*, 11 Leigh 58; *Kyles v. Tait*, 6 Gratt. 44; *Tennent v. Pattons*, 6 Leigh 106.

Personal Property to Be Sold First.—In enforcing a vendor's lien against the estate of the vendee after his death the court ought to require the personal estate in the hands of the administrator to be first ascertained, and should ascertain how much of it is applicable to the payment of the purchase money due, and should require the personally to be so applied, before it decrees a sale of the land to pay the lien. *Bierne v. Brown*, 10 W. Va. 748; *Sommerville v. Sommerville*, 26 W. Va. 482. See also, *Camden v. Haymond*, 9 W. Va. 680.

And in a decree enforcing a vendor's lien, the sale should be proceeded with according to the general rules regulating judicial sales. *Alford v. Helms*, 6 Gratt. 90. See cross reference to monographic note on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

12. REVIVOR.—When the plaintiff in a chancery cause, to enforce a vendor's lien dies, the cause of action survives to his personal representative, and may be revived by bill of revivor, *scire facias* or by a simple motion that it proceed in the name of the personal representative of the plaintiff, which may be made without notice to the defendants. *Galner v. Galner*, 30 W. Va. 390, 4 S. E. Rep. 424.

But the defendants may hasten the prosecution or discontinuance of the suit by suggesting the death of the plaintiff on the record, and if no steps are taken to revive the suit in any of these modes, at or before the second term next after that on which the entry of record is made, the court ought to enter an order discontinuing the

cause, which order can never after the adjournment of the court, be set aside, though the court may refuse to enter such order, or may set it aside at any time during the term. *Gainer v. Gainer*, 30 W. Va. 390, 4 S. E. Rep. 424.

XI. BONA FIDE PURCHASERS FOR VALUE AND WITHOUT NOTICE.

A. IN GENERAL.—The rules respecting purchasers without notice are framed for the protection of those who purchase the legal title and pay the purchase money in ignorance of an outstanding equity. *Hughes v. Harvey*, 75 Va. 200.

And a *bona fide* purchaser for value and without notice, is a great favorite of a court of equity, and that court will not disarm such a purchaser of a legal advantage, but we must not permit ourselves to be misled by words or maxims in this matter. *Lamar v. Hale*, 79 Va. 159; *Burwell v. Fauber*, 21 Gratt. 463; *National Valley Bank of Staunton v. Harman*, 75 Va. 606.

Nor will a court of equity be astute to charge a constructive trust upon one who has acted honestly, and paid a full and fair consideration without notice or knowledge. *Wilson v. Wall*, 6 Wall. 83, 90; *Mundy v. Vawter*, 3 Gratt. 518; *Connell v. Connell*, 32 W. Va. 319, 9 S. E. Rep. 252.

Grounds for Making Notice Binding.—The ground of holding a purchaser bound, who has notice of an outstanding title in another, is, that he acts with a corrupt conscience in purchasing what in equity he knows belongs to another. *Bumgardner v. Allen*, 6 Munf. 439; *Curtis v. Lunn*, 6 Munf. 42.

B. WHO CONSIDERED PURCHASER AND ENTITLED TO PROTECTION.

1. **TRUSTEE AND CESTUI QUI TRUST IN TRUST DEED.**—It is well settled that trustees and beneficiaries in a deed of trust to secure *bona fide* debts are purchasers for valuable consideration. *Wickham v. Martin*, 13 Gratt. 427; *Evans v. Greenhow*, 15 Gratt. 153; *Exchange Bank v. Knox*, 19 Gratt. 739; *Gordon v. Rixey*, 76 Va. 694; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. Rep. 813; *Western, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 409; *Douglass Merchandise Co. v. Laird*, 37 W. Va. 687, 17 S. E. Rep. 188; *Shurtz v. Johnson*, 28 Gratt. 657; *Cammack v. Soran*, 30 Gratt. 292; *Williams v. Lord*, 75 Va. 404; *Weinberg v. Rempe*, 15 W. Va. 831.

But a deed of trust unrecorded is void against subsequent purchasers without notice. *Weinberg v. Rempe*, 15 W. Va. 829.

Trustees under a deed of trust to secure antecedent debts are purchasers for value. But whether they are *bona fide* purchasers without notice depends on the facts of the case. The open and peaceable possession of land under a claim of right is notice to all the world of the right or claim of the person in possession; and when one buys land in the possession of another than his vendor or grantor, he is bound to take notice of such possession and of all that it imports. Such notice is the same, in effect, as the notice which is imputed by the recording acts. A subsequent purchaser of such land is affected with notice of whatever claim or interest the person in possession has, and which an inquiry into the possession would have revealed. *Evans v. Greenhow*, 15 Gratt. 153; *Wickham v. Lewis*, 13 Gratt. 427; *Exchange Bank v. Knox*, 19 Gratt. 739; *Shurtz v. Johnson*, 28 Gratt. 657, 667; *Cammack v. Soran*, 30 Gratt. 292; *Williams v. Lord*, 75 Va. 404; *Witz v. Osburn*, 83 Va. 230, 2 S. E. Rep. 33; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. Rep. 813.

Trust Deed on Property Lying in One County When Judgment is Docketed in Another.—Judgments gotten in Accomac county will be subsequent to a deed of trust conveying the equity of redemption in land

being in York county, the judgments not being docketed in Accomac county. the trustee and creditors were held to be purchasers for valuable consideration and without notice within the meaning of § 8, ch. 186, Code of 1860. *Shurtz v. Johnson*, 28 Gratt. 667; *Evans v. Greenhow*, 15 Gratt. 153; *Exchange Bank of Va. v. Knox*, 19 Gratt. 739.

Deed Not Showing Trust—Secret Lien—Bona Fide Purchaser.—Where deeds do not upon their face show any trust to be held upon land therein conveyed, which land has been sold to third parties, judgments against the parties who allege to be secret beneficiaries in the deed, cannot be enforced against the lands in the hands of third parties, who are innocent purchasers without notice. *Hill v. Ruffner*, 3 W. Va. 538.

2. **MORTGAGEE.**—It is well settled that a mortgagee is a purchaser to the extent of his interest in the premises. *Wickham v. Martin*, 13 Gratt. 436; *Gordon v. Rixey*, 76 Va. 698; *Weinberg v. Rempe*, 15 W. Va. 831; *Davison v. Waite*, 2 Munf. 527.

3. **ASSIGNEE AND CREDITORS UNDER ASSIGNMENT.**—The trustee in a deed of assignment made to secure creditors is regarded as a purchaser for value, and, in order to make void the deed, notice of the grantor's fraudulent intent must in some way be brought home to him or to the creditor. *Douglass Merchandise Co. v. Laird*, 37 W. Va. 687, 17 S. E. Rep. 188.

Where a vendor, by executory contract, sells real estate to an insolvent husband, who, after he has appreciated the value of the property by erecting a house thereon, requests the vendor to convey the same to his wife, in order to avoid the payment of a debt, and the vendor, with notice of this purpose, conveys the property to the wife, retaining in the deed a vendor's lien for the unpaid purchase money, such conveyance and retention of lien therein will be fraudulent and void as to the creditors of the husband; and the lien so retained will be held subordinate to the debts of such creditors. But, as between the wife and the vendor, such lien will be held binding, and enforced in a court of equity, even though it includes items not originally a part of the purchase money for the real estate. *Holmes v. Harshberger*, 31 W. Va. 516, 7 S. E. Rep. 452.

Trustee and Creditors under Assignment by Bank.—Where a bank is insolvent, the trustees are trustees of the creditors, not of the bank; and are purchasers and assignees for value of all the property and effects of the bank for the creditors. *Exchange Bank v. Knox*, 19 Gratt. 739.

And where an assignee or trustee accepts the assignment or trust deed, and such deed contains, to his knowledge, on its face, one or more falsehoods on a material point, calculated to deceive and mislead creditors to their injury, he is treated as having notice of his grantor's fraudulent intent, because a falsehood said or done to the injury of the property rights of another is the very essence of fraud. *Douglass Merchandise Co. v. Laird*, 37 W. Va. 687, 17 S. E. Rep. 188.

Assignee of a Purchase Money Bond.—Assignee of purchase money bonds, secured by vendor's lien, is assignee of a chose in action only and not such purchaser of the land for value as will be protected by Code, 1873, ch. 182, § 8. He is entitled to the rights of his assignor, and no more. *Gordon v. Rixey*, 76 Va. 694.

4. **PURCHASER WITH NOTICE FROM PURCHASER WITHOUT NOTICE.**—A purchaser with notice from a purchaser without notice is protected in his title; and the reason is, that if it were otherwise an innocent purchaser might be deprived of the benefit of

Selling his estate. Williams v. Lord, 75 Va. 404; Curtis v. Lunn, 6 Munf. 42.

5. PURCHASER OF EQUITABLE TITLE.—The law is well settled that the purchaser of an equitable title can never claim the rights of a *bona fide* purchaser. The simple fact that his vendor has no legal title is of itself sufficient to give him notice that he is purchasing an imperfect title and to deprive him of the character of a *bona fide* purchaser and the protection which the law accords to such purchaser. Poe v. Paxton, 26 W. Va. 607; Richards v. Fisher, 8 W. Va. 55; Coles v. Withers, 83 Gratt. 186; Morehead v. Horner, 30 W. Va. 548, 4 S. E. Rep. 448; Stoner v. Harris, 81 Va. 461; Yancey v. Mauck, 15 Gratt. 307; Lowther Oil Co. v. Miller Sibley Oil Co. (W. Va.), 44 S. E. Rep. 433.

6. PURCHASER WITHOUT NOTICE FROM PURCHASER WITH NOTICE.—A purchases land with notice of B's equitable right to have a conveyance of the same land, under a prior purchase from their common vendor; and then, A sells the land to C and the vendor makes a conveyance to C, who has no notice of B's equity. *Held*, C, the first purchaser without notice, shall be protected in equity. Tompkins v. Powell, 6 Leigh 576.

And where the first purchaser has not the legal title, and the subsequent one has paid his money, and has not, indeed, the legal title, but the best right to call for the legal title, before he receives notice, he shall be entitled to priority, notwithstanding he has not actually acquired such title. Lamar v. Hale, 70 Va. 156; Mitchell v. Dawson, 23 W. Va. 86.

Vendor Estopped from Collecting Purchase Money.—A vendor who, after sale to a vendee, sells and conveys to another, without notice to the second purchaser of the first sale, the land sold to the first purchaser, is estopped thereby from collecting by specific performance of the contract from the first purchaser the purchase money for the land to the second purchaser. Core v. Wigner, 32 W. Va. 277, 9 S. E. Rep. 36.

C. MUST BE A COMPLETE PURCHASER.

1. REQUISITES OF A COMPLETE PURCHASER.—

1. Must have paid all the purchase money;
2. Must have received a conveyance of the legal title.
3. Must have been without notice of any outstanding equity or adverse claim. Beverley v. Brooke, 3 Leigh 425; Doswell v. Buchanan, 3 Leigh 365; Camden v. Harris, 15 W. Va. 563; Cain v. Cox, 23 W. Va. 594; Webb v. Bailey, 41 W. Va. 469, 23 S. E. Rep. 644.

But the strictness of the rule has been much relaxed, and a purchaser for value is now held to be one, who has paid the purchase money and who though, has not received a conveyance of the legal title, has the best right to call for it. South West Va. Va. Mineral Co. v. Chase, 95 Va. 50, 27 S. E. Rep. 826; Pillow v. Southwest Va. Improvement Co., 92 Va. 144, 23 S. E. Rep. 32; Gregory v. Peoples, 80 Va. 355; Lamar v. Hale, 70 Va. 147; Preston v. Nash, 76 Va. 1; Doswell v. Buchanan, 3 Leigh 365; Mutual Assur. Society v. Stone, 8 Leigh 218; Williamson v. Gordon, 5 Munf. 257; Watson v. Coast, 35 W. Va. 463, 14 S. E. Rep. 249; Marshall v. Hall, 42 W. Va. 641, 26 S. E. Rep. 300.

And the purchaser of a legal title takes it discharged of every trust or equity which does not appear on the face of the conveyance, and of which he has not had notice, either actual or constructive. Evans v. Roanoke Savings Bank, 95 Va. 304, 28 S. E. Rep. 323.

D. ACQUISITION OF LEGAL TITLE.

1. WITHOUT NOTICE OF PRIOR EQUITIES.—It is well settled that a purchaser for a valuable consideration, without notice of a prior equitable right,

obtaining the legal estate or title at the time of his purchase, or before he has notice of such prior equity, will be entitled to priority in equity, as well as at law, according to the maxim, "where equities are equal the law shall prevail." Rorer Iron Co. v. Trout, 83 Va. 397, S. E. Rep. 718; Carter v. Allan, 21 Gratt. 241; Hault v. Donahue, 21 W. Va. 394; Turk v. Skiles, 45 W. Va. 82, 30 S. E. Rep. 234.

And a purchaser of land who has acquired and holds the same by executory contract, duly executed, acknowledged and admitted to record, has from the time it is thus admitted to record a good title against all subsequent creditors and purchasers. Chapter 74, § 4, Code (Ed. 1891), p. 660; Thorn v. Phares, 35 W. Va. 771, 14 S. E. Rep. 399.

Purchaser of Land without Notice of Note Given for Purchase Money in Prior Sale.—A vendor of real estate reserved in the deed of conveyance, a lien for the purchase money to be paid in five years, and a negotiable note was made by the vendee for the amount also payable in five years, but the note was not referred to in the deed. Shortly afterwards the vendor endorsed and transferred the note to a bank in discharge of an antecedent debt. After the note had been so transferred, the same vendor contracted to sell the same property to a third party, who paid the purchase money, and thereupon took from the first vendee a conveyance of the property. The second vendee was wholly ignorant of the existence of the outstanding negotiable note and of any claim on the part of the bank, to the purchase money. *Held*, that the second vendee took the property unaffected by any lien in favor of the holder of the note. National Valley Bank of Staunton v. Harman, 75 Va. 604.

Without Notice of Prior Attachment.—When one purchases without actual or constructive notice of a prior attachment, and for good consideration, he is a *bona fide* purchaser, and his title will be good against the world. But, if he have any notice whatever of the prior attachment, he will take in subordination to it. 1 Shinn Attach. § 421; Wap. Attach. § 880; Bowiby v. Dewitt, 47 W. Va. 323, 34 S. E. Rep. 920.

Sale Made by Trustee—Reinvestment.—Where a sale is made by a trustee under power to sell and reinvest upon the same terms, a *bona fide* purchaser, paying the purchase money to the trustee, will be protected. Claiborne v. Holland, 88 Va. 1046, 14 S. E. Rep. 915.

Purchaser Regarded as Trustee.—When a subsequent purchaser, whether for value or not, whether by deed with covenants of general warranty or of special warranty, whether with or without actual notice or knowledge of the prior purchaser's equitable title by contract executed, duly acknowledged and admitted to record, acquires the legal title, a court of equity regards him and treats him as a trustee, holding the same for the real and true owner, and bound to convey it to such equitable owner when properly requested. Thorn v. Phares, 35 W. Va. 771, 14 S. E. Rep. 405.

And the word subsequent in § 2465, Va. Code 1887, applies to purchasers only. Price v. Wall, 97 Va. 334, 33 S. E. Rep. 599.

Purchaser without Notice of Implied Lien.—In Moore v. Holcome, 3 Leigh 597, it was held that the owner of land who sells and conveys without reserving a lien on the face of the deed, cannot set up his secret implied lien against a subsequent *bona fide* assignment of bonds, who paid valuable consideration for them. Gordon v. Rixey, 76 Va. 604.

Land Liable in the Hands of the Second Purchaser without notice to the Extent of Unpaid Purchase Money.—"Where the vendee of land still retains the

estate is clearly liable for the whole of the unpaid purchase money by virtue of the vendor's lien. Where he has sold to a subvendee, and the title has been made to him, and the money paid before notice of the original vendor's lien, the subvendee holds discharged of that lien. Where, however apart of the purchase money is unpaid by the subvendee, the land in his hands is liable for that unpaid portion, but for no more. The equity is that he shall pay to the original vendor whatever he himself yet owes to his own vendor. If he owes anything, he, and his land are discharged, upon his paying up that to the original vendor's demand; and if he owes nothing, neither himself nor his land is in anywise responsible." *Moore v. Holcombe*, 3 Leigh 597. See also, *Brawley v. Catron*, 8 Leigh 522; *Mitchell v. Dawson*, 23 W. Va. 89.

Purchase without Notice of Right of Way.—Where no private right of way or other easement is reserved in the deed itself, and the purchase has no notice of any such claim, he takes the property without the burden of any such claim, either from the grantor or any person claiming under him. *Scott v. Beutel*, 23 Gratt. 1; *Deacons v. Doyle*, 75 Va. 258.

Purchaser from Cotenant.—A purchaser of the common property from a cotenant, with notice of the character of his title, will be limited in his holding to the actual interest of his grantor in the property. *Parker v. Brast*, 45 W. Va. 399, 32 S. E. Rep. 269.

Purchasers Liable for Annual Encumbrance.—A purchaser, with notice of an annual incumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value of the land. *Blair v. Owles*, 1 Munf. 38.

Equity Disclosed by Title Papers.—In *Morris v. Terrell*, 2 Rand. 6, it was said by the court that "a man who purchased an estate subject to an equity, which the title papers disclose, is bound in the same way as if he had actual notice, although he may never have seen the title papers, and may have been assured by the vendor, and believed that the estate was free from encumbrance. It is folly or wilful neglect not to have resorted to the means palpably in his power of ascertaining the true state of the title to the property for which he had treated." *Effinger v. Hall*, 81 Va. 105.

Assignee Not to Be Affected by Latent Equity.—In the case of *Gordon v. Rixey*, 76 Va. 694, the court, citing and approving *Moore v. Holcombe*, 3 Leigh 597, held that an assignee cannot be affected by a latent equity in the hands of a third person, of which he has no notice; that the secret implied lien of the vendor was a mere creation of the courts of equity, and could not be used to the injury of third persons who had been misled by the conduct of the original vendor. *Stoner v. Harris*, 81 Va. 458.

Purchaser with Notice of Trust Holds Subject to It.—If a grantee holding land in trust convey it to a purchaser for a valuable consideration with notice of the trust, it would be enforced in a court of equity against the purchaser. *Cain v. Cox*, 23 W. Va. 594; *Smith v. Proffit*, 82 Va. 832, 1 S. E. Rep. 67.

Lien against Policy Holders for Quotas Good against Purchasers without Notice.—By the statutes relative to the mutual assurance society against fire on buildings, and the constitution and rules of the society, the society has a lien of property insured, for all quotas called for under the original act of incorporation of 1794, and for additional premiums upon revaluation and reassurance under the act of 1805, and for all contributions required under the act of 1809 or 1819; and this lien attaches to, and

follows, the property in the hands of a subsequent bona fide purchaser without notice of the lien or of the insurance. *Mutual Assurance Society v. Stone*, 3 Leigh 218.

Where Land Subject to a Charge.—Where land is devised subject to a charge under a will which has been probated, a purchaser of the land, if the charge has not been satisfied, cannot hold it as a purchaser without notice. *Burwell v. Fauber*, 31 Gratt. 446. See *Walters v. Hill*, 27 Gratt. 388; *Briscoe v. Ashby*, 24 Gratt. 454.

Equity of Redemption—Sale to Bona Fide Purchaser.—The husband and wife convey the equity of redemption in land belonging to the wife to a trustee, in trust to sell for the use and benefit of the grantors. Held, the land not having been sold by the trustee, he is not entitled to hold it against a subsequent bona fide mortgage without notice, in satisfaction of debts due to him from the husband, or advances made by him to the husband before the mortgage. *McClanachan v. Siter*, 2 Gratt. 280.

Bona Fide Mortgagee May Purchase Equity on Claim Originating before Notice.—A bona fide mortgagee of a tract of land, without notice of any equitable lien in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but, after notice, the lien attaches, for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice. *Duval v. Bibb*, 4 Hen. & M. 113.

Purchaser with Notice of Option.—A third party who, with notice of the equity of the holder of an option, purchased the land from such proposer, takes it subject to the rights of the holder of the option, and holds it in trust for him, and the latter may in equity follow the land into the second purchaser's hands, and compel him to convey the land to him. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. Rep. 220.

2. PURCHASE WITH NOTICE OF PRIOR SALE.—A party purchasing land who is cognizant of a previous purchase by another takes the place of his vendor, and is liable to the same equity, and bound to do that which his vendor should have done under the contract with such other. *Cox v. Cox*, 5 W. Va. 335.

Where a vendee of land failed to record his deed, and gave a trust deed which was not recorded, a purchaser without notice from him or from the commissioner authorized to sell his estate acquired all the title he had free from such incumbrance. *Hunt v. Wood (Va.)*, 43 S. E. Rep. 186.

E. WHERE BOTH CLAIMS ARE EQUITABLE.—It may be laid down as a general rule, that between mere equities equal in all other respects, the elder shall prevail. If however the junior claimant shall have an advantage at law, or superior equity, such party shall prevail. *Cox v. Romine*, 9 Gratt. 37; *Williamson v. Gordon*, 5 Munf. 257; *Coleman v. Cocke*, 6 Rand. 618; *Mutual Assurance Society v. Stone*, 3 Leigh 218; *Doswell v. Buchanan*, 3 Leigh 365; *Camden v. Harris*, 15 W. Va. 563.

Though equitable rights may, in favor of a fair bona fide purchaser, for valuable consideration, and without notice, be lost by a sale, still legal rights never can unless there be a fraud. *Hooe v. Pierce*, 1 Wash. 312.

F. PURCHASE UNDER MISTAKE OF FACT.—The vendee, to whom, under a mutual mistake of fact, the vendor has conveyed more than was bargained or paid for, cannot be regarded, as to such excess,

as a purchaser for value without notice. *Massie v. Heiskell*, 80 Va. 789.

G. WHERE BOTH CLAIMS ARE LEGAL.

Lien of Judgment Not Effected by Notice.—"The lien of a judgment is a legal lien, and the question of notice has no influence upon it. The purchaser takes the legal title subject to the legal lien, whether a purchaser with or without notice." *Taylor v. Spindle*, 2 Gratt. 44; *Rogers v. McCluer*, 4 Gratt. 81; *Gordon v. Rixey*, 76 Va. 702.

H. WANT OF CAPACITY IN VENDOR.

Sale by Married Woman.—If a deed from husband and wife conveying land of the wife be void as to her because of defective certificate of her examination and acknowledgment, and after the death of her husband she convey the land to another with notice of the former deed, yet the second purchaser will not be affected by such notice, the former deed being void and passing no right, legal or equitable, and the second purchaser does not hold the land as trustee for the first purchaser, and equity will not compel him to convey to the first purchaser, nor will it enjoin the second purchaser from prosecuting an action of ejectment to recover the land from the first purchaser's possession or that of his vendee. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. Rep. 61.

Nor will equity refund to the first purchaser, or his vendee, the consideration paid by the first purchaser by personal decree against the second purchaser, or by charging it on the land. The covenant of warranty in the deed binds the woman no further than to pass her land even if valid. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. Rep. 61.

Purchaser under Void Decree.—A purchaser from a purchaser under a decree void for want of jurisdiction will not be regarded a *bona fide* purchaser without notice. He is bound to know the want of jurisdiction in the case. *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. Rep. 1014.

I. PURCHASE OF CONDITIONAL INTEREST.

Where a vendor has a conditional interest and sells, with the knowledge of the vendee, an absolute interest, it was held to be a valid sale. *Reeves v. Dickey*, 10 Gratt. 138.

J. WHERE PURCHASER ENTITLED TO IMPROVEMENTS.—In order to entitle a purchaser to compensation for improvements it must be shown either that he was at the time he made the improvements a *bona fide* occupant and holder of the property, or that the improvements were made by him under such circumstances that it would be a fraud upon his rights to permit the owner to take them without compensation. To bring the purchaser within the first class, it must appear that he not only believed he had a good title to the premises and made the improvements in good faith under that belief, but it must be shown that he at the time had reasonable grounds to believe his title good. It is sufficient to defeat his right to compensation if the title under which he claimed appeared upon its face to be defective; in other words he will not be entitled to compensation if he had the means of obtaining information of the defect in his title. *Hall v. Hall*, 30 W. Va. 779, 5 S. E. Rep. 262.

C bought with notice of infirmity of title, put improvements on the land, and sold it at increased price, and his vendee (H) was evicted as to five-sixteenths. Held C can recover from his vendor only five-sixteenths of the price he received. *Effinger v. Hall*, 81 Va. 94; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. Rep. 2.

K. CONSIDERATION.

Antecedent Debts.—The existence of antecedent debts is a valuable consideration for the conveyance or assignment of property to secure the pay-

ment of the debts, and the trustee and creditors are purchasers for a valuable consideration. *Western, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 409.

Fraudulent Deed Good to Extent It Secures Bona Fide Creditors.—Where a deed is made to hinder, delay and defraud creditors, but which protects some *bona fide* creditors, it is valid as to them, they being regarded as purchasers for value and without notice under ch. 114, § 1, Code 1873. *Evans v. Greenhow*, 15 Gratt. 153; *Witz v. Osburn*, 83 Va. 227, 2 S. E. Rep. 33.

Voluntary Settlements.—Voluntary settlements though free from actual fraud are void against a subsequent purchaser for valuable consideration without notice. *Cain v. Cox*, 23 W. Va. 594.

Liable for Lien Secured by Mortgage.—Land encumbered by a mortgage is liable, in possession of a purchaser with notice, for the sum intended to be secured by the mortgage, but not for other claims of the mortgagee against the mortgagor, especially, if the purchaser has had no notice of the claims. *Davidson v. Waite*, 2 Munf. 537.

Must Take Subject to Amount of Purchase Money Paid.—One buying from holder of legal title, with constructive notice of trust on the land in favor of one who has partly paid the purchase money, must take subject to that trust. *Smith v. Proffitt*, 82 Va. 832, 1 S. E. Rep. 67.

Purchaser to Prevail to Extent of Purchase Money Paid.—Where there is a secret lien on land which is sold to a purchaser with notice, who is put in possession and makes payments on it, he should prevail over the secret lienor to the extent of the purchase money paid by him. *Cox v. Romine*, 9 Gratt. 27.

L. NOTICE.

1. **IN GENERAL.**—Notice is any knowledge however acquired, which is sufficient to put a party on enquiry; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence and ordinary diligence would have apprised him. If the notice is of this character only, it is called constructive notice, but it is as binding on a purchaser, as if he had actual personal notice of all of which a diligent enquiry would have informed him, if he had knowledge of such facts as would put him upon enquiries. *French v. Loyal Land Company*, 5 Leigh 627; *Wood v. Krebs*, 30 Gratt. 715; *Lamor v. Hale*, 79 Va. 147; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. Rep. 713; *Cain v. Cox*, 23 W. Va. 609.

a. **Nature and Sufficiency.**—To charge a *bona fide* purchaser with notice, either express or implied, the notice must be something more than a vague statement that the vendor's title is subject to an equity. It must be such information as to bind the conscience of the purchaser. *Connell v. Connell*, 32 W. Va. 319, 9 S. E. Rep. 252.

And a party will not be considered as having notice unless the circumstances are such that the courts can say, not only that he could have acquired, but that he ought to have acquired the notice but for his gross negligence in the conduct of the transaction in question. *McClanahan v. Siter*, 2 Gratt. 313; *National Valley Bank of Staunton v. Harman*, 75 Va. 608.

It is well settled that what is sufficient to put a person of common prudence, ordinary diligence and business experience upon inquiry will charge him with the actual knowledge of the facts of which a diligent pursuit of that inquiry would have informed him. *French v. Land Co.*, 5 Leigh 627, 655; *Cain v. Cox*, 23 W. Va. 594, 609; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. Rep. 263; *Fouse v. Gillfillan*, 45 W. Va. 213, 32 S. E. Rep. 178; *Coles v. Withers*, 33 Gratt. 186; *Miller v. Holland*, 84 Va. 652, 5 S. E. Rep. 701; *Pillow v. Southwest Va. Imp. Co.*, 92 Va. 144, 23 S. E.

Rep. 32; Robinson v. Crenshaw, 84 Va. 348, 5 S. E. Rep. 222; Lamar v. Hale, 79 Va. 147; Morgan v. Fisher, 83 Va. 417; Lenhart v. Zents, 50 W. Va. 86, 40 S. E. Rep. 444; Keneweg Co. v. Schilansky, 47 W. Va. 287, 34 S. E. Rep. 773.

And the means of obtaining knowledge, with the duty of using them are in equity equivalent to the knowledge itself. Long v. Weller, 29 Gratt. 347; Carneal v. Lynch, 91 Va. 114, 20 S. E. Rep. 959; Eminger v. Hale, 81 Va. 94; Lamar v. Hale, 79 Va. 147; Shelton v. Ficklin, 32 Gratt. 727; Armentrout v. Gibbons, 30 Gratt. 651; Wood v. Krebs, 30 Gratt. 708; Whitlock v. Johnson, 87 Va. 331; 13 S. E. Rep. 614; Clayton v. Henley, 32 Gratt. 65; Davis v. Tebbs, 81 Va. 60.

b. Constructive Notice.

Nature of Constructive Notice.—Constructive notice is in its nature no more than evidence of notice. The presumption of which is so violent that the court will not even allow of its being controverted. Fouse v. Gilfillan, 45 W. Va. 218, 32 S. E. Rep. 185.

And an illustration of this doctrine of constructive notice is, when the party has possession or knowledge of a deed, under which he claims his title and it recited another deed which shows a title in some other person, then the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it. Fouse v. Gilfillan, 45 W. Va. 218, 32 S. E. Rep. 185.

1. BY POSSESSION.

(a) **In General.**—Possession of land is evidence that the possessor has the right to the possession that he enjoys. Generally, a person purchasing a tract of land, is presumed to know who has possession of it, and to ascertain the character of the right by virtue of which he holds the possession; or, if the purchaser fails to do so, he is charged with notice of the character of the right, so far as this may be necessary to sustain the possession. But the possession by a stranger to the title sold or conveyed, having no right of possession whatever, is not notice, and does not put a purchaser on inquiry. Western M. etc., Co. v. Peytona C. C. Co., 8 W. Va. 409; Camden v. Harris, 15 W. Va. 564; Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813; Graff v. Castleman, 5 Rand. 195; Wood v. Krebs, 3 Gratt. 708; Rorer Iron Co. v. Trout, 83 Va. 419, 2 S. E. Rep. 713; Weekly v. Hardesty, 48 W. Va. 39, 35 Rep. S. E. 880; Ellison v. Torpin, 44 W. Va. 414, 30 S. E. Rep. 183; Campbell v. Fetterman, 20 W. Va. 398.

(b) **Possession Need Not Be Continuous.**—But actual possession need not be continuous and unbroken. The vital question is, was he in possession under a claim of right at the time the lands were conveyed. Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813.

Possession Not Notice to Creditors of Grantor.—Actual possession of land is notice to purchasers of the occupant's right to the land, though his title paper is not recorded, whether the subsequent purchaser actually knows of such occupant's right or not; but such possession is not notice to creditors of the grantor of such occupant of the rights of the occupant, whether the creditors have actual notice of his rights or not. Weekly v. Hardesty, 48 W. Va. 39, 35 S. E. Rep. 880.

Information as to Claim of Tenant in Possession May Be Relied on.—When a purchaser has been put upon inquiry by the possession of a tenant, and upon making such inquiry receives information as to the tenant's claim, he may rely on such information, in the absence of anything to give notice of its falsity. Ellison v. Torpin, 44 W. Va. 414, 30 S. E. Rep. 185.

2. BY INSTRUMENTS RELATING TO TITLE.

Recordation of Deed.—Where a deed is recorded it constitutes notice to all subsequent purchasers of the land, of the interest of the grantees therein, and those claiming under them. Clayton v. Henley, 32 Gratt. 65.

And where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice. Fidelity Ins. etc., Co. v. Shenandoah Val. R. Co., 33 W. Va. 244, 9 S. E. Rep. 180; Coles v. Withers, 33 Gratt. 186; Lenhart v. Zents, 50 W. Va. 86, 40 S. E. Rep. 444.

A strong case on the question of constructive notice is Armentrout v. Gibbons, 30 Gratt. 632. There a deed reserving a vendor's lien was duly recorded, and afterwards the record of the deed was destroyed. It was held that the constructive notice afforded by the recordation of the deed was equivalent to actual notice of the existence of the lien, notwithstanding the destruction of the records. Eminger v. Hall, 81 Va. 106.

Recollection of a Deed but Unable to Find It.

Where a beneficiary in a deed of trust not on record remembers that there was such deed, but cannot find it, it is insufficient as constructive notice to one put on inquiry as to such deed. Roanoke Brick & Lime Co. v. Simmons, 3 Va. Dec. 70.

Subsequent Recorded Deed Inferior to Prior Unrecorded Deed.—Where a deed for land is made to A which is not recorded, if B have knowledge of the deed and especially further knowledge that the land was claimed by, and had been in possession of A for a long time prior to a deed to B from the grantor of A, a deed by the grantor of A to B for the same land, although recorded, vests no title to the land in B. Cosgray v. Core, 2 W. Va. 353.

Vendee Takes All by Deed Unincumbered if without Notice.—Where the deed conveys, without reservation, the grantee takes all conveyed by the deed unincumbered, unless in some way notice is brought home to him that the land is sold subject to the incumbrances of some easement or privilege in another person, or in the public. Deacons v. Doyle, 75 Va. 256.

Plat Filed and Mentioned in Subsequent Deed.—With report of sale was filed a plat of the land sold. Deed for the same, to intermediate purchasers, mentioned that plat. Deed to defendant referred to those deeds. Defendant's agent to examine the title, by the deeds, was referred to the plat and the report of sale, and inspection thereof must have given him notice of the plaintiff's rights therein. Held, the defendant is affected with constructive notice of the outstanding title of the plaintiff. Whitlock v. Johnson, 87 Va. 333, 13 S. E. Rep. 614.

Effect of Acquiescence.—Where those to be affected by the improper delivery and recordation of a deed were fully acquainted with the facts, and acquiesced therein for an unreasonable time, and until the rights of third parties have intervened, they will not be permitted to avoid such deed. Connell v. Connell, 33 W. Va. 319, 9 S. E. Rep. 253.

3. BY SUIT PENDING.—*Pendente lite* purchasers are charged with notice of all the facts of which the record of the suit would inform them at the date of their purchase. But this is only for the purposes of that suit, and for the benefit of its parties, not for other separate suits or parties. Stout v. Mfg. Co., 41 W. Va. 339, 23 S. E. Rep. 571.

And *pendente lite* purchasers, after recordation of a notice of *lis pendens*, where that is required,

though not formal parties, are bound by the adjudication touching the property purchased by them, involved in the suit, as if formal parties. *Stout v. Mfg. Co.*, 41 W. Va. 339, 23 S. E. Rep. 571.

4. BY DECLARATIONS AND SILENCE OF OTHERS.

Information from Attorney.—Where a bill was filed to set aside a deed of trust and a sale in pursuance thereof, the defendants claimed to be purchasers without notice, but it was shown by evidence that one of the defendants was told by his attorney that the title was bad, and the other drew a paper settling the property on the grantor's wife and was told by the trustee that the land was owned by the children. So it was held, that the defendants took the property subject to the adverse equities, having had sufficient notice of them. *Dugger v. Dugger*, 84 Va. 180, 4 S. E. Rep. 171.

Purchaser Bound by Declaration of Grantor.—A purchaser from the grantor, as well as all subsequent vendees, where the trust deed is duly recorded, has no greater rights against the creditor than the grantor himself had, and the title and possession of the one are no greater than the other. The purchaser from the grantor is bound by the acts and declarations of the grantor in respect to the trust while he retains the equity of redemption or any part of it. *Camden v. Alkire*, 24 W. Va. 675.

Silence of Claimant at Sale by an Adverse Claimant.

—If the owner of real estate, whether he has the legal title in him or not, permit it to be sold, in his presence, by one who claims he has full power and authority to dispose of the same, it thereby becomes his duty to assert his claim then, and if he does not, but stands by and permits an innocent purchaser to buy the land, he is estopped thereafter from claiming the land of an innocent purchaser on the ground that the person of whom he purchased had no authority to sell such land. *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. Rep. 878.

Declaration by Agent of Adverse Claimant That Arrangements Are Made to Satisfy Claim—Silence of Vendor.—Where land is sold at public auction, and a third person makes a declaration in the hearing of the vendor and the bidders, that he is agent for persons having a claim to part of the land, but that an agreement has been made between him and the vendor, by which the purchaser shall not be injured by the conflicting claims, and the vendor remains silent, he shall be bound by such declaration. *Allen v. Winston*, 1 Rand. 65.

c. Notice to Trustee.—Where property is conveyed to two or more trustees jointly to secure debts, the estate which they take is joint and inseverable, their title joint and indivisible. Hence, notice to one of the trustees is notice to all. There can be no such thing as a purchase partly *bona fide*. And notice to a trustee is also notice to his *cestui qui trust*. *Chapman v. Chapman*, 91 Va. 398, 21 S. E. Rep. 813; *Wickham v. Lewis*, 13 Gratt. 430; *French v. Loyal Co.*, 5 Leigh 627; *Beverly v. Brooke*, 3 Leigh 446; *Fidelity, etc., Co. v. Shenandoah Valley R. Co.*, 33 W. Va. 244, 9 S. E. Rep. 180; *Mfg. Co. v. Coal Co.*, 8 W. Va. 409.

d. Notice before Payment Equivalent to Notice before Contract.—Notice before actual payment of all the money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract, and is sufficient to charge lands in the hands of a purchaser with all the claims legal and equitable which third parties may have upon it. *Webb v. Bailey*, 41 W. Va. 468, 23 S. E. Rep. 646; *Blair v. Owles*, 1 Munf. 88.

But the rule that a purchaser is bound by notice at any time before he receives a conveyance, does

not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. *Lewis v. Madisons*, 1 Munf. 308.

M. PLEADING AND PRACTICE.

1. PARTIES.—When a party purchases land with notice of an equity in a third party, in a suit by such third party to enforce his equity brought after such purchase, such purchaser is a necessary party, if relief by way of sale of the land is given, unless it appear either that he had notice of the suit pending at the time of his purchase, or that notice of his *lis pendens* had been recorded under § 13, c. 139, Code 1887, before such purchase. *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. Rep. 220.

One Joining Deed to Relinquish Collateral Need Not Be Party.—In a suit in equity by the claimant of an encumbrance against a vendee, having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim need not be a party. *Blair v. Owles*, 1 Munf. 88.

A Pendente Lite Purchaser Need Not Be Party.—A purchaser of the land from another *pendente lite*, need not be brought in as a party to the suit. The law imputes notice to such purchaser, for public policy requires that this real property, specifically sued for, shall abide the result of the suit; and such purchaser is as conclusively bound by the decree as if he had been a party from the beginning. *Wilfong v. Johnson*, 41 W. Va. 233, 23 S. E. Rep. 730.

2. PLEA AND ANSWER.

Necessary Averments.—This defense may be made by plea or by answer. But answer, as well as plea must aver all the essentials of the defense, *viz*: (1) That they are purchasers for valuable consideration actually paid; (2) that they have received, or are best entitled to receive, conveyance; (3) that their grantor was in possession of the property at the time; and (4) that these facts happened before notice of the adverse claim. But this defense cannot be made unless it is set up by answer or plea. *Rorer Iron Co. v. Trout*, 33 Va. 397, 3 S. E. Rep. 713; *Lamar v. Hale*, 79 Va. 147; *Doswell v. Buchanan*, 3 Leigh 381; *Mutual Assur. Soc. v. Stone*, 3 Leigh 218; *Hoover v. Donally*, 3 Hen. & M. 316; *Bowby v. DeWitt*, 47 W. Va. 323, 34 S. E. Rep. 919.

And burden of establishing first three essentials rests on alienees; and to affect them with notice of his adverse claims, rests on claimant. *Lamar v. Hale*, 79 Va. 147.

Answer Must Deny Notice Though Not Charged in Bill.—In *Dowman v. Rust*, 6 Rand. 660, *CARR, J.*, said: "A purchaser who claims to be a purchaser for value without notice, must expressly deny notice in his answer, though it is not charged in the bill. This is settled law." And in *Tompkins v. Mitchell*, 2 Rand. 480, this court laid down the same rule in nearly the same language. *Rorer Iron Co. v. Trout*, 33 Va. 397, 2 S. E. Rep. 713.

3. APPEAL.—One not a formal party cannot appeal though affected as a *pendente lite* purchaser. *Stout v. Mfg. Co.*, 41 W. Va. 339, 23 S. E. Rep. 571.

N. EVIDENCE.

Clerk's Certificate as.—Where the clerk gives a certificate that there is no lien on land, while in fact there is, and which lien is a matter of record, the clerk's certificate will not be taken as conclusive, and the purchasers will be charged with constructive notice. *Wood v. Krebbs*, 30 Gratt. 708.

Purchasing Agent as Witness.—A purchasing agent is a competent witness to prove that his principal had notice of an incumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever, for the vendor himself may be pur-

chasing for the vendee by his appointment, and the vendee, by constituting him agent makes him a competent witness to prove the notice. *Blair v. Owles*, 1 Munf. 38.

Burden of Proof.—The burden of proving notice to a purchaser for value is on him who alleges it. It will not be implied from the confidential relation existing between the grantor and the grantee. *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. Rep. 447; *Rorer Iron Co. v. Trout*, 83 Va. 415, 2 S. E. Rep. 713; *Lamar v. Hale*, 79 Va. 147; *Carter v. Allan*, 21 Gratt. 241.

The fact of notice may be inferred from circumstances, as well as proved by direct evidence; and where the facts and circumstances are such as to raise a presumption of notice, the burden of proof is shifted, and it devolves upon the defendant purchaser to prove want of notice. *Newman v. Chapman*, 2 Rand. 93; *French v. Loyal Co.*, 5 Leigh 635; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. Rep. 72.

594 *Brown v. Armistead.

December, 1828.

Executors—Power Given to Sell Land—Right of Administrator.—*C. T. A.*—Where Executors are directed by Will to sell lands, and they renounce the Executorship, an Administrator, with the Will annexed, may sell, under the authority given by our Statute, although the Will directs the Executors to sell, "provided the said land will sell for as much as, in their judgment, will be equal to its value." For, the power of the Executors is rather restricted than enlarged by the proviso. It does not vest any peculiar personal confidence in them. The Executors are made Trustees, and within the limit imposed on the exercise of the power, the trust is imperative, and the Executors having renounced, the case falls within the letter and spirit of the Statute.

Executed Contract—Rescission—Ignorance of Law.—The rescission of an executed contract, will not be allowed merely on the ground of an ignorance of Law, where there is neither fraud, concealment, nor mistake in fact.

Decrees—Infant Defendant—Effect.—Although it is a general rule, that an infant Defendant is not bound by a Decree, if, when he arrives of age, he can show error in it, yet, it seems that, where a Decree is obviously for his benefit, his rights may be absolutely bound by it.

This was an appeal from the Chancery Court of Williamsburg, dissolving an Injunction obtained by the Plaintiff, Samuel Brown, against Stark Armistead, Administrator with the Will annexed of David

***Executors—Power Given to Sell Land—Rights of Administrators.**—*C. T. A.*—On this subject the principal case is cited in *Mosby v. Mosby*, 9 Gratt. 599; *Davis v. Christian*, 15 Gratt. 38. In this last case it was held that a power given to executors will survive, though a discretion is given to them in regard to the exercise of the power.

See further, monographic note on "Executors and Administrators" appended to *Kosser v. Depriest*, 5 Gratt. 6.

†Executed Contract—Rescission—Ignorance of Law.—A mistake in law, when there is no fraud, concealment, nor mistake in fact, constitutes no ground for rescinding a contract. *Ferry v. Clarke*, 77 Va. 409, citing the principal case to sustain the point. To the same effect, the principal case is cited in *Shriver v. Garrison*, 30 W. Va. 478, 4 S. E. Rep. 672.

See generally, monographic note on "Contracts" appended to *Enders v. The Board of Public Works*, 1 Gratt. 364.

†Decrees Infant a Party—Effect.—In *Harman v. Davis*, 30 Gratt. 468, it is said: "Although the infants, were incapable of consenting to the decree, it is binding upon them, if for their benefit—as binding as it would have been if no consent had been given. An infant plaintiff is as much bound by a decree as an adult. *Brown v. Armistead*, 6 Rand. 594." To the point that infant plaintiffs are as much bound and as little privileged as one of full age, the principal case is cited in *Goddin v. Vaughn*, 14 Gratt. 123.

See further, monographic note on "Infants" appended to *Caperton v. Gregory*, 11 Gratt. 505; monographic note on "Decrees" appended to *Evaus v. Spurgin*, 11 Gratt. 615.

Wright, deceased, and others, and dismissing his Bill. The case is fully stated in the following opinion of the Court.

Leigh, for the Appellant.

Johnson, for the Appellee.

December 17. JUDGE CARR delivered his opinion.*

In 1813, David Wright made his Will, in which we find the following clause: "My will and desire is that my Executors hereafter appointed sell at public sale all my land, provided the said land will sell for as much, in their judgment, as will be equal to its value and the money arising from such sale be placed in the hands

595 of my friend *Stark Armistead one of my Executors hereafter appointed, who I vest with power to apply the said money to any use or uses he in his discretion may deem best for the benefit of my wife and all my children." The Testator then adds, "In case the land should not be sold on account of its not selling for its value in the judgment" of those in whom he had vested the power to sell, lends a particular part of it to his wife for life. He appointed three Executors, of whom Stark Armistead was one. The Executors all refused to take upon themselves the execution of the Will. The wife relinquished all benefit under it, and qualified as Administratrix, with the Will annexed. She died between three and four years after her qualification; and on the 9th of February, 1818, the same Stark Armistead, who had been appointed Executor, qualified as Administrator de bonis non, with the Will annexed, and three days afterwards, sold the land to Samuel Brown. The Deed, bearing date the 12th of February, 1818, contains a full recital of all the facts on which the authority of the Administrator to sell the land depended. The land was sold for \$6,560, payable in three annual instalments, to be secured by bonds, with personal security, and also a Deed of Trust on the land. The contract was carried into complete execution by the vendee's accepting the Deed, taking possession of the land, and sealing and delivering the Deed of Trust and Bonds. In 1823, five years after the execution of the contract, the vendee paid \$1,658 of the purchase money, and in April 1824, he filed his Bill, stating that Armistead had no power under the Will to sell the land; that his title is therefore defective, and that he has a right to a Decree, either perfecting it, or if that cannot be done, rescinding the contract, and giving him back his money, with interest, which he prays may be made a lien on the land. He makes Armistead, the Trustee, and the four children of Wright, Defendants. Two of the children are adults, two infants. Armistead and one of the adults are non-residents, and have been 596 properly proceeded against. The Trustee, the other adult, and the infants (by their Guardian,) have answered. The children insist earnestly on the contract; that under the Will, the Law, and the decisions of this Court, the Administrator had full power to sell; that the sale was fair, all the facts being disclosed to

*Absent, JUDGE GREEN.

the vendee; that it was a very good sale for them, and that the Bill has grown out of the subsequent depreciation in the price of lands. The adult Defendant offers to give any security for the title that can be required. The Chancellor dismissed the Bill. We will enquire in the first place, could the Administrator execute the power of sale given by the Will to the Executors? In the 1st vol. R. C. 388, § 52, it is said, "The sale and conveyance of lands devised to be sold, shall be made by the Executors, or such of them as shall undertake the execution of the Will, if no other person be thereby appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it," (thus stood the Law, as passed in 1785, 12th Stat. at Large, 150; in 1974, was added the rest of the clause, as it now stands in the Revisal of 1819, viz:) "but if none of the Executors named in such Will shall qualify, or, after they have qualified, shall die before the sale and conveyance of such lands, then, in those cases, the sale and conveyance thereof shall be made by such person or persons to whom administration of the Testator's estate, with the Will annexed, shall be granted." This Law as passed in 1785, was taken from 21st H. 8, c. 4. It was admitted in the argument, that if the Testator had directed a positive and unconditional sale of the land by his Executors, the case would have come directly within the Law: but they are directed to sell "provided the land will sell for as much in their judgment as will be equal to its value;" and this, it is insisted, renders it a special confidence reposed in the individuals appointed Executors, which is personal to them; and can only be exercised by them, and not even by a part of them, but by the whole "only. This point was argued with great strength, but the researches of the Counsel had enabled him to produce no cases in support of it; nor have I found any. Without pretending to enter deeply into the doctrine of powers, I may observe that at Common Law they were of two kinds, a naked power, and a power coupled with an interest. Thus, if A. devise his land to his Executors, B., and C. and D., with directions to them to sell it, and hold the money for the benefit of E., this is a power coupled with an interest, because the land being devised to the Executors, the legal estate passes to them. But if A. direct in his Will, that his Executors B., C. and D., sell his land, and hold the money for the benefit of E., this is a naked power, because no estate or interest passes to the Executors. In their construction of these powers, the Courts of Common Law have said, that the first shall be taken liberally, the last strictly; that a naked power given to Executors to sell land, can only be exercised by all the Executors; that, therefore, if one refuse to qualify, or to join in the sale, or die before a sale, no sale can take place. But if lands be devised to Executors to be sold, the power will survive, and such Executors as qualify, or remain alive, may execute the power. This was sacrificing reason and justice to narrow views of

strict technical form, for nobody could fail to see, that in each case the intention of the Testator was to turn the land into money, and give that to E., and that in each, equally, the Executors were merely instruments for effectuating such intention. On this ground, Courts of Equity, at an early day, took up the subject, and decided that such naked powers, though extinct at Law, should be enforced in Equity, "rightly deeming, (says Hargrave, in his Note on Coke Littleton, 113, a,) the purpose, for which the Testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling, to be mere Trustees, which brings the case within the general rule of equity; that a trust shall never fail of execution for want of a Trustee, and that if one is wanting, the Court shall execute the office." I apprehend, that the Stat. 21st H. 8, c. 4, was intended to save parties from the delay and expense of resorting to Courts of Equity in such cases, by supplying a Trustee, and such also was the meaning of our Act; and as I think, such should be the spirit in which it is executed. When the question is, whether Equity will assist the execution of a power, by supplying a Trustee, or otherwise, the important enquiry does not seem to be, whether the exercise of the power involves a personal confidence, (for most powers do that in a greater or less degree,) but whether it be a pure and simple power, or a power blended with a trust. In the first case, Equity never interposes; in the last, always. In *Toilet v. Toilet*, 2 P. Wms. 490, the Master of the Rolls says, "This Court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason Equity will not say he shall execute it, or do that for him which he does not think fit to do for himself." Lord C. J. Wilmot says, (*Wilm. 23*, cited Sugd. on Powers, 393,) "Powers are never imperative: they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory on the conscience of the party intrusted." "But sometimes," (says Sugden, in his *Treatise on Powers*, 393,) "trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, Equity, on the general rule that the trust is the land, will carry the trust into execution. This is the case where a power is given by a Will to Trustees to sell an estate, and apply the money upon trusts. The power is in the nature of a trust." In *Harding v. Glyn*, 1 Atk. 469, *Harding* devised certain articles to his wife, "but did desire her at or before her death, to give the same unto and amongst such of his own relations, as she should think most deserving and approve of." Here we see a personal confidence of a very particular kind reposed in the wife. She was to select of his own relations as she

thought most worthy. Yet the Master of the Rolls held this to be a trust for the relations, in default of appointment. He said that it operated as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power should not make the devise void, but the power would devolve on the Court. And this decision is cited by Lord Eldon, as sound Law, in *Brown v. Higgs*, 8 Ves. 574. In *Franklin v. Osgood*, 14 Johns. Rep. 554, it is said by Judge, with whom a large majority of the Court agreed, "where a power is coupled with a trust to be executed for the benefit of others, although the power be given in the plural number, and a single Executor does not satisfy the literal expression of the Will, yet the power survives, and a conveyance made in execution of it, is valid."

Let us see how the principle of these cases applies to the case before us. The Testator directs that his Executors shall sell at public sale all his land, provided it will sell for as much, in their judgment, as will be equal to its value, and the money to be placed in the hands of Armistead, one of the Executors, to be applied by him to such use as in his discretion he shall deem most for the benefit of his wife and all his children. What was the chief, indeed the sole purpose, of the Testator? The conversion of his land into money for the benefit of his family. The Executors were the mere instruments for effecting this purpose. Nor do I think that any peculiar personal confidence is reposed in them. They are to sell, if the land will bring what in their judgment is equal to its value. But this, so far from an enlargement, is a restriction of their power. If he had said they should sell the land, without more, they might have sacrificed it. He meant to prevent this, and therefore restrained their power to a sale for a fair price. By appealing to their judgment, as to the value of the land, it cannot be supposed that he meant to submit it to their arbitrary will, and that they might so exercise that will, as to defeat the whole purpose of the power given them. No! they were bound to exercise a sound discretion in the matter, bound to use all proper means to effect a sale; bound to take an advantageous offer for the land, if made to them: they were Trustees to this purpose for the beneficiaries, the wife and children, and if they neglected or abused their trust, a Court of Equity would interpose. Suppose they had been about to sell the land for half its value, would not Equity, on a Bill filed by the wife and children, have restrained them? Suppose double the value had been offered, and they had refused to sell, would not Equity have compelled a sale? I can have no doubt of it. The Executors then, were mere Trustees empowered to sell upon the trusts declared in the Will. Their power was limited in one respect, but within that limit the trust was equally as imperative, as if no such limit had been imposed. The case, therefore, seems to fall directly within the principle of those I have cited, and is clearly, I think, within the letter and the spirit of our Law; for, it is a case where land was

devised to be sold by Executors, and they refusing, administration with the Will annexed was granted, and the Administrator has sold and conveyed the land. It was contended in the argument, that the renunciation of the wife defeated the purpose of the trust, and thereby destroyed the power of sale: but, I cannot assent to this. The Testator knew that the wife could, if she please, renounce the Will, but he did not make the power of sale dependent on that. It is to be seen throughout the Will, that the children were the chief objects of the Testator's bounty; for, the provision made for the wife (except a trifle) is by way of loan for her life, while every thing is given to the children. Would it not be strange, then, if the wife, by any movement of her's could destroy a power given principally for the benefit of the children?

By renouncing the Will, she placed herself "upon her legal rights; one of these was a third of the land for life. This might possibly suspend the execution of the power of sale, by preventing the Executors from selling the land for its value, while encumbered with her dower, but it could have no further operation, and we know, that the sale here, was made after her death, and for a full price.

But, another and very conclusive objection to this Bill is, that it seeks to rescind an executed contract, where there has been neither fraud, concealment, nor mistake in fact. The exhibit annexed to the Bill, show that every fact in the case was fully explained and understood, and the sole ground on which a rescission is asked, is ignorance of Law, a conclusion from the facts that the Administrator had a right to sell. I think I have shown that this conclusion was correct; but, suppose it otherwise, that it was founded on a mistake of the Law. "Ignorance of the Law excuses no man." This is among our oldest maxims, and applies even to criminal cases of the highest grade. In truth, it lies at the very foundation of all Law: for, if we suffer the plea of ignorance to excuse a man from the legal consequences of his acts or agreements, that plea must rest wholly on his own assertion, the truth of which, no other evidence could be adduced either to prove or disprove. In executed contracts, it is the general rule that fraud must be charged and proved to authorise a rescission. Mistake of fact, where it is plain, palpable, and affects the very substance of the subject matter of the contract, is sometimes a ground for rescission, but a simple mistake of Law, I think, never. There are certainly some of the elder cases which have given relief, in a few instances, of very gross mistake of Law, and two of them are cited in my remarks on the case of *Thompson v. Jackson*, 3 Rand. 504; but, the great weight of authority, indeed I believe I might say, all the late cases are to the contrary. For these cases, I refer to the case just mentioned, and also to *Pate v. M'Clure*, 4 Rand. 164, and *Commonwealth v. M'Clanachan's Ex'ors*. Id. 482.

There was another subject touched in the argument, on which I will not now give a decided opinion, but my present impres-

sions. The question is, whether a dismissal of the Plaintiff's Bill would not so far bind the infants, as to preclude them hereafter from impeaching the title of the Plaintiff. I incline to think it would. I know very well that the general rule is, that an infant Defendant is not bound by a Decree, if when he arrives at age he can show error in it; and to enable him to do this, he has a day given him, which is generally six months after he comes of age. But, an infant Plaintiff is as much bound by a Decree as an adult. Even an infant Defendant may be bound by a Decree, if made for his benefit. For instance, where a Bill is brought against an infant heir of a mortgagor, the usual course in England (till lately) was to decree a foreclosure, and give the infant a day after his age, (not that he would then be entitled to unravel the accounts, or to redeem the mortgage, but merely to show error in the Decree.) But if, instead of a foreclosure, it was found most for the benefit of the infant to Decree a sale, this might be done by the Court, and such Decree and sale would bind the infant. *Booth v. Rich*, 1 Vern. 295. So, if lands devised to be sold for payment of debts are Decreed to be sold, the infant has no day after he comes of age, unless he be Decreed to join in the sale. 2 Vern. 429. In *Goodier v. Ashton*, 18 Ves. 83, there was a Bill to foreclose against an infant heir of a mortgagor. Counsel for the Plaintiff, proposed, instead of a foreclosure, to take a Decree for a sale, as most advantageous for the infant, as was Decreed in the case of *Booth v. Rich*. Counsel for the Defendant, admitted that a sale would be most beneficial to the infant, and suggested a reference to a Master, to report whether it would not be for the advantage of the infant to have a sale. The Master of the Rolls said, the modern practice had been to foreclose, and unless he could find the case in Ver-

603 non had *been followed since, he would not make the precedent, though he seemed to entertain no doubt of the power of the Court to bind the infant by a sale in such case. In *Mondey v. Mondey*, 1 Ves. & Beame, 223, the same question came before Lord Eldon. The Counsel prayed a sale, observing that though they could not produce an instance, this might perhaps be done; as the Court had in many respects extended its jurisdiction for the benefit of infants. The Chancellor said, "It would be too much to let an infant be foreclosed; when, if the mortgagee will consent to a sale, a surplus may be got, of perhaps 4,000l. considered as real estate, for the benefit of the infant. If there was no precedent, I would make one: but I am sure this has been done." See also *Mills v. Dennis*, 3 Johns. Ch. Rep. 368. From these cases, it seems not doubted, that a Court of Equity, acting for the benefit of the infant, may bind his rights absolutely by their Decree, though he be a Defendant. And if such doctrine be sound in any case, it would seem to apply very strongly to the case before us. Here, the land was devised to be sold for the benefit of the children, it was sold, and, as the whole case shows, most advantageously sold. The vendee

asks to rescind the contract, because he has not, and cannot get a good title. The children, adults and infants, protest against setting the sale aside, asserting that the title is perfect in the vendee. If these children were all of age, there can be no doubt that their Answers and the Decree of the Court, would bind them. It is the privilege of infants, given for their safety and protection, not to be bound generally in such cases, and the Court as their Guardian, is to take care of them; but, to enforce this privilege in the present case, and say, that because the Court cannot bind infants, this contract shall be rescinded, would be to use their shield as a sword to pierce them; for, if the contract be rescinded, the money paid must be returned and made a lien on the land, and I have little doubt, that for the \$1,658, which the vendee has paid, he would, on a sale

604 of the land, be *enabled to buy it in; thus ruining the infants under the privilege given for their protection. In such a case it would seem strange, if a Decree at their instance and for their benefit, would not bind them. Suppose, that instead of a Deed of Trust, the vendee had given a Mortgage on the land, and the infants had come in as Plaintiffs to foreclose, asserting the validity of the sale, the goodness of the vendee's title, and praying a Decree for the sale of the land unless the money were paid in a given time; being Plaintiffs, there can be no doubt that a Decree in such a case would bind them, and prevent their ever after impeaching the title of the vendee. But do they not in truth and reason, occupy precisely the same ground here? Having a Deed of Trust, they could proceed in the country to a sale, they have not therefore filed a Bill, but when called into Court to prevent their selling under the Deed, and to rescind the contract, they affirm the contract with all their might, they take their stand upon it, and pray the benefit of it, just as they would have done on a Bill to foreclose a mortgage. From these views, I am strongly inclined to think, that these infants will be so far bound by this Decree, as to be precluded from ever impeaching the Plaintiff's title. Upon every ground, I am for affirming the Decree.

The PRESIDENT, and JUDGES CABELL and COALTER, concurred, and the Decree was affirmed.

605 *Heth's Executor v. Wooldridge's Executor.

December, 1828.

Sale of Land—Written Instrument—Parol Agreement Varying—Statute of Fraudst—Case at Bar.*—There having been a written agreement, on the sale of land, that the purchaser shall search for coal, under the direction of the vendor, for a limited time; and that if within that time coal be found in a sufficient body to work, the purchaser shall

**Sale of Land—Parol Agreement—Part Performance.*—On this subject, see the principal case cited in *Payne v. Graves*, 5 Leigh 577; *Wright v. Puckett*, 22 Gratt. 374; *Snyder v. Martin*, 17 W. Va. 308; *Miller v. Lorentz*, 39 W. Va. 172, 19 S. E. Rep. 395; *foot-note to Parrill v. McKinley*, 9 Gratt. 1, containing excerpt from *Miller v. Lorentz*, 39 W. Va. 172, 19 S. E. Rep. 395.

**Statute of Fraud.*—See monographic note on "Frauds, the Statute of" appended to *Beale v. Digges*, 6 Gratt. 582.

pay an augmented price for the land, a parol agreement, varying the written agreement by extending the time within which the search may be continued, (and consequently obliging the purchaser to pay the augmented price,) is within the Statute of Frauds, and will not be enforced by a Court of Equity:

This was an appeal from a Decree of the Court of Chancery for the Richmond District. The case is fully stated in the following opinion of the Court.

Johnson, for the Appellant.
Stanard, for the Appellee.

December 17. JUDGE CARR delivered his opinion.

On the 29th day of July, 1807, Thomas Wooldridge sold to Thompson Blunt, by a contract under the seals of the parties, a tract of land lying in the county of Chesterfield, and containing one hundred and twenty-eight acres, for the sum of \$2,000, payable, one half on the 25th December, 1807, the other half on the 25th of December, 1808; and it was further agreed, that Blunt was to commence in the month of July, 1808, to search upon the land for coal, by sinking shafts or boring with bare rods, for the purpose of speedily finding the same, and to continue such search from time to time, as his convenience and the state of the weather will permit, until the 1st of July, 1809, and to be guided in his sinking and boring by the said Wooldridge, or his agent, at his said Blunt's sole expense, and if within the time aforesaid, that is to say, before the 1st of July, 1809, the said Blunt should find a good and sufficient body of coal to work on said land, in that case said Blunt binds himself
606 to pay to said Wooldridge, "or his assigns, \$4,000 for said land; that is to say, \$2,000 in addition to the bonds already given. In November, 1807, Blunt having sold out his bargain to Henry Heth, gave written directions to Wooldridge to convey the land to him, which was accordingly done. No coal was found within the time stated in the contract. Wooldridge died in 1814. About the middle of July, 1820, Heth found on the land a valuable body of coal. In the early part of the year 1821, Heth died. In April, 1822, this Bill was filed by the Executor of Wooldridge, against the Executor of Heth. It states the written contract, and makes it a part of the Bill. That Heth was a purchaser with full notice, having drawn the agreement: that under the agreement, some slight attempts were made to find coal, but that Heth being very anxious to employ his hands in working other pits, at his instance it was agreed between him and Wooldridge, that the search should be postponed till a more convenient time; and the said Heth agreed, that if at such future time, at which the search should be prosecuted, or at any time, a good and sufficient body of coal to work should be found on said land, the said augmented price of \$2,000 should be paid. The Bill then states the subsequent findings of coal, the death of Heth; that by his Will, he subjected his lands to be sold by his Executor; that Randolph qualified, sold the land and became the purchaser; that by the second contract, the augmented price became a charge upon the land; and pays

a Decree for the money, and a sale of the land in defect of payment.

The Executor of Heth answered, averring that both Blunt and Heth, being exceedingly anxious to find coal as soon as possible, commenced searching for it immediately after the 29th July, 1807, (before Blunt was required by the contract to do so.) in conformity with the directions of Wooldridge, which search was pushed on, by sinking a shaft, with the utmost vigour, till Christmas, 1807: that in the Spring of 1808, the sinking of the
607 shaft *was resumed by Heth, and pushed on with like energy, till December, 1808, when it was suspended in despair of finding coal there: that several years after, an European Collier of reputation, explored the direction of the coal in the adjoining land, which had been worked for years, and revived the hope that coal might probably be found in the said shaft; that some time after this, the sinking of the shaft was again resumed, and was carried on from time to time, until it was sunk many feet deeper in July, 1820. He positively denies the change of the first agreement by a second, stating many reasons for disbelieving it, and relying on the Statute of Frauds and Perjuries, as a defence. Evidence on both sides was taken, the cause came to a hearing, and the Chancellor decreed, that the additional price be paid, and that unless such payment be made within six months, the land be sold to raise the money. From this Decree the appeal is taken.

The first question respects the Statute of Frauds. "No action shall be brought, whereby to charge any person upon any contract for the sale of lands, tenements and hereditaments, &c., unless the promise or agreement, &c., or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised." Having in the case of *Anthony v. Leftwich*, 3 Rand. 238, given my opinion on the general policy of this Statute, and the mischiefs which (in my mind) have followed its relaxation by Courts of Equity, I shall make no further remarks on that subject. With respect to parol agreements for the sale of lands, I believe the Courts have never gone further than to say, that wherever such agreement has been so far executed, that a refusal of full execution would operate a fraud upon a party, and place him in a situation which did not lie in compensation; then a specific execution would be given, provided the contract were clearly established. Before we come to the application of this Statute, we must determine the nature of the
608 contract relied on by the *Plaintiff.

That it is a contract for the sale of land, all must agree. Is it a written or parol contract? Or, is it a written contract, varied by a subsequent parol contract, which the Plaintiff seeks to set up and enforce? The Plaintiff states the written contract for the sale of the land, and makes it a part of his Bill. This is a perfect contract, and as to the claim of the additional \$2,000, makes that depend on the finding coal before the 1st of July, 1809;

but, it is most clear, that this additional sum is not claimed by the Bill under this contract: and equally clear, that if it had been, it could not be recovered; for, it is admitted on all hands, that no coal was discovered for eleven years after the time which this contract limits for its discovery. The Bill states, that there was a subsequent agreement as to the time of search for the coal, and the payment of the additional \$2,000, but this is neither stated nor proved as an independent agreement; indeed, it would be unintelligible unless connected with the written contract, nor would it be at all less exposed to the operation of the Statute, nor the mischiefs which it was intended to remedy, by taking it as standing by itself. The truth (as it seems to me,) is, that this is a Bill relying on the written contract, to show that by the terms of sale, Blunt was bound to seek for coal twelve months before the 1st July, 1809, and if found in that time, was to pay \$2,000 more, and relying on the verbal agreement to show that the parties subsequently changed these terms of the written agreement, Wooldridge agreeing to let Heth off from searching within the time limited, and Heth agreeing that he would resume the search when convenient, and would pay the additional \$2,000, if at any time coal should be found. Can a party in Equity enforce a written contract thus varied by parol? The mischief intended to be remedied by this part of the Statute, were the frequent perjuries committed in swearing to parol agreements set up by persons with whom none such had been made. To countervail such proof, (it 609 admitted at all,) *would generally be impossible, because the parties would take care so to fix the time and place of such agreements, as to have no other witnesses present; and then the negative was out of the reach of proof. The Legislature, therefore, thought that the only cure for the evil was to take away entirely, to cut up by the roots, all parol agreements for the sale of lands. Courts of Equity have narrowed this somewhat, by their doctrine of part-performance, but, still, it is settled Law, that a naked parol agreement for the sale of land is void, yea, even if the Defendant, by his Answer, acknowledge the agreement precisely as stated, provided he, at the same time, pleads the Statute. See 2 Bro. Ch. Ca. 564; 1 Bro. Ch. Ca. 416; 4 Ves. 23; 6 Ves. 12; 2 Hen. Bl. 63. Is the attempt to vary this written contract by parol, within the mischiefs of the Statute? Let us look at the circumstances. The written contract was made in 1807; the parties, with great particularity, set down all the terms and conditions of their agreement. Fifteen years after this, and after Wooldridge and Heth were both dead, this Bill is filed, claiming the augmented price of the land, under this parol variation of the contract. How is the new agreement proved? By the testimony of a single witness, (William Wooldridge,) who had been appointed Executor of Wooldridge, the vendor, had qualified, and had afterwards been disqualified, without which he could not have been a witness in the cause. Did he hear the contract

made? No! but in the latter part of the year 1808, he met Heth on the road, and Heth, in a casual conversation, told him of the new arrangement between himself and Wooldridge; no other person present. Nor is there another witness who speaks of having heard from any quarter, the slightest intimation of this change of the written contract. The witness gives his evidence in 1824, and speaks from memory solely, of a conversation accidentally held upwards of fifteen years before, a conversation in which he had no interest, to impress it on his memory; and the import of which may have been materially 610 *changed, by a slight misunderstanding in the delivery, or misgiving of memory, in the recollection of it. Nor is there, in the nature of things, any possible check (except the Statute) upon any misstatement of his, whether accidental or wilful. When I speak thus, no one can so far misunderstand me as to suppose that I mean a personal reflection. The witness stands upon the Record perfectly fair in his reputation, and so I take him. But we can make no distinction; for the Law has made none; and I am supported by the Law and the Authorities, when I say that this case presents, in a strong point of view, the very mischiefs which the Statute meant to prevent. These remarks equally apply, whether we consider this as an independent, unconnected, parol contract about the sale of land; or, an attempt to enforce a parol variation of a written contract for the sale of land. The latter, as I have said, strikes me as the true point of view. Many cases might be cited, to show that a written agreement cannot be varied by parol, but the Law is too well settled to require it. I will only cite one, *Jordan v. Sawkins*, 3 Bro. Ch. Cas. 388; 1 Ves. jr. 402. A lease was agreed by writing to be granted of a house for twenty-one years, to commence from 21st April, 1791, and it was afterwards agreed by parol, that the lease should commence 21st June, instead of 21st April. To a Bill filed by the tenant for a specific performance of the written agreement, varied by the parol agreement, the Statute of Frauds was pleaded, and Lord Thurlow held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer, and therefore he allowed the plea. The variation attempted in the case before us, is of much more importance, it goes to double the price of the land. Is there any such part-performance of this alleged parol contract as will take it out of the Statute? The Books say, that an agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design 611 *than to perform the agreement, and if it do not appear, but that the acts done might be done with other views, the agreement will not be taken out of the Statute. The Bill in the case before us, states no such act, nor does the evidence disclose any such. If it be said that the suspension of the search for coal was such act, the answers are, 1st. That this is no act, but merely a forbearance to act; which

is laid down to be wholly insufficient: 2dly. The party might suspend the search, because he chose to break his covenant, and answer for such breach at Law; or, 3dly. He might suspend the search, because he considered that he had complied with his contract by searching twelve months, which there is a good deal of evidence to show he might well think he had done. There is, then, no act of part-performance. There were several other points made, of which I take no notice, because the ground on which I have placed the case is perfectly conclusive to my mind, that the Decree should be reversed, and the Bill dismissed.

The PRESIDENT and JUDGE COALTER, concurred.*

612 *Montgomery, a Pauper, v. Fletcher. Whitford v. Smith, a Pauper. Cordell v. Smith, a Pauper.

December, 1838.

Slaves—Importing—Case at Bar.—A son acting for his father, removed with his father's slaves from Maryland to Virginia in March, 1797: bought a farm for his father, and settled the slaves on it. He took the oath, within sixty days, prescribed by the Act of 1792, to be taken by those who remove from another State to this with slaves. The father shortly after removed also, and became a citizen, but did not take the oath.—The Law was complied with, for although the son was not the owner, yet he was the importer, and the agent of the owner. The paupers therefore, who sued for their freedom, adjudged to be slaves.

These cases were all considered together; the first and third were on appeals from the Superior Court of Fauquier; the second on a Supersedeas to a Judgment of the same Court.

In the first case, the Plaintiff, Jonas Montgomery, a negro man, brought his suit in forma pauperis, to recover his freedom from Robert Fletcher, the Defendant, who held him as a slave. At the trial in July, 1826, the Plaintiff excepted to an opinion of the Court. The Bill of Exceptions states, that the Plaintiff proved that Robert Whiteford, a citizen and inhabitant of the State of Maryland, intending to remove thence with his family and slaves, and to become a citizen of this Commonwealth, in the month of March, 1797, sent his son, Hugh Whiteford, to the County of Fauquier, in this State, and sent with him from Maryland to the said County, sundry slaves, the property of the said Robert Whiteford, amongst whom was the Plaintiff, who was then about nine or ten years old: that the said Hugh Whiteford, who also removed to Virginia with an intention of remaining, and has ever since remained therein; purchased a farm for the said Robert Whiteford, in the County aforesaid, and settled the said slaves upon it, and managed the farm and slaves as the agent of the said Robert Whiteford, who in pursuance of his said original design,

613 himself removed *from the State of Maryland to the said farm in the month of August, 1797, and resided upon and held the same, and the said slaves until his death, which happened about 1804. The Defendant proved, that the said Hugh Whiteford, within sixty days after his said removal, and bringing with him the said slaves, took the oath, in due form, which

was prescribed by Law to be taken by persons intending to remove from any of the United States, and to become citizens of this Commonwealth, and importing slaves, which oath was taken before a Justice of the Peace for the County of Fauquier. The Defendant also proved, that after the death of the said Robert Whiteford, in 1805, the Plaintiff was sold as a slave by the legal representative of said Robert, to the Defendant, who has ever since held him as a slave; and thereupon the Defendant, by his Counsel, moved the Court to instruct the Jury, that if they were satisfied of the truth of the foregoing facts, the oath so as aforesaid taken by the said Hugh Whiteford, was a compliance with the requisition of the Act of Assembly, so as to prevent a right to freedom from accruing to the Plaintiff, by his being so imported into this Commonwealth, and that it was necessary for the said Robert Whiteford, upon his said removal, to take the said oath, to prevent the right to freedom accruing to the Plaintiff, which instruction the Court gave, and the Plaintiff excepted. There was a verdict and judgment for the Defendant, and the Plaintiff appealed.

In the second case, Benjamin Smith, a negro man, a son of Fanny Smith, brought his suit in forma pauperis, against Mary Whiteford, to recover his freedom. At the trial, before another Judge, in November, 1826, who then held the Superior Court in Fauquier, the same instruction was moved for by the Defendant as in the first case, and the same facts proved, except, that in this case, the mother of the Plaintiff was brought in by Hugh Whiteford, the Plaintiff being born after the introduction of his

614 mother *into this State, and the certificate of the Justice before whom the oath was taken, was produced. The Justice certifies that, "Hugh Whiteford, who had just removed from the State of Maryland, into this Commonwealth, and into this (Fauquier) County, the following slaves, viz: Fanny, Jonas, and Jack, took the oath prescribed by Law to prevent the further importation of slaves." The Judge differing in opinion from the Judge who tried the other case, refused the instruction, and there was a verdict and judgment for the Plaintiff.

Leigh, of Counsel for Mary Whiteford, in the petition for a Supersedeas, stated, that Hugh Whiteford was the actual importer: that in the case of *M'Michen v. Amos*, 4 Rand. 134, the wife of the importer of the slaves took the oath, and that was held not to be a compliance with the Act of 1792. Here the actual importer took the oath, though the slaves imported belonged to his father: if the importer was not the proper person to take the oath, then, though the importation was clearly legal under the circumstances, no person could take the oath, for the owner could not, as he was not also the importer. The Supersedeas was awarded.

In the third case, the action was brought by Fanny Smith, and her daughters Eleanor and Harriet, who, in forma pauperis sued William B. Cordell, to recover their freedom. This suit was tried at the same Court at which the second case was tried. The

*Absent, JUDGES CABELL and GREEN.

Defendant demurred to the evidence of the Plaintiffs: that evidence proved the same facts as are set out in the other two cases as to the importation, and the oath taken by Hugh Whiteford. In addition thereto, there was evidence to prove that these Plaintiffs were sold at Robert Whiteford's sale to one Israel Johnson who agreed to take \$300 for them from the Plaintiff, Fanny Smith, who, on the payment thereof, was to be free, as well as her children; but he made a Bill of Sale of them to one Thomas Chapple, who had as-
 615 sisted *her with a part of the money: that Chapple permitted them to act as free persons for ten years, but that a part of the money being still due to him, he at length, in 1825, sold them to the Defendant as slaves. They were never legally emancipated either by Johnson or Chapple.

A verdict was found for the Plaintiffs, subject to the opinion of the Court on the demurrer to evidence, and the Superior Court as above mentioned, gave Judgment for their freedom. The Defendant appealed.

The Act of Assembly on which this question turns, is to be found in the Revised Code of 1792, ch. 103. The second section of that Act declares, that "slaves which shall hereafter be brought into this Commonwealth, and kept therein one whole year together, &c. shall be free." Sec. 4: "Provided, that nothing in this act contained shall be construed to extend to those who may incline to remove from any of the United States, and become citizens of this, if, within sixty days after such removal, he or she shall take the following oath before some Justice of the Peace of this Commonwealth: I, A. B., do swear, that my removal into the State of Virginia, was with no intent of evading the Laws for preventing the further importation of slaves, nor have I brought with me any slaves with an intention of selling them, nor have any of the slaves which I have brought with me been imported from Africa, or any of the West India islands, since the first day of November, one thousand seven hundred and seventy-eight. So help me God."

Briggs, for the Appellant, Montgomery, and for the Appellees, Smith, in the other two cases.

Staudard, for the Appellee Fletcher.

Leigh, for the Appellants Cordell and Whiteford.

616 *December 17. The PRESIDENT delivered his opinion.

Passing by some minor points, which it is not material to notice, these cases will turn on the following facts: Hugh Whiteford, as agent of his father, the owner of the slaves whose freedom is in question, who then, and ever afterwards managed the affairs of his father, came from Maryland to Virginia, purchased for his father a farm, to which, in the Spring of 1797, he removed with the slaves, and before he was followed by his father, which happened soon after, went before a Magistrate and within the sixty days took the oath prescribed by the Act concerning slaves, &c.; and the question is now raised, after the

lapse of more than thirty years, whether he was competent to take that oath, he not being the absolute owner of the slaves: and the case of M'Michen v. Amos, 4 Rand. 134, is relied on as having decided it in favor of the slaves. In that case there was no distinction taken between the proprietor of the slave and the person bringing him into the State. The only question submitted by the Jury was, whether the husband, being the owner and importer, the wife was competent to take the oath, and the decision was, that the person bringing the slave into the State was alone competent to take the oath, which was entirely consistent with the Act, which does not advert to the owner, either in the clause imposing the penalties, in that giving freedom, or in that prescribing the oath. Nor can a contrary decision be implied from the opinion of the Judge in the first of the cases now before us. The son, (who was the agent of the father,) and the father, were the importers of the slaves. Both intended to become, and did become citizens of Virginia, by which the Law was satisfied, its policy being to exclude slaves generally, but to admit them when brought by persons removing from another State and becoming citizens. Either the son or the father might take the oath. Being taken by the son, it was sufficient, within the letter and spirit of the Act. It is best to lay down no general rule in these
 617 cases. Where *the Act has been substantially obeyed, and its policy advanced, it cannot be decided to be violated, and heavy penalties inflicted, upon nice distinctions drawn in supposed cases.

In the first case, in which the instruction of the Judge to the Jury was proper, the Judgment is to be affirmed. In the case of Cordell v. Smith, the Judgment is to be reversed, and Judgment rendered for the Defendant; and in the case of Whiteford v. Smith, the Judgment is to be reversed, and a new trial awarded, on which, the instruction which was asked for by the Defendant is to be given, if again required.

All the other Judges concurred.

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*Coleman v. Cocke.

December, 1828.

Execution*—Returned Satisfied in Part—Right of Creditor.—According to the equitable and correct construction of our Statute concerning Executions, (section 8d.) if a creditor, by Judgment or Decree, sues out a F. Fa. which is levied, and returned satisfied in part only, he may take out another kind of Execution, as the Elegit, without pursuing the F. Fa. to a return of Nihil.

Fraudulent Conveyance*—By Debtor to Son—Setting Aside—Case at Bar.—Conveyances from a father, who is in debt, to his sons, without any valuable consideration, declared to be grossly fraudulent, and decreed to be set aside at the suit of the creditors of the father, who obtained their Decrees long after the execution of the Deed.

Same*—Same—Same—Same.—If a father purchase lands, and direct the conveyance to be made to his child, the conveyance may be impeached for fraud by a creditor of the father. Therefore.

*Executions.—On this subject, see monographic note on "Executions" appended to Paine v. Tutwiler, 37 Gratt. 440.

See principal case cited in M'Cullough v. Sommerville, 8 Leigh 484; Findlay v. Toncray, 3 Rob. 578; Taylor v. Spindle, 2 Gratt. 67.

†Fraudulent Conveyances.—See full discussion of this subject in monographic note on "Fraudulent

where a father, B., purchased two tracts of land of C., under an agreement that the legal title should be withheld till the purchase money be secured, or paid, and the father held the possession as real beneficial owner for several years, and then being in debt, directed the vendor of the land, C., to convey to his son, W., which was done, and gave possession to his said son, no valuable consideration having passed from the son, either to his father, or the vendor, and then directed his said son to convey and deliver a part of the said land to another son, P., which was done, no valuable consideration passing, these conveyances decided to be fraudulent and void, and decreed to be set aside, and the lands to be sold, at the suit of the creditors of the father.

Same-Same-Rights of Purchaser from Son.—Although if a son obtain a conveyance for land purchased by his father, that conveyance may be set aside for fraud by a creditor of the father, whilst the land is in the hands of the son; yet, if the son sell and convey the land to a third person for valuable consideration, who has no notice of the fraud between father and son, such third person being a bona fide purchaser, will be protected in his purchase against the creditors of the father, from the operation of the Statute of Frauds, by its proviso.

Same-Same-Same-Priority over Judgment—Creditor of Grantor.—And if the Deed of such bona fide purchaser be not duly recorded, yet he will be protected in his purchase against a creditor of the father, who obtains a Decree against the father, after the bona fide purchase so made, because such a purchaser has a prior equity to such creditor. For, if the original vendor had never made a Deed to the son, yet the purchaser, holding the equitable title transferred from the father to the son, and from the son to him, would have had a better right to call on the original vendor for a conveyance of the legal title, than any creditor of the father obtaining a Judgment against him, after his transfer of the equitable right to the son.

Decrees—Two Decrees against Defendant on Same Day—Effect.—If there be two Decrees on the same day against a Defendant's land, the whole, and not a moiety only of the land, ought to be directed to be sold; for, at Law, each of two Judgments would have taken a moiety of the land, and both of course the whole, if it had been extendible at Law.

This was an appeal taken by Henry E. Coleman and William A. Bentley, from a Decree rendered against them 619 *and others, by the Superior Court of Chancery for the Richmond District.

The Bill was exhibited in February, 1820, by John F. Cocke, and Anne, his wife, who was Anne Ronald, and Elizabeth Ronald; and sets forth, that William Bentley, in the year 1793, together with Samuel Pleasants and John Swann, qualified as Guardians of the female Plaintiffs, and of their sister, Jane Ronald, and executed a Guardian's Bond, with four sureties, (nam-

and Voluntary Conveyances" appended to *Cochrane v. Paris*, 11 Gratt. 348.

The principal case is cited on the point in *Taylor v. Spindle*, 2 Gratt. 57; *Dold v. Geiker*, 2 Gratt. 102; *Withers v. Carter*, 4 Gratt. 415; *Lockbar v. Beckley*, 10 W. Va. 96.

[Real Estate—Priority—Equitable Interest—Legal Title.]—In *Delaplain v. Wilkinson*, 17 W. Va. 267, it is said: "It seems that it has long been an established rule of courts of equity, that, apart from any positive provision of a statute to the contrary, where one has an equitable interest in land with a good right to call for the conveyance of the legal title, and a subsequent encumbrancer (i. e. a judgment creditor) whose debt did not originally affect the lands, acquires the legal title, he shall notwithstanding be postponed to the equitable claimant. For since the subsequent encumbrancer did not originally take the land for his security, nor had in his view an intention to affect it, when afterwards the land is affected by his lien, and he comes in claiming under the very person who is obliged in conscience to make the assurance good, he stands in that person's place and is postponed, despite his legal title, to the superior equity of the adverse claimant." 2 Lom. Dig. 487; *Burgh v. Francis*, 1 P. Wms. 279; *Withers v. Carter*, 4 Gratt. 411; *Coleman v. Cocke*, 6 Rand 618; 2 Min. Inst. 873, 874."

See principal case also cited in *Camden v. Harris*, 15 W. Va. 563.

ing them;) that the sister, Jane, died some time afterwards, under age and unmarried, leaving the female Plaintiffs her heirs: that Pleasants and Swann were merely passive, and that William Bentley took possession of the lands, slaves, and other personal property of the Plaintiffs, and received the rents, issues and profits thereof, till August, 1806, when the Plaintiff, Elizabeth, made choice of Samuel Pleasants as her Guardian, and Anne, of John Swann as hers: that Bentley, having disposed of, and dissipated a great deal of property of the female Plaintiffs, their new Guardians sued Bentley, to compel him to account, and to restrain him from wasting the estate, and the Superior Court of Chancery, finally, on the 19th February, 1819, Decreed, that the said Bentley should pay each of the Plaintiffs, his former Wards, (who had then come of age,) the sum of \$6,621 62, and their joint costs, amounting to \$337 99: that the Plaintiffs sued out their Executions against the said Defendant's goods, by which the costs were made, and the sum of \$91 86 for each of the Plaintiffs, and "no effects," returned as the residue.

The Bill states, that the said William Bentley, early in 1805, purchased of William A. Cocke a tract of land in Halifax County, containing one thousand and fifty-seven acres, for the sum of 1,800l., and in 1806, purchased of James Cocke another tract of land and ferry in the same County, for 1,200l., and paid the full amount of the purchase money to the Messrs. Cockes; that at the former period, the said Bentley

was indebted to the Plaintiffs 620 *in more than \$12,000, and at the latter period, more than \$14,000, according to the report made in the before-mentioned cause: that no Deed was made of the said tracts of land to the said Bentley, but that by his desire, William A. Cocke conveyed, in August, 1805, the first mentioned tract to William A. Bentley, a son of the said William Bentley; and by the same request, James Cocke conveyed, in 1806, the second tract to the same William A. Bentley: that no consideration passed from William A. Bentley to either James or William A. Cocke, and the Bill expressly charges, that William Bentley voluntarily, gratuitously and fraudulently caused the conveyances to be so made to his said son: that the said William A. Bentley, in May, 1807, conveyed, by the direction of his father six hundred acres of the first mentioned tract to Peter E. Bentley, a brother of the said William A. Bentley, for the consideration of \$1; and the Bill charges fraud also in this transaction.

The Plaintiffs further aver, that the said William Bentley made, in August, 1807, a fraudulent conveyance to his son, John W. Bentley, of a tract of land in Powhatan County, of three hundred and ninety acres, with sixteen slaves and other property, and that no valuable consideration passed for the same: that in April, 1808, he fraudulently conveyed another tract in Powhatan, on which he then lived, containing eight hundred acres, together with two negroes, a carriage, his horses and stocks of all kinds, plantation utensils

and house hold furniture, including plate and kitchen furniture, to the same son, John W. Bentley, who gave no valuable consideration for the same: that John W. Bentley died in 1814, having devised his land and other property to his sister, Judith, and brother, Henry Bentley; and that his brother, Joseph R. Bentley, administered on his estate: that the said William Bentley also conveyed, fraudulently to his son, Joseph R. Bentley, a tract of land in Halifax, and another in Harrison County, together with sundry slaves, and other property, the son paying no valuable consideration for the same.

621 *When these conveyances were thus made to the two sons, John and Joseph, the father was still more largely indebted to the Plaintiffs.

The Plaintiffs further state in their Bill, that in July, 1813, the said Peter E. Bentley conveyed to Henry E. Coleman, for the consideration of \$6,243, five hundred and twenty acres of land, part of the said tract which had been conveyed to him by the said William A. Bentley, in May, 1807; and they expressly charge, that the said Coleman was cognizant, at the time of his purchase, of the fact, that the said tract was part of that which had been fraudulently conveyed, by direction of the father, by the one son to the other, and of the fact that the said William Bentley was largely indebted to the Plaintiffs, and as a proof of the fact, they refer to a Deed, bearing date 28th October, 1815, from the said William Bentley and Wife to the said Coleman.

They state, that in June, 1807, the said William Bentley, under the pretext of indemnifying the sureties for his administration, on the estate of William Ronald, conveyed to certain Trustees, two tracts of land in Powhatan, one of them containing four hundred and twenty acres, the other eight hundred, being the same conveyed afterwards to John W. Bentley, as above-mentioned: that the said William Bentley had fully administered the estate of William Ronald as early as 1794, when a balance was found in his favor of more than 9851. due to him from the estate, and that this pretended Trust Deed was not made till 1807, when the sureties in the Administration Bond were in no manner of danger, but the said William Bentley, as Guardian, was indebted to the Plaintiffs in the above-mentioned large sums, and they therefore charge, that the said Deed of Trust was executed for the express purpose of defrauding them.

They state, that after the above mentioned voluntary and fraudulent conveyances were made, and during the pendency of the suit brought by their Guardians against the said Bentley, that is, on 622 the 26th September, 1811, he *the said William Bentley, took the oath of an insolvent debtor.

They pray that the said William Bentley, and his sons, William A., Peter E., Joseph R., and Henry Bentley, and his daughter, Judith Bentley, and the representatives of his deceased son, John W. Bentley, and the said Henry E. Coleman, may be made parties Defendants to their

Bill: also, that the Trustees for the sureties of William Bentley's administration on the estate of William Ronald, and the surviving sureties, and the representatives of the deceased sureties of William Bentley, as Administrator of William Ronald, and the representatives of the deceased sureties of William Bentley's guardianship of the Plaintiffs, (all by name,) should be made parties Defendants.

They pray that the Defendants to whom the voluntary and fraudulent conveyances aforesaid have been made, may account with them for the same, and may release to them the legal titles: that the property, real and personal, conveyed to the sons, be declared a trust for the Plaintiffs, and sold by a Decree of the Court: that the Trustees for the sureties of Bentley release the property conveyed to them, or that the property be declared a trust for the Plaintiffs, after the sureties are indemnified: that the representatives of the sureties in the Guardian's Bond be required to pay the penalty of the Bond, and that the Defendant Coleman be declared a purchaser with notice, and the land purchased by him be subjected to the just claims of the Plaintiffs, and for general relief.

The Deeds and other documents referred to in support of the Plaintiffs' Bill are correctly recited therein, except perhaps the Deed from William Bentley and Wife to Coleman, in 1815. That Deed recites that William Bentley had purchased the land in Halifax from William A. Cocke, previous to his intermarriage with his present wife, (she being the second,) but that he had given it to his sons, Wm. A. and Peter E., and that the conveyance was made by

William A. Cocke to his son William 623 A. Bentley, *and by him to his son Peter E. after his intermarriage: that Peter E. had conveyed to Coleman, and that doubts had been entertained whether his said wife was entitled to dower in that land; to remove that doubt, and to relinquish such supposed dower right, the Deed is declared to be made.

The Deed from Peter E. Bentley to Henry E. Coleman, bears date 10th May, 1813; it is a Deed of bargain and sale, in the usual form, expressing the consideration paid by the grantee to the grantor, and with general warranty. It does not show on its face how Peter E. Bentley, the grantor, derived his title. The Deed is attested by five witnesses, was proved in the County Court of Halifax, on the 24th May, 1813, by two witnesses, which was ordered to be certified, but it does not appear to have been ever proved by any other witnesses, and was therefore not recorded.

Amongst the documents referred to by the Bill, are three Executions of Fi. Fa., consequent on the Decrees rendered in the suit of the Guardians of the female Plaintiffs, which suit was in process of time carried on by the Plaintiffs themselves, they having come of age. One of the Executions was in behalf of Elizabeth Ronald, against William Bentley's goods and chattels, for \$6,621 62, with interest from 30th January, 1811, till paid; another in behalf of John F. Cocke and Anne his

wife, against the same Defendant, for the same sum; and the third in behalf of all of the said Plaintiffs against the same Defendant for \$337 99, which had been Decreed to them for their joint costs. All of the Executions bore date 8th March, 1819, returnable to the first day of the next Term, and were levied by the Marshal on three slaves, the proceeds of the sales of which were applied first to the discharge of the Execution for costs, and the surplus divided and applied equally to the other two, on each of which was made the sum of \$91 86. The Marshall does not return "nulla bona," as to the residue of
624 the money "decreeed to the Plaintiffs, nor does it appear from the Record that any other Execution was sued out under that Decree. This suit was shortly afterwards brought.

So much for the Bill, and its exhibits.

The Defendant William A. Bentley, answered, saying that in 1805 or '06, a verbal contract was made between his father and himself, by which he was to purchase, and receive from his father, a tract of land, for which his father had paid a full and valuable consideration: that as some difficulty was expected in the relinquishment of dower by his father's wife, it was agreed that the Messrs. Cockes should convey directly to the Defendant, and that the Defendant should convey six hundred acres to his brother Peter: that several exchanges having been made between the Defendant and his brothers Peter and Joseph, he now retains about fifty acres of that six hundred acre tract, for which he has paid a valuable consideration to Joseph. He argues, that if no valuable consideration had passed, that blood alone, from a father in prosperous circumstances, to a son just commencing life, would be entitled to some respect, and that the creditors of William Bentley could not disturb his title, so long as there was other property unprotected by such an equity; but he avers that for the five hundred and seven acres which he holds, he bound himself to pay his father 1,000l., in annual instalments, beginning in 1808, and that he has paid that sum, the last in 1812. [He supports this allegation by the deposition of one Armistead Martin, who proves that he saw the Defendant pay his father 200l. in each of the years 1808-9-10; and by the deposition of John Peck, who proves that he saw him pay his father 200l. in 1812, and that William Bentley said that it was the last instalment.] The Defendant further says, that since 1812, he has made sundry advances to his father, and to others for him, but has rarely retained the vouchers, knowing there would be no occasion for them between himself and his father: that he has recently paid 262l. 10 4,

as a surety for his father, under an
625 Execution "issued by Ellis & Allan.

[This allegation is supported by the deposition of the Deputy Sheriff.] He concludes that he has thus paid a full and valuable consideration for the land, and prays that the Bill may be dismissed as to him.

The Defendant, Henry E. Coleman, answers, and says that he purchased of Peter

E. Bentley, a tract of land in Halifax, containing five hundred and twenty-one acres, for \$6,243, which he has long since paid for. At the time of the purchase he knew that the said tract was part of that conveyed by William A. Cocke to William A. Bentley, but he has no recollection that he knew the fact, that William Bentley had purchased and paid for the land, and desired Cocke to convey to William A. Bentley. That Peter E. Bentley had been in possession of the land for several years, and the Defendant denies that at any time before the transaction was closed by the payment of the purchase money to the said Peter, he the Defendant had any notice whatever, that William Bentley was indebted to the Plaintiffs, or others, or that he had procured the said land to be conveyed to the said William A. Bentley, for the purpose of defrauding the Plaintiffs, or any other creditor, or creditors. With respect to the Deed to him from William Bentley and Wife, in 1815, he says, that after he had paid to Peter Bentley about two thirds of the purchase money, he was informed that the wife of William Bentley would set up a claim of dower, and required a release of that interest, and the Deed was executed for that purpose alone. He relies for this protection, on his own equitable and legal title, obtained from Peter E. Bentley, without notice of the claim of the Plaintiffs, fortified by the Deed from William Bentley and Wife, made before the Plaintiffs obtained any Judgment or Decree against the said William Bentley, which could have given them a lien on any land which the latter might have owned.

626 "Several of the representatives of the sureties for the Administration of William Ronald's estate answered, but it is not necessary to notice those Answers.

The deposition of William A. Cocke was taken. He proves that in 1796, or '97, he sold to William Bentley a tract of land in Halifax of one thousand one hundred acres and more, for which the said William Bentley alone paid him, and he made the Deeds in 1805, to William A. Bentley, at the request of his father. He denies that, at the time of the purchase, William Bentley declared he was purchasing for his son, and would not ask for a Deed till he came of age: the Deed was not to be made till the purchase money was secured, but it was made sooner. The whole money was, however, afterwards paid.

James Cocke deposed, that about the year 1800, he exchanged his land, containing one hundred and fifty four acres, at Bibb's ferry, in Halifax, valued at 1,000l., with William Bentley, for a tract of eight hundred acres, in Amelia, valued at \$7 50 per acre: the deponent made the Deed in 1806, by request of William Bentley, to his son William A. Bentley, for the purpose, as Bentley said, of saving the expense of record in two Deeds. The deponent paid the difference to William Bentley, or to his orders, transmitted by his son William A. Bentley.

There were two other depositions taken by the Plaintiffs, to invalidate the evidence of Armistead Martin and John Peck, the

two witnesses adduced by William A. Bentley to prove the payment of 1,000l. to his father in several years from 1808 to 1812.

The Chancellor pronounced an interlocutory Decree on the 24th June, 1826; in which, after reciting the Decree rendered in 1819, in behalf of the present Plaintiffs, against William Bentley and others, and stating that Executions had issued, and that they had produced only a small part of the sums Decreed, he says, that "It also appears to the Court, that while the said William Bentley was largely indebted to his

Wards, he, by several voluntary
627 Deeds, "conveyed, or caused to be conveyed to his sons, the whole, or nearly the whole, of his estate, real and personal, and afterwards took the oath of an insolvent debtor." He then specifies those Deeds, viz., the Deeds from William A. Cocke and James Cocke, to William A. Bentley; from William A. to Peter E. Bentley; the two Deeds from William Bentley to his son, John W.; and from the said William Bentley to his son, Joseph. He then proceeds: "It also appears to the Court, that the said Peter E. Bentley sold and conveyed to the Defendant, Henry E. Coleman, five hundred and twenty acres, part of the said land in Halifax, purchased as aforesaid from the said William A. Cocke. This purchase and conveyance were made pending the suit in this Court, in which the Decree aforesaid was rendered; and on the face of the conveyance it appears, that the Defendant, Coleman, had notice of the manner in which the said Peter E. Bentley acquired his title to the lands aforesaid. The said Coleman, to confirm his title thus acquired, took a Deed of Release from the said William Bentley and Wife in October, 1815." The Decree then states, that it does not appear that the Deeds for the lands in Halifax had ever been recorded, and that it was admitted "by the Defendant's Counsel, that the said Deeds were not otherwise recorded, than appears by the certificates of the Clerk, though he insisted, that as the legal title to the said land had never been in the said William Bentley, the recording of the said Deeds was not necessary to their validity. Upon the facts above stated, and upon the proof in the cause, the Court is of opinion, that all the aforesaid Deeds to the sons of William Bentley, were voluntary, fraudulent and void, as to the Plaintiffs, the creditors of said William Bentley; and that the whole of the property, real and personal, conveyed by them, is liable to be sold in satisfaction of the debts due to the Plaintiffs. The Court is also satisfied, that the Deed to the Defendant, Coleman, does not prevent the property thereby conveyed to him,
628 from being subjected to "the Plaintiffs' claim; but, as he is a purchaser for valuable consideration, the Court will not subject his property to sale, until it shall be ascertained whether the Plaintiffs' debt can be satisfied from the other property within the reach of the Court."

The question arising on the Deed to the Trustees for indemnifying the sureties to

the administration on William Ronald's estate, are deferred till the final hearing; and in the mean time, the property so conveyed will be brought into market, and the proceeds held subject to the future order of the Court. The question as to the liability of the sureties of William Bentley as Guardian, is also deferred.

The Decree then directs, that unless the Defendants, or some of them, shall pay to the Plaintiffs the sums respectively due to them, the Defendants do surrender the whole of the property, real and personal, included in the Deeds aforesaid, to the Marshals, who are directed to sell the same on the terms specified: but, the Marshal is ordered not to require a surrender of the land held by the Defendant, Coleman, nor to proceed to sell the same, unless the proceeds of the other property surrendered under the Decree, shall be insufficient to satisfy the debt and interest due to the Plaintiffs.

From this Decree the Defendants, Coleman and William A. Bentley, appealed.

Leigh, for the Appellants.

Johnson and Stanard, for the Appellees.

December 17. JUDGE GREEN delivered his opinion.

The Appellees having obtained Decrees against William Bentley, filed their Bill against him, and many persons holding personal, and others holding real property, some of them directly, and others indirectly, under him, the object of which was to set aside the conveyances as being
629 "fraudulent as to them, and to subject the property, thereby conveyed, to the satisfaction of their claims.

The Counsel for Coleman, who holds a part of the land in question, urged as an objection to the jurisdiction of the Court, that at the time when the Bill was filed, the Plaintiffs had not a capacity to sue out Elegits on their Decrees, without taking some further preliminary step to enable them to do so, and consequently had not then a subsisting lien on their debtor's land, that not being the effect of a Judgment only per se, but of the capacity to extend it by Elegit, and that a creditor at large, having no lien on his debtor's land, cannot claim the aid of a Court of Equity, in order to enable him to reach it by removing impediments to his proceedings at Law. This objection, if well founded, would lead to the dismissal of the Bill as to the relief sought, in respect to all the lands mentioned in it.

The objection is founded on the decision of this Court in *Eppes v. Randolph*, 2 Call, 125, and a recent decision of C. J. Marshall, to the same effect, in which it was held, that a judgment creditor could not overreach in Equity a bona fide conveyance of his debtor's land, made after the Judgment, and at a time when the capacity to sue out an Elegit was suspended in consequence of no Execution having been sued out within the year, and no election entered on the Record, or for any other cause. These decisions proceeded upon the merits of the respective cases, and not upon the question of jurisdiction, and whether right or wrong, do not touch the case under consideration, either in respect to the question

of jurisdiction, or upon its merits; for here all the Defendants were purchasers before the date of the Decrees, and are charged to have purchased fraudulently. And in all the cases upon the subject, in the English Court of Chancery, it seems to have been the uniform course to consider a Judgment, with a capacity to acquire the right to sue out an Elegit, by Scire Facias or otherwise, as such a lien as gave jurisdiction to the Court whenever other
630 circumstances justified its *interposition. And in no case has there ever been any enquiry whether the Judgment had been kept alive by taking out Execution within the year, or otherwise, or whether it had been actually revived or not, in the case of the death of either party, unless from some cause, (for instance the great lapse of time,) it was doubted whether the party could revive his capacity to sue out an Elegit, by reviving his Judgment, as in the case of Burroughs v. Elton, 11 Ves. 29.

However all this may be, I think it clear that at the time when this Bill was filed, the Plaintiffs had an existing capacity to sue out Elegits upon their Decrees, without any preliminary proceeding whatever. They had taken out Executions of Fieri Facias, which had been levied, and returned in part satisfied by the sale of the property taken, without any return of Nihil as to the residue. And in such a case, it is contended, that the Plaintiff could not take out an Elegit, without first taking out a new Execution of Fi. Fa., and having it returned Nihil, upon the ground that upon the just construction of our Statute concerning Executions, it was required that a party electing to resort to one species of Execution, could not resort to one of another description, until he had exhausted the effect of the first, by pursuing it to a return of Nihil or Non est Inventus; and, especially, that upon the literal terms of the Statute, an Elegit could not be taken out after a Fi. Fa. or Ca. Sa. returned, unless the return was Nihil, or Non est Inventus.

This leads us to a particular examination of our Statute, the first section of which provides, that all "persons who have, or shall hereafter recover any debt, damages or costs, in any Court of Record, may at their election prosecute Writs of Fieri Facias, Elegit, and Capias ad Satisfaciendum, within the year, for taking the goods, lands and body of the debtor." It then prescribes the teste and return days, and the forms of those Executions, and of their returns. The third section provides,
631 that "when any *Writ of Execution shall issue, and the party, at whose suit the same is issued, shall afterwards desire to take out another Writ of Execution at his own proper costs and charges, the Clerk may issue the same, if the first be not returned and executed; and where, upon a Ca. Sa. the Sheriff shall return, that the Defendant is not found, the Clerk may issue a Fi. Fa.; and if, upon a Fi. Fa. he shall return that the party hath no goods, or that only part of the debt is levied, in such case it shall be lawful to issue a Ca. Sa. upon the same

Judgment; and where part of a debt shall be levied upon an Elegit, a new Elegit shall issue for the residue; and, where Nihil shall be returned upon any Writ of Elegit, a Ca. Sa. or Fi. Fa. may issue, and so vice versa; and where one Judgment is obtained against several Defendants, Execution thereon shall issue, as if it were against one Defendant, and not otherwise."

The fourth section, enacts the provisions of 32 Hen. 8, ch. 5, which provides, that if a tenant by Elegit be evicted, he may have Scire Facias against the debtor, his heirs, executors and administrators, and have such Executions for the residue of his debt unpaid, as if no Execution had theretofore issued, enlarging the provisions of the English Statute, in this, that whilst that only allowed a new Elegit, ours allows a new execution of any sort. The next three sections enact the provisions of the 16th and 17th Car. 2, ch. 5, declaring, that an Extent shall not be avoided on account of the omission of any lands which were extendable. The eighth and ninth sections enact the provisions of the 21st Jas. 1, ch. 24, authorising a new Execution against the lands and tenements, goods and chattels of a debtor dying in execution, except such lands and tenements as have been bona fide sold for the payment of some other creditor, and the proceeds so applied.

The thirteenth section enacts the provisions of 29th Car. 2, ch. 3, declaring, that goods shall be bound by a Fi. Fa. only from the time of the delivery to the Sheriff.

632 *The twenty-eighth section provides, that a debtor in execution may relieve his body, by surrendering goods to be sold as if taken under a Fi. Fa., provided that if they be not sufficient to pay the debt, or are subject to a lien, a new Fi. Fa. or Ca. Sa. may issue. These are all the provisions which touch the question under consideration.

The argument, that a party having once made an election to take one species of Execution, cannot afterwards resort to another, till that elected is exhausted by a return of Nihil or not found, proceeds upon the idea, that such is the effect of the first section giving such election, or the consequence of the particular provisions of the third section, according to which, in every case, (except one, in which a new species of Execution is allowed to be resorted to,) the former is supposed to be first returned Nihil, or not found; and so in the twenty-eighth section, in which a Fi. Fa. or a Ca. Sa. but not an Elegit, is allowed after a debtor has been discharged upon the surrender of property, which proves insufficient to pay the debt incumbered. And the other suggestion, that the literal terms of the Statute allowing a Ca. Sa. or Fi. Fa. after an Elegit returned Nihil, and so vice versa forbids an Elegit after a Ca. Sa. or Fi. Fa., unless they be returned Nihil in the one case, and not found in the other, proceeds upon the idea, that our Statutes have abrogated the Common Law in respect to Executions, and contain in their own provisions all the Laws in force upon that subject, none of which propositions appear to me to be sustain-

able. And if not, then upon Common Law principles connected with the Stautes giving the Elegit the latter Execution might issue after a Fi. Fa. in part satisfied, although not returned Nihil, as was decided in the case of *Berry v. Wheeler*, 14 Car. 2; 1st Siderfin, 91.

The Statute of Westm. 2, 13 Edw. 1, ch. 18, which gave the Elegit, is nearly in the language of ours: "Wnen debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be from henceforth in the election *of him that sueth for such debt or damages, to have a Writ to the Sheriff Fiera Facias of the lards, (Levari Facias) 2 Inst. 395, and goods (Fi. Fa.) 2 Inst. Ibid., or that the Sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and the one-half of his land," &c. At this time, the Writ of Ca. Sa. in the case of a private person, was only allowed in cases of trespass vi et armis, when the Capias in Process laid. It was afterwards extended to other cases, by allowing the Capias ad Respondendum to them.

The early constructions of the Statute of Westminster, proceeding on the maxim that "electio unius est exclusio alterius," determined, that when the creditor had elected one species of Execution, he could never resort to any other, although that elected proved ineffectual. Thus, in 20 Edw. 2, Execution, 132, it was held, that after a Ca. Sa. awarded, although it was returned "not found," no other Execution could afterwards issue; and so in 19th H. 6th, it was held, that after an Elegit prayed and entered on the Record, the party could not resort to any other Writ of Execution, because he had made his election; and in the early cases there are many instances of the like construction. But this rigorous, and to creditors, michievous construction, gradually gave way to a more liberal spirit in the Courts of Justice, favoring the remedies of creditors, and in some instances, in which the contrary principle had become so fixed as to be beyond the power of the Courts, the Legislature interposed in their favor, as in the instances of the Statutes of Hen. 8, Jac. 1, and Ch. 2, incorporated into ours. And when our Statute of 1726, the prototype of the present, so far as the question under consideration is concerned, was passed, this principle of construction was almost wholly, and soon after was entirely repudiated, and the doctrine fully settled, that a creditor might take in succession all sorts of Execution, as long as it appeared that his Judgment was not, and until it was fully satisfied, unless

indeed some Execution had been levied, which had *such a tendency to satisfy, as that there was no criterion by which to ascertain for what sum a new Execution should issue; as a Ca. Sa. executed, or lands extended under an Elegit. Our Statute of 1726, so far from intending to abolish the Common Law and English Statutes in force here in respect to Executions, and to return to the strict doctrine of election, which had prevailed in ancient times, was, I think, designed to declare, that the Common Law and English Stat-

utes, prior to the 4th of James 1, were still in force here, and to be continued, and to adopt, not only the liberal constructions of the Courts in favor of creditors, as far as they had then gone, but the Statutes in the same spirit which had been passed since our Colonization. Accordingly, it recites that by the Common Law of England, and divers Acts of Parliament, which are binding on the people of this Colony, all creditors might, at their election, within the year, prosecute Executions of Fi. Fa., Ca. Sa. and Elegit; and professes only to prescribe the forms of those Executions, and their returns, in order to produce uniformity in practice. And whilst it omits to enact the Statute of Westm. 2, which gave the Elegit, and that of 32 Hen. 8, giving remedy to tenants by Elegit evicted, as being already in force, it enacts verbatim the other English Statutes, now incorporated in our Statute, which passed subsequent to the 4th James 1, which had no force here till so re-enacted. And the preamble to the section which enacted those provisions, which are now in the third section of our present Act, declared that they were enacted for the purpose of "removing all scruples which may be entertained amongst Clerks concerning the issuing of Executions;" and in giving directions concerning the issuing of Executions, the Act conformed to the most liberal decisions which had then taken place in favor of creditors. Thus, the first provision that the Plaintiff might have two Executions of different kinds in the hands of the Sheriff, provided he had only one executed, was contrary to the ancient principle of election, but in conformity to the then

635 *very recent decision (in 1725) of *Stamper v. Hodson*, 8 Mod. 302. So, as to the second provision, allowing a Fi. Fa. after a Ca. Sa. returned "Not found," which was in conformity to the decision in *Hob. 57*. So as to the third, allowing a Ca. Sa. after a Fi. Fa. returned "Nihil," or in part satisfied, which was according to *Carr v. Copping*, 4 James, cited 11 Vin. Abr. 38, pl. 5. So in the fourth case, of an Elegit allowed after an Elegit in part satisfied; that agreed with the decision in the case of *Glasscock v. Morgan*, 14 and 15 Car.; 1 Lev. 92. And so also in the fifth case, of a Ca. Sa. or Fi. Fa. after an Elegit returned "Nihil;" that was in conformity with the determination in *Andrews v. Cope*, 15 James 1; cited *Hob. 57*; 11 Vin. Abr. 42, Execution, (Y. a.) and so in the sixth case, of an Elegit after a Ca. Sa. returned "Not found," or a Fi. Fa. returned "Nihil;" that agreed with the more ancient cases of 30 Edw. 3, 24 and others. And the last provision, directing Executions to issue against several, as if there were but one Defendant, pursued the decision in *Rosser v. Welch & Kemmis*, Godb. 208; 11 Jas. 1; 11 Vin. Abr. Execution, (X. a.) pl. 19.

Considering, then, the general spirit and objects of this Statute, I cannot conceive that it was the intention of its framers to deprive creditors of remedies by Execution, which they would have had if the Statute had not been made. And even if these Statutes were considered as containing the

whole Law of Executions, I should say that a right to take an Elegit after a Fi. Fa. in part satisfied, and not returned "Nihil" as to the residue, would fall within the spirit, and be sanctioned by the equity of the Statutes.

All the Defendants claiming lands directly under William Bentley, are volunteers, and the Deeds under which they claim, grossly fraudulent, and the Decree as to them correct.

The case is different as to the lands claimed by William A. Bentley and Coleman, indirectly under him, in respect

636 *to which the facts are these: In 1796 or 1797, William Bentley purchased of Wm. A. Cocke, upwards of eleven hundred acres of land, with an agreement that no Deed was to be made until he had given Bond and security for the purchase money. Wm. A. Bentley was then, and probably long after, an infant.

In August, 1805, Wm. A. Cocke, at the instance of Wm. Bentley, conveyed this land to Wm. A. Bentley, who paid no valuable consideration for it to any one. Wm. Bentley had not then paid the whole purchase money, or secured it to Cocke, but afterwards paid it to him.

In 1800, James Cocke and Wm. Bentley exchanged lands, Cocke giving him one hundred and fifty-four acres adjoining the land sold by Wm. A. Cocke to Bentley, at the price of 1,000l., and Bentley giving Cocke about eight hundred acres in Amelia, at \$7 50 per acre. A considerable part of the difference was paid by James Cocke to William A. Bentley, by order of his father, William Bentley. In December, 1806, James Cocke, at the instance of Wm. Bentley, conveyed the one hundred and fifty-four acres of land to Wm. A. Bentley, who paid no valuable consideration to any one for it.

In May, 1807, Wm. A. Bentley conveyed to his brother Peter E. Bentley, six hundred acres of these two tracts of land, by a Deed reciting that their father had purchased the lands from the Messrs. Cockes, who had conveyed them to him at the instance, and by the permission of Wm. Bentley, who particularly enjoined it upon him to convey the six hundred acres to Peter E. Bentley, and this is the only consideration stated, and no other was given by Peter E. Bentley to any one.

In July, 1813, Peter E. Bentley conveyed five hundred and twenty acres of this land to Coleman, for the consideration of something more than \$6,000, and in October, 1815, Wm. Bentley and his wife, with a view to bar her claim to dower, conveyed the same land to Coleman

637 *by a Deed reciting that William Bentley, had purchased the land of Cocke, but had not procured any conveyance to himself, or in trust, and had given it to Peter E. Bentley and Wm. A. Bentley, his sons, to the last of whom Cocke had conveyed the land at his request, who especially enjoined it on William A. Bentley to convey to Peter E. Bentley, all that part of the land which laid above the bridge road. At this time, Coleman had paid only about three-fourths of the purchase money to Peter E. Bentley, but afterwards paid the balance, before, as he says in his An-

swer, he had any notice of the fraud charged upon the Bentleys, by the Plaintiffs.

At the several periods when all these transactions took place, William Bentley was largely indebted as their Guardian to the female Appellees, who, in August, 1806 chose new Guardians, and in November, 1807, instituted the suit against William Bentley for the settlement of his accounts as their Guardian, in which they obtained the Decrees (in 1819,) which are the foundation of this suit.

In 1807, and early in 1808, Bentley conveyed the residue of his estate, real and personal, without any valuable consideration to his other children, and in September, 1811, took the oath of an insolvent debtor. None of the Deeds, under which Coleman claims, from those of the Cockes to William A. Bentley, inclusive, were duly recorded. This fact was not charged in the Bill, but being urged at the hearing, time was given to enquire into it, and the fact afterwards admitted to be so.

If the legal title to these lands had even been in William Bentley, and were claimed under him by direct conveyances from him, made under the circumstances accompanying the transfer of his equitable title to William A. Bentley, his Deeds would clearly be void for fraud, so far as William A. Bentley was concerned, and even in respect to Coleman, if he had notice of the fraud.

Some doubt seems at one time to have existed upon the question, whether, if a father or husband purchase lands

638 *in the name of his child or wife, or in his own name, causing in either case a conveyance to be made to the wife or child, the transaction could be impeached by a creditor of, or purchaser from, the husband or father, upon the ground of fraud, inasmuch as in such case there is no resulting trust for the husband or father, as in the case of a purchase by one, and a conveyance to a stranger.

In Lady George's Case, cited Cro. Car. 550, as decided in the 10th of Car. a father having purchased in the name of his daughter, and afterwards sold to another, it was held in the King's Bench, that unless there were some fraud discovered, it was not within the 27th Eliz. though there be many badges of fraud.

In Back v. Andrews, Prec. Ch. 1; 2 Vern. 120, (1689,) a father purchased copyhold, which was conveyed to himself, and his wife and daughter, and their heirs. This was held to be an advancement for the wife and daughter, and not a trust for the husband, and that a mortgage by him should not bind the lands in the lifetime of the wife and daughter.

In Fletcher v. Sedley, 2 Vern. 490, (1704,) Wright, Lord Keeper, inclined, that a lease purchased by A., and conveyed to B. in trust for A. during his life, and afterwards for C., who lived with A. as his wife, and was so reputed, was not assets of A., nor liable after his death to his creditors; for when a man purchases, he may settle as he pleases, and thought that fraudulent conveyances are made so only by the several Statutes made for that purpose.

In Proctor v. Warren, Sel. Ca. in Lord

King's time, 78, (1739,) Lord King said, that he did not know that it had ever been determined, that if a man indebted, intending to provide for his children, has an estate originally conveyed to them, it should be subject to his debts.

On these cases, which are all that I have met with tending to establish the proposition, that such a transaction cannot be impeached for fraud, I remark, that in *Lady George's Case*, and that of *Back v. 639 Andrews*, no fraud appears *to have been established, and the declarations of *Keeper Wright* and *Lord King* in the other cases, were mere dicta, upon which no Judgment was founded.

The case of *Stileman v. Ashdown*, as it can be collected from the Reports of *Atkyns*, vol. 2, p. 477, and *Ambler*, pl. 13, appears to have been thus: The father purchased lands, which were conveyed, in 1700, jointly to himself and one of his sons, and their heirs, and other land, which, in 1708, was conveyed jointly to himself and another of his sons. The dates of these purchases are not noticed. They were probably contemporaneous with the conveyances. The father was also entitled to an equity of redemption of an estate mortgaged to one of his said sons. In 1721, a creditor of the father obtained a Judgment against him. The father continued in possession of these lands until his death in 1735, when his sons entered upon the estates respectively conveyed to them jointly with their father. The Executor of the creditor filed his Bill against the sons, for satisfaction out of the mortgaged and purchased estates. In 1742, Lord Hardwicke decreed, that the Plaintiff might redeem the mortgage; in which case the mortgaged premises should be sold, and the money paid for the redemption of the mortgage, refunded, and then the Judgment, and the costs at law and in Equity, satisfied. And if the sales of the mortgaged premises should not be sufficient to satisfy the whole of the Plaintiff's demands, that then a moiety of each of the estates, conveyed jointly to the father and his son respectively, should be sold, and the balance due to the Plaintiffs paid out of the proceeds rateably and proportionably, and the surplus paid to the sons respectively. But, if the sales of the whole property should not be sufficient to pay the whole of the plaintiff's demands, the Court reserved the consideration of the rents and profits of the two moieties directed to be sold. Upon a re-hearing in 1743, upon the petition of the Plaintiff, who considered himself aggrieved in that, the Decree did *not subject the whole of the purchased lands, and all their rents and profits to his demands, the Decree was affirmed.

In this case the whole of the purchased lands conveyed jointly to the father and sons, was considered, so far as the creditor was concerned, as belonging to the father, but as between the father and the sons respectively, and as between the sons, as belonging to the latter, according to the conveyances. A moiety was condemned to satisfy the Plaintiff's demand, not because the father was entitled by the conveyances to a moiety, for in that case the right of

survivorship in the sons, which they insisted on, would have been preferable to the lien of the Judgment on the father's moiety; (6 Co. Rep. 79, *Lord Abergavenny's Case*;) but because considering the father as entitled to the whole, so far as the creditor was concerned, yet only a moiety could be subjected in Equity, since no more could have been reached at Law, if it had been a legal estate.

Lord Hardwicke, as reported by *Atkyns*, argued that although a purchase by a father, in the name of a child, in general imported an intention to advance the child, and prevented the implication of a trust for the father, such as would arise in the case of a conveyance to a stranger, yet that a conveyance jointly to the father and child, was not calculated to effect the object of an advancement, and left it doubtful whether it was so intended; a suggestion which contradicted the express decisions in point in *Scroope v. Scroope*, 1 Ch. Ca. 27; 15 Car. 2, and *Back v. Andrews*, before noticed, and the subsequent decision in *Dyer v. Dyer*, noticed in 1 P. Wms. 112, Note; and I am persuaded that Lord Hardwicke's Judgment did not proceed on that ground, for if, as between the father and children, respectively, there was a trust for the father, and therefore, and for that reason only, the property liable for his debts, then for the same reason, the surplus of the sales, after satisfying the debt, would have been Decreed to be paid to the eldest son, as heir at law,

641 and who was a party, *whereas the Decree was precisely such as must be made in the case of all fraudulent conveyances, setting them aside so far as to let in the claims of creditors, and leaving them to have full effect as between the parties. And that this was the ground of the Judgment, appears by Lord Hardwicke's concluding observation: "It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement, to make it fraudulent, for if he does it with a view to his being indebted at a future time, it is equally so, and ought to be set aside." And *Sugden*, in his *Treatise on the Law of Vendors*, (page 424,) justly considers this as the ground of the Judgment, "the settlement being considered as voluntary, and fraudulent against creditors." And after showing that the case of a joint conveyance to father and child cannot be distinguished from that of a conveyance to the child only, but that in both cases, as between the parties, it should be considered as an advancement, he adds, "Fraud is of course an exception to every rule."

Thus we have against the dicta of *Keeper Wright* and *Lord King*, the express decision of Lord Hardwicke, in *Stileman v. Ashdown*, and the implied admission in *Lady George's Case*, that a purchase by a father, and a conveyance to a child, may be impeached for fraud, either by a creditor of, or purchaser from, the father. And so in *Christ's Hospital v. Budgin et ux.* 2 Vern. 683, it was said, that a purchase in the name of a wife or child after marriage, and voluntary, may, perhaps, be fraudulent as against creditors, in like manner

as if the settlement was of property actually vested in the husband or father. And deplorable, indeed, would be the imbecility of the Law if it could not reach such a case as that under consideration. Here the father purchased in his own name, and not in the names of his children: he held the property, in one instance, as his own ten years, and in the other six, not only apparently, but as the real beneficial owner of the property. He was then largely indebted, and any creditor who could

642 then "have had a Judgment against him, might have subjected that property to the payment of his debts, either under our Statute, making uses and trusts liable to the charges and debts of the cestui qui trust, or upon the original principles of a Court of Equity, which, following the Law, will, in general, give such relief against equitable estates of the debtor, as might be had at Law, if the estate was legal. The beneficial estate was settled in the father, and it was as much a fraud to give away to a child this beneficial interest, to the prejudice of his creditors, as to have conveyed away the legal title in like manner, if he had it. If such a transaction could not be held to fall within the Statute of Frauds, I should think it might be well reached by the general principles of Equity, according to which the Cockes were trustees for William Bentley. And although a conveyance by them to his son, with William Bentley's assent, would, as between the parties, extinguish the trust, and the son would hold the land exempt from it, yet a Court of Equity might well hold, that by reason of the fraudulent intent of this transfer, the existing trust for William Bentley should not be thereby destroyed, but should still subsist so far as creditors were concerned; upon the ground that persons acquiring a title by fraud are held to be trustees for the injured person, although they certainly did not intend to require the property in that character.

The Decree was, therefore, right also as respects the lands held by William A. Bentley, and has properly directed the whole, and not a moiety only of the lands held subject to satisfy the demand of the Appellees, to be sold, since there were several Decrees on the same day; each of which would have taken a moiety of the lands, if they had been extendable at Law.

As to Coleman, I think he must be considered as a bona fide purchaser, for valuable consideration, without notice of the fraud, and therefore protected against the operation of the Statute of Frauds by its proviso. And as to the lands held by him,

643 the only question is, whether they are liable "to the claims of Bentley's creditors on account of the Deeds under which he claims not being duly recorded. Upon the fullest consideration, I am of opinion that they are not. So far as Coleman is concerned, we are to consider the case as if William A. Bentley had given to his father an adequate valuable consideration for the transfer of his interest in the lands purchased from the Cockes, and that the transaction was tainted by no fraud. The equitable interest of the father was not transferred to the son by the ex-

ecution of Deeds to him by the Cockes, but by the previous authority given by him to them to execute those Deeds. And if such an authority had been given by the letter, and the Deeds never made, a bona fide purchaser of the equitable interest from William A. Bentley, would have had a better right now to call upon the Cockes for their conveyance of the legal title, than any creditor of William Bentley getting a Judgment against him after the transfer of his equitable right to his son. Such a transfer was valid without Deed, and was not necessarily to be recorded to make it available against his creditors. The Deeds from the Cockes passed, not Bentley's equitable title, but their naked legal title only, and if void so far as to leave that title still in them, yet those Deeds, together with the other evidence in the cause, would be full proof that William Bentley's equitable right was transferred to his son, and in respect to Coleman, we must take it to have been done (as before said) bona fide, and for valuable consideration: So, that if we held the Deeds to be void, it would not avail the Appellees any thing. The Decree as to Coleman should therefore be reversed, and the Bill dismissed, and in all other respects affirmed.

The PRESIDENT, and JUDGES CABELL, COALTER, and CARR concurred.

644 *Cole's Administrator v. M'Rae.

December, 1828.

Chancery Practice—Decree to Sell Land—Priority of Liens.—If there be several parties who claim to be paid their debts, and to be indemnified for security out of a debtor's land and chattels conveyed by Deeds, and there be an adversary creditor by Judgment, who claims to have the Deeds set aside for fraud, and the property sold to pay his Judgment-debt, an interlocutory Decree, which, without deciding on the validity of the Deeds, or the extent to which, and in what order the said several debts are chargeable on the property, yet directs that the lands conveyed shall be sold for cash, and the proceeds to be paid into Bank to the credit of the cause, is premature and erroneous, because it has a tendency to sacrifice the property, by discouraging the creditors from bidding, as they probably would, if their right to satisfaction of their debts, &c. had been previously ascertained.

Same—Decree for Sale of Personality—Priority of Liens.—Such a Decree may be proper as it regards the

***Chancery Practice—Decree to Sell Land—Priority of Liens.**—It is a well-settled rule that where there are conflicting claims to priority out of the proceeds of land about to be sold to satisfy the liens upon it, the court in order to prevent the danger of sacrificing the property by discouraging the creditors from bidding as they probably might if their right to satisfaction of their debts and the order in which they were to be paid out of the property, were previously ascertained, should declare the order of payment before it decrees the sale to be made. *Jaeger v. Boissieux*, 15 Gratt. 108, citing the principal case, and *Buchanan v. Clark*, 10 Gratt. 164, as its authority. And in *Bristol Iron, etc., Co. v. Caldwell*, 9 Va. 48, 27 S. E. Rep. 838, it is said: "There is no better settled rule of equity practice in this state than that which declares it to be premature and erroneous to decree a sale of land to satisfy encumbrances thereon before ascertaining the liens binding the land, and their amounts and priorities. This principle was established at an early day in the leading case of *Cole v. M'Rae*, 6 Rand. 644, where it was held that such a decree was premature and erroneous, because a sale, without previously ascertaining and determining the liens and incumbrances, and the order in which they are chargeable, has a tendency to sacrifice the property sold, by discouraging the creditors from bidding, as they probably would, if their right to the satisfaction of their debts, etc., had been previously ascertained. This case has been followed by numerous decisions

sale of chattels, because they are perishable, liable to be wasted, and no sacrifice need be apprehended, because they may be sold in detail.

Same.—Conflicting Claims to Land.—Disposal of Land Until Rights Ascertained.—As to the lands, they should in such case, be put into the hands of a receiver, to be rented out, until the rights of the parties, in respect to that subject, are determined, leaving a due regard to the rights of the widow of the debtor.

John M' Rae of Petersburg, filed his Bill on the 4th February, 1822, in the Richmond Chancery, against William Cole and others, which states, that he obtained a Judgment in the Superior Court of Law of Petersburg, in October, 1820, for \$9,120, with interest from 30th June, 1820, till paid and costs, subject to a credit of \$4,153, from the 23d October, 1820: that a Ca. Sa. was issued, Cole was arrested, and took the insolvent oath on the 30th December, of the same year, giving in a schedule of his estate, consisting only of three bonds, executed to him by one Thomas P. Cocke, for \$166 67 each. He charges that Cole, aware that Judgment would be rendered against him, prepared to render it unavailing, by a succession of fraudulent conveyances, and that he still lives on a farm in genteel style, enjoying many luxuries as well as comforts. The first of those conveyances was made in July, 1820, to Benjamin Harrison as Trustee, (whom he makes a Defendant,) to whom he conveyed personal property, consisting of twenty slaves, his stock of horses, mules, cattle, and hogs, his plantation utensils, household furniture, of which much was of an expensive character, and kitchen

645 furniture, for the purpose *of securing the payment of six or seven thousand dollars, for which the uncles of his wife, Benjamin Cocke, and Thomas Cocke, were his sureties, or creditors: that of these debts \$3,385 were due for a tract of land then recently purchased by Cole from Byrnes's Executors, which land was under no incumbrance, and would have constituted a more certain indemnity than personal estate, if fraud against creditors had not been intended: that \$1,354 were due to Benjamin Cocke by Bond of that date, and that the balance was due on delivery Bonds, against any danger from which no indemnity ought to have been required, unless the debtor was suspected of the vilest fraud. The second Deed was executed on the 13th October, 1820, by Cole and Wife, by which they conveyed to Ben-

jamin Cocke, as Trustee, three tracts of land containing nine hundred acres, more or less, near Petersburg, on the extraordinary trust, the Trustee should at the end of one year, sell the land on a credit of one, two, three, and four years, and out of the proceeds of such sale, should pay those of Cole's creditors who should, within thirty days, sign the Deed, and thus become parties thereto: but, he avers that no one creditor did sign it, and therefore it became of no effect. The third Deed was executed by the said William Cole on the 29th December, 1820, by which he conveyed to Thomas P. Cocke, his wife's brother, absolutely, all his interest in the lands and slaves before-mentioned, and all his wife's interest in the dower slaves held by her mother, for the paltry consideration of \$500, which were paid in the three Bonds mentioned in the schedule aforesaid. He charges that this Deed was executed by Cole, with full knowledge that the Execution was in the hands of the Sheriff, and after he had promised to surrender himself on the 30th, and for the sole purpose of enabling him to take the insolvent oath. He offers to allow \$5,000 instead of \$500, for the lands and slaves so conveyed, and will consent that the Court shall Decree an immediate sale of them for cash: that

646 all debts then legally *chargeable on them under the Deeds aforesaid, shall first be paid out of the proceeds of the sale, and that the \$5,000 shall be allowed as a credit to Cole in part of the Plaintiff's Judgment. He calls on Cole to say, whether he will accept the offer: if not, he calls on Cole, and Thomas and Benjamin Cocke, who are made Defendants, to say whether they did not design by the first Deed to protect the property against his debt, and especially whether the personal property was included with any other view, and whether the said Thomas and Benjamin entertained any apprehension of loss, when they professed to take a Deed of indemnity: he requires also Cole, and Benjamin Cocke, to state what debts were intended to be secured by the second Deed, and whether it was not intended to drive the Plaintiff into a compromise, or sale of his claim, upon terms which he had rejected: and he requires Thomas P. Cocke, who is also made a Defendant, to say what was the inducement to the execution of the last Deed, whether he did not promise to cancel it; whether he did really intend to force his brother-in-law to abide by so ruinous a sale, and whether it was not designed to defeat the Plaintiff's demand. He prays, that the Sheriff of Prince George County, in whom the property vests by operation of the Statute, and whom he makes a Defendant, may be decreed to sell the property, or that it may be sold in some other way, and that his Judgment debt may be paid.

The Deeds are filed as exhibits, and they are truly set out, except that the last Deed conveys to Thomas P. Cocke, all of Cole's interest in the lands and negroes conveyed by the two Deeds of Trust, "after the payment of the said debts," &c.

The Defendant Cole, in his Answer, admits the Judgment against him, but denies

of this court to the same effect. Many of them are cited in *Horton v. Bond*, 28 Gratt. 815; *Schultz v. Hansbrough*, 33 Gratt. 567, and *Fidelity Loan, etc., Co. v. Dennis*, 93 Va. 504, 25 S. E. Rep. 546. To the same effect, the principal case is cited with approval in *Wash., etc. R. Co. v. Alex., etc. R. Co.*, 19 Gratt. 617; *Lipscombe v. Rogers*, 20 Gratt. 660; *Moran v. Brent*, 25 Gratt. 106; *Horton v. Bond*, 28 Gratt. 822; *Schultz v. Hansbrough*, 33 Gratt. 567, 577, and *foot-note*; *Hoge v. Junkin*, 79 Va. 281; *Alexander v. Howe*, 85 Va. 202, 7 S. E. Rep. 248; *Stevens v. McCormick*, 90 Va. 736, 19 S. E. Rep. 742; *Marling v. Robrecht*, 18 W. Va. 461; *Tracey v. Shumate*, 22 W. Va. 500; *Hartman v. Evans*, 38 W. Va. 679, 18 S. E. Rep. 814; *Sandusky v. Farris*, 49 W. Va. 150, 38 S. E. Rep. 572.

See further, monographic note on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 636.

The principal case is also cited in *Beard v. Arbuckle*, 19 W. Va. 148.

Chancery Practice.—Appointment of Receiver.—See principal case cited in *Moran v. Johnston*, 26 Gratt. 111.

See generally, monographic note on "Receivers" appended to *Gibson v. Randolph*, 2 Munf. 310.

that it is a just debt; says, it was founded on an award, which he is endeavouring by a Bill in Equity against M'rae, to set aside. He denies, that there is any fraud in the conveyances, or any intention of fraud, either on his part, or on the part of the other *parties to those Deeds; he denies that he is living in comfort and luxury. He says, that the whole amount of the property conveyed by the Deeds, will not sell for more than \$500, if so much, over and above the debts they were intended to secure. He denies, that the land he purchased of Byrnes's Executors is unincumbered; on the contrary, he avers that it is under an incumbrance to a former owner of it, although the Defendant did not know it when he purchased, but that being so incumbered, Thomas Cocke, his surety, thought it prudent to take a Deed on slaves, and other personal property, as an indemnity. He admits the execution of the conveyances to Thomas P. Cocke, for the consideration of \$500; says, that he had only an equity of redemption in that property, and that the price agreed on is a full consideration for it. He denies, that there was any agreement between himself and the said Thomas P., to have the interest restored, or re-conveyed, or released to the Defendant. He says, that the second Deed expresses truly on its face the true intention of the parties. As to the offer of the Plaintiff to give \$5,000, he considers it an artful attempt to seduce the Defendants into an admission that the Deed was fraudulent, and therefore repels the offer with indignation. He hopes to be able to set aside the Judgment of the Plaintiff, but if he should fail in that, he expresses his willingness that the property may all be sold in any manner the Court may direct.

Thomas Cocke, in his Answer, repels with indignation, the imputation of fraud against him. He says, when he consented to become Cole's surety for the purchase of Byrnes's land, he was not apprised of Cole's embarrassment: that he executed the Bond as surety, for Cole, to Byrnes's Executors, under a conviction that a mortgage of the land had been previously executed by Cole, as had been stipulated, and he knows not why the Executors failed to require a mortgage, and thereby undertook to augment the responsibility of the sureties: that, when the Defendant obtained a lien on personal property from Cole, *his inducement was, not only to secure himself against loss, in consequence of the depressed value of the land, but as a protection against other large sums for which he had been security for Cole. He says, that he has reason to believe, that the property conveyed by the said Deed will be inadequate to discharge the debts intended to be secured by it, and that the reason why the property has not been sold to pay that debt, is, because the last Bond has recently fallen due, and that further proceedings on the part of Byrnes's representatives have been enjoined by the Chancellor: that the Defendant is perfectly willing that a sale be made of all of Cole's property, being assured that the Chancellor will save the Defendant harmless, and di-

rect the purchase money due to Byrnes's Executors, to be paid out of the lands, if the personal subject should be inadequate.

Benjamin Cocke in his Answer denies fraud, and says, that he had a just claim against Cole for the amount stated in the Deed to Harrison: that the Defendant proposed to the Complainant to compromise his controversy with Cole, because he believed that the Plaintiff, in the exchange of lands, had obtained a very great advantage over Cole: that the Plaintiff rejected the proposal, whereupon the Defendant advised Cole to execute a Deed for the benefit of all his creditors, so that all might come in for a distributable share. He declares his willingness that a Decree should be pronounced, directing a sale of the property.

Thomas P. Cocke in his Answer admits, that he became a purchaser of the residue of Cole's estate, for \$500: that, at the time of the purchase, it was believed not to be worth more after the payment of all Cole's debts, and the Defendant is still of that opinion. He denies, that he contemplated any fraud in this transaction: that it was his wish to preserve for his sister and her children the remnant of the estate. He says, he does not know how it can be considered fraudulent, when he was not to be

entitled to any part of the estate, till all the debts were paid. If *he had intended to have covered Cole's estate, and protected it from the payment of his debts, he might have been justly charged with fraud, but his interest was not to accrue till after the payment of the debts, and that the payment of Cole's debts was the inducement to the execution of the Deed. He expresses his willingness that a Decree should be made, to sell Cole's whole estate to pay all of his debts, and the Defendant is willing to surrender all his interest under the Deed, after being paid the money already advanced by him.

So much for the Bill and Answers in the suit of M'rae against Cole and others.

The Record also contains the proceedings in a cross suit in Chancery, brought by Cole against M'rae. In that suit, Cole represents that the debt on which M'rae had obtained a Judgment against him, arose out of a contract for an exchange of lands. He had purchased M'rae's lots in Petersburg, and land adjacent, of which the price was fixed, and had given in exchange several valuable tracts in Tennessee, of which the price was kept open. Pending the action at Law, brought by M'rae against him, on the contract, the parties referred their dispute to arbitrators, who decided that he should receive only \$2 per acre for his Tennessee land, Cole claiming \$4. The sum awarded, constituted the credit on M'rae's Judgment. The object of Cole's Bill was to set aside the award, and the Judgment consequent thereon. He objected to the award, not on account of the want of integrity or ability in the arbitrators, but because they were misled and deceived by the testimony of the only witness who was examined before them, and because great injustice had been done to him in ascertaining the value of the land, which he endeavoured to support by

proof. At the hearing on the Bill, Answers and Depositions, Cole's Bill was dismissed by the Chancellor, and is supposed to have been finally disposed of. It is not necessary to say more here as to that case,

because it is not referred to in the 650 Decree either of "the Chancellor, or of the Court of Appeals, in the suit which forms the subject of this Report.

During the progress of this suit, about March, 1824, Cole died, leaving a widow. The suit was revived in the name of Benjamin Cocke, jr., the Administrator, but the widow does not appear to have been made a party.

At the Term in March, 1827, the Chancellor entered and interlocutory Decree in this case, of M' Rae against Cole's Administrator and others, to the following effect:

"The Court, not deciding on the priority of any of the creditors before it, doth order, that one of its Commissioners do state an account of the several claims and debts which may be chargeable upon the estate in the proceedings mentioned: that the Defendants, Benjamin Harrison and Thomas Cocke, do render before the same Commissioner an account of the trust property disposed of by them: that the Commissioner make report, &c., and that unless the Defendants, or one of them, do within six months pay the Plaintiff the amount of his Judgment, (specifying it,) and the costs of this suit, the Marshal of this Court, or one of his Deputies, after giving six weeks previous notice of the time and place of sale, &c. &c., do sell to the highest bidder, for cash, on the premises, the tract of land in that County, (Prince George,) in the proceedings mentioned, whereof William Cole died possessed, and pay the proceeds of sale into the Bank of Virginia at Petersburg, to the credit of this cause, subject to the future order of the Court, and report his proceedings to the Court."

In February, 1828, the Court of Appeals granted a Supersedeas to so much of the above Decree as related to the sale of the land.

Allison, for the Appellants.

May and Spooner, for the Appellees.

651 *December 18. JUDGE GREEN prepared the following Decree, which was concurred in by JUDGES CABELL, COALTER and CARR, and entered as the Decree of the Court.*

"The Decree in this case not having decided upon the validity of any of the Deeds mentioned in the proceedings, and impeached by the Plaintiff as fraudulent, nor as to the extent to which, and in what order, the debts due from the Defendant, Cole, to the Plaintiff, and the other Defendants, are chargeable upon the property professedly conveyed by those Deeds, it is not thought proper in this stage of the proceedings to decide those questions here. And although it is clear that the whole property conveyed by those Deeds, or so much thereof as may be necessary to pay all the debts aforesaid, must be sold for that purpose in the progress of this cause, yet the Court doubting whether it was

proper to direct the real property in question to be sold for cash to be deposited in the Bank to the credit of the cause before these questions were decided, since that course had a tendency to sacrifice the property, by discouraging the creditors from bidding, as they probably would, if their right to satisfaction of their debts, and the order in which they were to be paid out of the property, were previously ascertained, awarded a Supersedeas in respect to the land only, leaving the Decree as to the personal property to be executed, inasmuch as that was perishable, and liable to be wasted, and no such sacrifice was to be apprehended in respect thereto from the causes aforesaid, since it could be sold in detail. And the Court is now of opinion that the Decree, so far as it directed the lands, in the proceedings mentioned, to be sold, was premature, and therefore erroneous: and that the said lands should have been put into the hands of a receiver, to be by him rented out until the rights of the parties, in respect to that sub- 652 ject, *were determined, having a due regard to the rights also of the widow of Cole, if any she has."

The Decree was therefore reversed, so far as it conflicts with this opinion, and affirmed as to the residue, and the cause remanded to be further proceeded in accordingly.

ISAAC v. West's Executor.

December, 1828.

Deed of Emancipation—Construction—Increase—Case at Bar.—A Deed of Emancipation, by which the master manumits his slaves at his death, directs, that they shall serve him as long as he lives, and at his death go free from all persons; and, for himself, his heirs, executors, and administrators, relinquishes all his right and title to the said negroes, is to be construed as passing a present right to freedom, reserving a right in the grantor to their personal services during his life, as a condition of the emancipation. Therefore, a child born of one of the emancipated females in the interval between the execution of the Deed and the death of the grantor, is free from its birth.

Same—Same—Rule of.—If the construction of a Deed of Emancipation be doubtful, resort may be had to the rule, that the Deed is to be taken most strongly against the grantor, and to the spirit of the laws of all civilized nations which favors liberty.

This was an appeal from a Judgment of the Superior Court of Law for the County of Accomack. The Appellant Isaac, instituted an action in forma pauperis against John G. Joynes, Executor of Abel West, deceased to recover his freedom. The Jury who tried the cause, found a special verdict, as follows: That Abel West, in the year, 1806, was possessed of a negro woman named Jenny, as his slave; that on the 8th April, 1806, he manumitted the said Jenny by a Deed in these words, to wit: "Know

***Deed of Emancipation—Construction—Increase.**—See principal case cited on this subject in *Manns v. Givens*, 7 Leigh 717; *Logan v. Com.*, 2 Gratt. 574; *Wood v. Humphreys*, 12 Gratt. 334, 335, 346. The principal case was cited in *Forward v. Thamer*, 9 Gratt. 539, to the point that a testator cannot emancipate a slave and annex a condition subsequent repugnant to the freedom conferred.

†**Same—Same—Rule of.**—"I approve of the principle declared by this court, in the case of *Isaac v. West*, 6 Rand. 852, that every instrument conferring freedom, should be construed liberally, in favor of liberty." JUDGE CABELL in *Elder v. Elder*, 4 Leigh 280. To the same effect the principal case is cited in *Manns v. Givens*, 7 Leigh 714.

*Absent, the PRESIDENT.

all men by these presents that I Abel West of Accomack County and State of Virginia, for divers good causes and considerations, thereunto me moving, have and by these presents do manumit and set free the following negroes at *my death: they shall serve me as long as I shall live, and at my death shall go free from all persons, and I do hereby for myself, my heirs, executors and administrators, relinquish all my right and title in, and unto the aforesaid negroes, Josiah, Joshua, Nanny, Brittany, Fanny, Toby, Stephen, Alcy, Sampson, Nancy, Jenny, Jack, Mary, Perey, Peter, Frank, Levin, Strong, Kesiah, James, Annet, Candis, Adam, Mehala. In testimony whereof, I have hereunto set my hand and seal this 8th April, 1806, Abel West, (Seal.)" Which deed was duly recorded. They found, that on the 1st January, 1806, the said Abel West placed the said negro Jenny, and other negroes belonging to him, upon that part of the tract of land supposed to be two hundred acres, which in his Will he devised to the negroes which belonged to him, and the said Jenny continued to live on the said land, from that time until the death of Abel West, and from that time till Isaac, the Plaintiff, was taken possession of by the Defendant: that the Plaintiff is the son of Jenny, and was born in 1813, and lived with his mother from the day of his birth till the day of the death of the said Abel West: that the said Jenny and the other negroes cultivated the said two hundred acres of land, and used the profits; and the said West neither cultivated, nor interfered with the cultivation of the said land after Jenny and the other negroes were placed on it, nor had it been cultivated for many year before by any one: that all the negroes who were placed on the said tract were considered in the neighbourhood as free, and were dealt with, and dealt with others as such. from the time they were placed there till West's death: that Nanny, in the said Deed mentioned, who lived on the said tract, hired out her son Toby, from 1810, to 1813, inclusive and her son Sam, for 1813, and received the hires: that Jack, in the said Deed mentioned, is a child of Jenny, and that the said West, when he placed Jenny on the land, gave up to her the boy Jack, who continued in possession of his mother till he arrived to the age of twenty-one years, and *that for three years, beginning in 1811, he was hired out by her, and she received the hires: that the said West never made any objection to the dealings and transactions of the said Jenny and the other negroes, or exercised any control over them: that in 1803, the said Abel West declared that he intended after his death, that his slaves should never serve his relations, or any one else. They found, that Abel West died 30th May, 1816, having first made his last Will and Testament, bearing date 22d of that month, which Will is found in hæc verba. [After devising sundry tracts of land to his relations, and bequeathing them sundry valuable cattels, he says. "Item, I give all the negroes which belonged to me the land lying above the Neck road, supposed to be

two hundred acres more or less, it being part of the land where I now live, to them and their heirs forever on the female side in common amongst them all as a place of refuge. I also authorise my Executors to give them thirty barrels of corn, and one thousand weight of pork. I also give them all the flax, wool, and leather that may be in the house at my death. Item, I give to my men Joshua, Will, Sam, Parker, Edmund, and Adam, forty dollars each should they finish the crop." He appoints the Defendant his Executor.]

The Jury also found, that the two hundred acres given by the Will to the negroes, is the same land on which Jenny and the other negroes had been placed by West, at the time aforesaid: that the said West, after the payment of his debts, left, besides negroes, personal estate of the value of more than \$4,000: that Joshua, Brittany, Sampson, Mary, Perry, Frank, and Adam, named in the said Deed lived with West till his death, and that Brittany and Mary had several children born after April, 1806, all of whom also lived with West till his death, and that Alice was placed by West with John G. Joynes, after April, 1806, and continued with him till West's death. The Jury also found a Deed executed by West, bearing date 27th June, 1808, by which, after reciting that he had *by the Deed of April, 1806, manumitted Josiah after his death, he released to the said Josiah his life estate in him, and all claim to his services, from that time, making him as completely free in every respect as he had a right to do, which Deed was duly recorded. They also found that the said Abel West had, by Deed of the 24th February, 1806, which was duly recorded, emancipated sundry other slaves, eleven in number, absolutely, and without any reservation of right to their services. It was also agreed that Adam and Joshua, mentioned in the Will, were the same negroes named in the Deed of April, 1806.

Upon this statement of facts, the question was referred to the Court, to decide whether the Plaintiff Isaac was entitled to his freedom or not. The Superior Court adjudged the Law to be for the Defendant, from which the Plaintiff appealed.

Leigh, for the Plaintiff.

Johnson and Stanard, for the Defendant.
December 18. JUDGE GREEN.

In April, 1806, Abel West emancipated many of his slaves, by a Deed, which in the same month was duly recorded, upon his acknowledgment. Amongst these was Jenny, the mother of the Appellant, who was born in 1813. West died in 1816. The operative words of the Deed were: "I, Abel West have, and by these presents do manumit, and set free the following negroes at my death; they shall serve me as long as I live, and at my death shall go free from all persons; and I do hereby for myself, and my heirs, executors, and administrators relinquish all my right, and title of, in, and unto the aforesaid negroes Josiah," &c.

In the month of January preceding the date of the Deed, many of the negroes were settled by West, upon two hundred acres of land, which he afterwards

devised to the negroes, which had belonged to him. These were from the time of that settlement, practically free, rendering no service to West, and appropriating all their earnings to their own use, some of the women hiring out their children, and receiving their hires. Some of the slaves named in the Deed, continued to serve West until his death.

If the civil condition of Jenny was changed from that of slavery to freedom, immediately on the execution of the Deed, Isaac was born free, although she might have been bound to service during her former master's life. On the contrary, if she continued a slave till West's death, he was born a slave, and so continues, notwithstanding the subsequent change of his mother's condition.

If the first clause of the Deed conferring freedom on these slaves, was the only one having that effect, it is clear that they would have continued slaves to all intents and purposes, until West's death. On the other hand, if the last clause was the only one in the Deed which had that effect, they would have been immediately free. And if there were no other clause affecting the construction of the Deed, I should think the generality of the last would be modified by the first so as to give effect to the manifest purpose of holding the slaves during West's life-time, and in the absence of any evidence of his intention as to the mode of holding them, it must have been taken that he intended to continue to hold them as he then did, as absolute slaves, to be disposed of during his life, as he pleased, by transferring them for that time to any other purpose, or otherwise. The second clause, which declares that they should serve him during his life, seems to indicate that he did not intend to reserve his original and general power over them, as a master entitled to dispose of them during his life, at his pleasure, by selling them to others, but only to impose on them the obligation to serve him personally as he should require.

657 *The three clauses, then, taken together, may be considered, as modifying each other, so that all may have some effect, and be construed to give immediate freedom, to all intents and purposes except to hold them bound to serve West himself, personally, during his life. They may be read together thus: "I Abel West have, and by these presents do manumit, and set free, and do hereby for myself, my heirs, executors, and administrators, relinquish all my right and title of, in and unto the following negroes Josiah, &c. But they shall serve me as long as I shall live, and at my death shall go free from all persons." The effect of this would be that he renounced all his right and title as master, from that moment, reserving a right to claim their personal services to himself only, as a condition of the emancipation. If this condition was against Law, as inconsistent with the right granted, it would not frustrate the grant. Thus, a condition that the grantee should not enjoy the estate granted, but in a particular way, or should not alienate it, would be void, and not affect the validity

of the grant; and so in case of a grant of present freedom to a female slave, with a condition that her future issue should be slaves, the condition is against Law, and void, but does not invalidate the grant, as was held in *Fulton v. Shaw*, 4 Rand. 597.

If this construction is doubtful, some weight is due to the maxim, that every Deed is to be taken most strongly against the grantor, and to the spirit of the Laws of all civilized nations which favours liberty. "In obscura voluntate manumissionis, favendum est libertati." Dig. Lib. 50, tit. 17, § 179, Ulpian. And for the Common Law, see Coke Litt. 124, b.

The Judgment of the Superior Court ought to be reversed, and Judgment entered for the Plaintiff.

JUDGES CABELL, COALTER, and CARR, concurred.*

658 *Joseph Meze v. John Mayse.

December, 1828.

Equity Jurisdiction—Settlement of Accounts.—Where a Plaintiff goes into Equity for a settlement of accounts, on the ground that he cannot substantiate the items in his account, except by the Answer, and testimony of the Defendant himself, and in the progress of the suit it appears by his own showing, that the account is susceptible of proof by witnesses, in a Court of Law, his Bill ought to be dismissed.

Same—Damages for Breach of Contract.—A bill in Equity does not lie to recover damages for a breach of contract merely sounding in damages.

This was an appeal from a Decree rendered by the Superior Court of Chancery held at Greenbrier Court-house, in favor of the Appellee, against the Appellant, for the sum of \$325, with interest from the day of rendering the Decree, until paid, subject to a credit for the sum of \$118 23 cents. It is not deemed necessary to give any other statement of the case than that which is contained in the opinion of the Judge who delivered the opinion of the Court.

Wickham and Leigh, for the Appellant. Johnson, for the Appellee.

December 18. JUDGE GREEN.

The Appellee, John Mayse, filed his Bill against the Appellant, Joseph Meze, stating, that he had been appointed a Deputy for the Appellant, a High Sheriff of Greenbrier County, and had agreed to pay \$150 for the deputation. He charges, that the Appellant had discharged him from his office of Deputy before his office expired, contrary to his contract, and without just cause. He states, that during his continuance in the office of Deputy Sheriff, he had collected some arrearages of taxes accruing before he was Deputy, and intending to pay them over to the High Sheriff, he had, by mistake, paid him a part of the taxes which he had collected for the 659 year in which he was Deputy, to *the amount of \$36 02, which he afterwards paid into the Treasury: that the High Sheriff had collected other taxes due in the year in which the Plaintiff was Deputy to the amount of \$82 40, for which he, the

*Absent, the PRESIDENT.

Equitable Jurisdiction.—See monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 457.

A bill even without a demurrer will be dismissed at the hearing, if it shows no ground for equitable relief. *Surber v. McClintic*, 10 W. Va. 247, citing the principal case.

Plaintiff, had also accounted to the Treasury; and prays for a Decree on this score for \$74 02, the balance of the two sums above mentioned, after deducting \$44 40, a proportion of the price which he was to pay for the deputation of the office, according to the time during which he was permitted to continue in the office. He also prays for a Decree for damages for the violation of the contract by the High Sheriff, in discharging him from office.

The Plaintiff held, and exhibited the High Sheriff's receipt for the arrearages of taxes mentioned in the Bill, including the taxes due by the same persons for 1815, the year the Plaintiff was Deputy; so that he had the most perfect proof of the fact that he had paid the \$36 02, both to the High Sheriff, and into the Treasury, and that the High Sheriff was responsible to him for that sum. The Bill alleges, by way of giving jurisdiction to the Court, that "there are certain items in the Plaintiff's account which he cannot substantiate by any other person or evidence, known to him at that time, except by the Answer, and testimony of the Defendant himself, to wit, all the items contained in the exhibit B." These were the items, consisting of taxes to the amount of \$82 40, charged to be collected by the High Sheriff, and paid into the Treasury by the Deputy. One item of this was \$30, received for a Merchant's license, and for which the High Sheriff gave a receipt, as stated on the face of the exhibit: another was \$16 91, paid by the Executor of Wright Southgate, and proved by his deposition. Two items charged in the exhibit, were not received by the High Sheriff, amounting to \$29 21; and the other sums being received from third persons, who probably had the Sheriff's receipt, could certainly have been proved, without a discovery from the Defendant. The Plaintiff did not admit, in his Bill, that the

660 *Defendant had any set-offs against his claims, and excepted to every set-off allowed by the Commissioners. So, that there never was a case more clearly proper for a Court of Law, and improper for a Court of Equity, than this. A claim on the part of the Plaintiff, for two sums of money, paid by him for the Defendant both capable of proof in a Court of Law, and no set-offs which could make the accounts at all complicated. So far as this was a Bill for an account, it should have been dismissed, for want of jurisdiction, on the Plaintiff's own showing.

The claim to damages for a breach of contract, merely sounding in damages, was still more unfit for the jurisdiction of a Court of Equity. A Court of Equity can give damages in no case where the party has a clear remedy at law; nor even when he has no such remedy, unless, perhaps, under very peculiar circumstances. *Anthony v. Leftwich*, 3 Rand. 238. The issue of quantum damnificatus, is a familiar term in the Courts of Equity, but is resorted to chiefly, if not solely, in cases where a party applying for relief against a penalty, it is necessary to ascertain the damages for which the Plaintiff is responsible, and bound to pay, as the condition of the relief sought. Unliquidated damages can never surely be

said to be the subject of account. Nor was it necessary to ascertain whether the contract had been violated by the High Sheriff, in order to determine whether he was entitled to charge the Deputy in account with the price stipulated to be paid for the deputation of the office; for, whether the Sheriff was right or wrong in discharging the Deputy, he could not, in equity, claim more of the stipulated price, than a pro rata compensation for the term the Deputy actually enjoyed the office. I think the Decree should be reversed, and the Bill dismissed, with costs.

JUDGES CABELL, COALTER and CARR concurred. The PRESIDENT absent.

661 *Lane's Executrix v. Ellzey.

December, 1828.

Chancery Practice—Foreclosure of Mortgage—Usury—Evidence.—If to a Bill brought to foreclose a mortgage, the Defendant pleads Usury, and the Bill itself on its face, and the documents filed with it, present a case of Usury, such as is taken, it is not necessary for the Defendant to take depositions to support his plea. His adversary's Bill supports his plea.

This case has been on two former occasions before the Court of Appeals, and in the brief statement which will be made of it, a reference will be made to those decisions.

Thomazin Ellzey, by Deed of Bargain and Sale, bearing date 9th November, 1799, conveyed to William Lane, a tract of land in Fairfax County, containing four hundred and seventy-five and three-fourth acres, for the consideration of 475l. 15. On the same day William Lane signed an agreement in writing, by which he stipulated that if Ellzey should re-pay him the said sum of 475l. 15, with legal interest on the same, and the rent for the present year (1799,) within, or at the end of six weeks from that day, then that the said Lane would give up to the said Ellzey the said Deed. This agreement was copied and certified to be correct by the said Ellzey.

In 1800, Lane brought a suit in Chancery to foreclose the equity of redemption in the said land, charging that the said Deed, though on the face of it an absolute conveyance, yet when taken in connection with the agreement aforesaid (which he recites) was a mortgage. In May, 1801, the Bill was taken for confessed, and a Decree rendered by default against Ellzey, the Defendant, directing a sale of the land by Commissioners, &c. Before a sale was effected, Ellzey, in March, 1802, filed a Bill of Review, charging that the conveyance was obtained by Lane on an usurious consideration, and praying to be released from the interest. That Bill of Review was dismissed by the Court of Appeals in October, 1808. See 2 Hen. & Munf. 589.

Upon the cause being sent back to the Superior Court of Chancery at Richmond, and William Lane being dead, it

662 *was abated as to him, and in June, 1809, on the motion of Sally Lane, his Executrix, a Subpœna Scire Facias was awarded to revive the suit. The Defendant, Ellzey, on the return of the Sci-

*See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

Fa. in February, 1810, tendered a plea of the Statute against Usury, which avers, that from the scope of the Bill originally filed, and from the Deed and agreement referred to as exhibits in the said Bill, the said William Lane exacted of the Defendant a greater compensation for the sum advanced to the Defendant than the legal rate of interest. The Chancellor refused to receive the plea but on certain terms imposed by him: these terms not being complied with, the plea was not received, and an interlocutory Decree was entered at February Term, 1810, for a sale of the land by Commissioners. The land was sold, and the money paid to Lane's Executrix, and on the 6th February, 1811, a final Decree was rendered, confirming the sale, from which Ellzey appealed. In March, 1813, the Court of Appeals decided, that "although the statement made in the Bill may possibly be explained so as to show the transaction not to have been usurious, yet there being strong reasons, from that statement, to believe that the matter of the plea in the proceedings mentioned, may be true, which defence, where it is probably correct, ought at all times to be received in a Court of Equity, (so long as the case is within the power of that Court,) without annexing any unreasonable condition thereto," reversed both the interlocutory Decree of February, 1810, and the final Decree of February, 1811, and remanded the cause to the Court of Chancery, with directions to receive the plea, or such other plea or defence as the party may offer touching the usury of the transaction in the Bill mentioned. 4 Munf. 66.

On its being returned to the Chancery Court, then established at Fredericksburg, the Defendant filed his plea of usury, averring, that on the 9th November, 1799, it was corruptly agreed between William Lane, and Thomazin Ellzey, that the former should lend the latter the sum of 475l. 15s. and that Ellzey should re-pay the principal at the expiration of six weeks, and that for the forbearance of the said principal, the said Ellzey should pay interest at six per cent. per annum from the said 9th November, 1799, and the further sum of 40l., the amount of the rent of the land for that year; and that to secure the payment of the said several sums, the Deed in the Bill mentioned was executed. Issue being taken on the plea, the Court of Chancery, on the 2d May, 1817, sustaining the plea, dismissed the Bill, from which Decree the Plaintiff appealed.

Leigh, for the Appellant.

Nicholas, for the Appellee.

December 18. JUDGE COALTER delivered his opinion.*

This Bill is filed to foreclose a mortgage. It is stated in the Bill to be a mortgage. If the Bill had averred that Lane had, a year before, purchased and paid for the

land, and had then agreed to re-sell it to the Defendant for the sum paid, and the rent of the land for that year, it would have given such explanation of the transaction as would, I presume have required an Answer, such allegation not being so inconsistent with the transaction, as evinced by the writings, but that it might have been averred, and proved. This is not done, but it is merely alleged that the Defendant did not, within, or at the end of six weeks, pay the said sum, (which had before that time been paid to the Defendant for the said land,) with legal interest on the same, and the rent for the year 1799. The interrogatory part of the Bill calls on the Defendant to say whether he did not execute the Deed, (which is a common Deed of Bargain and Sale, without defeasance on its face:) whether the Plaintiff did not pay the said sum of money to his order: and whether he did not consent to the agreement made by the Plaintiff to restore the Deed, 664 on his paying "the said sum with legal interest, and the rent therein mentioned: and whether it was not at his special request that the Plaintiff agreed to the terms of the aforesaid agreement.

The agreement thus referred to, bears equal date with the conveyance and states nothing like a previous sale and a re-sale; but simply that Ellzey having conveyed to Lane four hundred and seventy-five and three-fourth acres of land on that day for 475l. 15s. he (Lane) agreed that if Ellzey, within, or at the end of six weeks, shall pay the said sum with legal interest, and the rent of the present year, then he agrees to give up the Deed.

The plea of usury being filed, it is said that Ellzey must prove the usury.

The Deed shows the parties to be both citizens of Virginia, and the land to lie in the County of Loudoun, so that it cannot be foreign interest.

The sum due for the rent is not stated in the Bill, but the rent, (be it more or less,) is claimed in the Bill. The quantum is not material.

It has been urged though, that the Defendant must prove his plea. This plea was filed at Rules in July, 1814, and in June, 1815, the Defendant was ruled to reply. In May, 1816, there was a general replication. No depositions were taken on either side, and in April, 1817, the cause was set for hearing by the Plaintiff.

It seems to me, that the Bill, and the documents filed with it, present such evidence of usury in support of the plea, that it must be taken as true, unless some explanation, compatible with the pleadings, had been adduced on the other side.

Nothing of this kind is done, though this Court formerly thought some explanation might possibly be given. 4 Munf. 66. No explanation being given, and the case being quite clear for the Defendant, the Decree must be affirmed.

JUDGES CABELL and CARR, concurred.

*Absent, the PRESIDENT and JUDGE GREEN.

CASES DECIDED BY
THE GENERAL COURT OF VIRGINIA,
NOVEMBER TERM, 1828.

JUDGES PRESENT:*

<i>Stuart,</i>	<i>Daniel,</i>
<i>Brockenbrough,</i>	<i>Semple,</i>
<i>Johnston,</i>	<i>Parker,</i>
<i>Smith,</i>	<i>Summers,</i>
<i>Dade,</i>	<i>Bouldin,</i>
<i>Saunders,</i>	<i>Upshur,</i>
	<i>Field.</i>

Richard Poindexter v. The Commonwealth.

November, 1828.

Indictment—**Verdict**—**Variance in Name**—**Effect**.—If an indictment charges an offence to have been committed by Richard, and the verdict abridges the name by finding the prisoner Rich'd. guilty, the verdict is not erroneous.

668 ***Grand Larceny**—**Indictment**—**Verdict**.—If a person be indicted for grand larceny, and the Jury convict him of petit larceny without ascertaining the value of the goods stolen, the verdict is sufficient.

Same—**Verdict**—**Sufficiency**.§—A verdict which does not ascertain what goods were stolen, nor their value, nor whether they are forthcoming, or not, nor what articles are not forthcoming, if any, nor the value of such as are not forthcoming, (but merely finds the prisoner guilty of petit larceny on an indictment for grand larceny,) will not be set aside as erroneous.

This was an application for a Writ of Error to a Judgment of the Superior Court of Law for Patrick County, by which the petitioner was sentenced to be confined in the Jail of that County for the term of two months, there to be kept on low and coarse diet, and at the expiration of his term, to receive fifteen stripes; the prisoner having been convicted of petit larceny.

The application was over-ruled. A statement of the case is to be found in the following opinion of the Court, which was delivered by JUDGE FIELD.

The petitioner was indicted and tried before the Superior Court of Law for Patrick County, for the larceny of certain goods, which were charged in the indictment to be over the value of ten dollars. The Jury found a verdict in these words: "We, the Jury, find the prisoner, Rich'd Poindexter, guilty of petty larceny." The prisoner moved in arrest of Judgment, and filed the following assignment of errors.

"1. Because he says that the verdict of the Jury is not rendered against the prisoner, but against Rich'd Poindexter.

*All of the Judges did not sit in all of the following Cases. Judge Dade was prevented by sickness from attending more than two or three days. JUDGE SEMPLE, with the concurrence of his colleagues, also retired on the fourth day, and JUDGE STUART, with like concurrence, about the seventh. —Note in Original Edition.

†See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com. 14 Gratt. 674.

‡See monographic note on "Larceny" appended to Johnson v. Com. 24 Gratt. 555.

"2. Because the Indictment charges an offence, which, by the Laws of the land, amounts to grand larceny.

"3. Because the Jury, by their verdict, have not ascertained what goods were stolen, nor the value of the goods stolen, so as to enable the Court to ascertain whether the offence be grand or petit larceny.

"4. Because the Jury have not ascertained whether the goods be forthcoming, or not.

669 "5. Because the verdict does not show what articles are not forthcoming, nor the value, so as to show the Court for what a restitution might be awarded."

The Superior Court over-ruled the prisoner's motion to arrest the Judgment, and sentenced him to imprisonment in the County Jail for the term of two Calendar months, and at the expiration of his term, to receive fifteen lashes.

This Court is of opinion, that the matters alleged in arrest of Judgment, are insufficient for that purpose, and that the Superior Court of Law properly over-ruled the motion. The Writ of Error is, therefore, overruled.

The Commonwealth v. John Booth. §

November, 1828.

Criminal Law—**Statute**—**Assemblage of Slaves on Lot**—**Proof**.—In a prosecution under the last clause of the 18th section of the Act concerning slaves, &c. against a Defendant for permitting a number of slaves, more than five, other than his own, to be and remain on his lot, or tenement, it is not necessary for the Commonwealth to prove that they remained thereon more than four hours at any one time.

Same—**Same**—**Object of Statute**.—The object of the first clause of the section is to protect private rights, by preventing persons from knowingly permitting the slaves of others to tarry on their premises without the owner's leave, for an unreasonable time. The object of the last clause, is to guard the public against assemblages, which might be dangerous to the peace, or injurious to morals, in a much shorter time than four hours.

Same—**Same**—**Same**—**Application**.—Qu. Does the last clause of the said section apply to the assemblage of any other negroes, than slaves?

Same—**Probata et Allegata**—**Case at Bar**.—The proof must correspond with the allegation, and therefore, if the Information charges an unlawful assemblage of negro slaves, the Commonwealth must prove that they were slaves.

In consequence of a previous Presentment of the Grand Jury, an Information was filed by the Attorney for the Commonwealth in the Superior Court of Law for Norfolk County, against the Defendant; which charged that, on the "first of August, 1827, and on divers other days and times, between that day and the 12th September, in the same year, at the town of Portsmouth, and County aforesaid,

670 charged that, on the "first of August, 1827, and on divers other days and times, between that day and the 12th September, in the same year, at the town of Portsmouth, and County aforesaid,

§See principal case distinguished in Davenport v. Com. 1 Leigh 594.

and in, about, and near the shop, and storehouse, and upon the lot and tenement of him the Defendant, he the said Defendant, did knowingly and willfully, permit and suffer unlawful assemblies of negro slaves, more than five, other than his own, that is to say, to the number of twenty negro slaves, then and there to assemble, and meet together, and then and there to drink, tipple, and make a noise, to the great nuisance, annoyance and disturbance of the good citizens of the town and county aforesaid, to the encouragement of dissipation, vice, and immorality, to the evil example of all others in like manner offending, against the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth. The Defendant having pleaded the general issue, a trial was had, and the Jury found him guilty, and assessed his fine to \$10, subject, however, to the opinion of the Court on the points reserved at the trial.

The question reserved was, whether, under the 13th section of the Act, (1 Rev. Co. ch. 111, p. 424,) entitled, "An Act reducing into one the several Acts, concerning slaves, free negroes and mulattoes," it is not essential for the Commonwealth, in order to convict the Defendant, to prove that the negroes and slaves above the number of five mentioned in the latter part of that section remained on the Defendant's lot, tenement, or plantation, above four hours? And also upon the question, whether it is incumbent on the Commonwealth, after proving that negroes and slaves above the number of five, were assembled on the Defendant's lot, tenement, or plantation, by his knowledge and permission, at one time, also to prove that they were slaves? If either of these questions is decided against the Commonwealth, Judgment is to be entered for the Defendant; otherwise, for the Commonwealth.

671 *The Superior Court adjourned these questions to the General Court, and also on the question, what Judgment on the whole case, the Superior Court ought to render?

PARKER, J. delivered the opinion of the Court.

After stating the case, he proceeded:

The 13th section of the Act referred to, provides, that "if any master, mistress or overseer of a family, merchant, tavern-keeper or any other person, shall knowingly permit or suffer any slave, not belonging to him or her, to be and remain upon his or her plantation, lot or tenement, above four hours at any one time, without leave of the owner or overseer of such slave, he or she, so permitting, shall forfeit and pay three dollars, for every such offence; and every owner or overseer of a plantation, merchant, tavern-keeper, or any other person, who shall so permit or suffer, more than five negroes or slaves, other than his or her own, to be and remain upon his or her plantation or quarter, lot or tenement, at any one time, shall forfeit and pay one dollar, for each negro or slave above that number." The questions arise out of the latter clause of this section.

As to the first question, the Court is of

opinion, that it is not necessary for the Commonwealth to prove that the negroes and slaves over the number of five, referred to in that clause, remained above four hours at any one time, on the Defendant's lot or tenement.

If they remained for any period of time however short, it satisfies the words of the Act. The expression "so permit," obviously refers to the knowledge of the Defendant, mentioned in the preceding clause, and not to the time of the negroes or slaves, remaining. It is the same as if the Legislature had said, "And any person who shall so knowingly permit," &c. The expressions "to be, and remain," were intended to obviate the possible construction, (if the words "to be," alone had been 672 used,) that the mere passing *through, or over a lot, or tenement, with the knowledge of the owner, or more than five negroes or slaves, without binding for any purpose whatever, was a violation of the Law.

If the expressions "to be and remain," or "so permit," render it necessary to conviction, that the negroes or slaves, referred to in the last clause of this section, should like those referred to in the first, remain above four hours at any one time, then this absurdity would follow, that if six slaves remained above four hours on a person's lot, tenement or plantation, with his knowledge, and he was prosecuted under the last clause of the section, he could only be fined one dollar, whereas if but one so remained, and he was prosecuted under the first, the fine would be three dollars. In fact, by such a construction, the same meaning is attributed to both clauses of the section, and the only difference would be in the amount of the fine, involving the above absurdity.

In looking to the spirit of the Act, the Court is confirmed in the construction which its words warrant. The first part of the clause is principally intended to protect private rights, by preventing persons from knowingly suffering the slaves of others to tarry on their premises, without leave of the owners, although the offence might not amount to an actual secret harbouring. The last part of it was intended to guard the public against assemblages of negroes, and slaves, equally dangerous to the peace of the community, and destructive of the morals of the persons concerned. In the first case, a remaining for less than four hours, might be considered a slight interference with the owner's rights: in the other, a much shorter period than four hours, would be sufficient to effect every purpose the Law intended to guard against, whether of tipping, committing breaches of the peace, plotting together for illegal purposes, or any other.

As to the second question arising out of the verdict, the Court is clearly of opinion, that as the Information charges 673 *the Defendant with permitting an assemblage of negro slaves, the proof ought to have corresponded with the allegation, and therefore, that it was incumbent on the Commonwealth to prove that the negroes assembled were slaves. Whether such proof would have been necessary, if

the Information had pursued the words of the Act of Assembly, this Court does not mean now to decide.

The consequence is, that in answer to the third question, this Court certifies its opinion to the Superior Court of Norfolk County, that upon the whole case, Judgment ought to be rendered for the Defendant.

Terrel Bledsoe v. The Commonwealth.

November, 1828.

Criminal Law—Continuances.*—Under what circumstances a continuance of a Criminal Case ought to not to be granted on the application of the prisoner.

This was an application for a Writ of Error to a Judgment of the Superior Court of Law for Montgomery County, which was overruled.

SMITH J. delivered the opinion of the Court.

It appears by the Record, that at the last September Term of the Superior Court for Montgomery County, the prisoner was indicted for feloniously stealing, taking and carrying away, a negro man slave, of the goods and chattels of one Michael Peterman, of the value of four hundred dollars. Being thereof arraigned, he pleaded not guilty, and put himself on the Country, and thereupon moved the Court for a continuance of the cause, for the reasons set forth in an affidavit filed, and ordered 674 to be made a part of the *Record. In that affidavit, the prisoner swears,

"that he considers that he cannot now safely go to trial, and assigns the following reasons: that he expects by the next Term of this Court, to be enabled to procure the attendance of sundry witnesses from the State of North Carolina, where he resided previous to his arrest, to prove that he is a man of good general character as to honesty, which he cannot prove here, he being a stranger in the country. He also expects to be able to prove at the next Term, that the negro, which he is charged with stealing, was the property of Jonathan Laws; that he regards this evidence as material, because, from the testimony given against him before the Examining Court, the Attorney for the Commonwealth relied principally, on evidence which went to show that the affiant was seen travelling in company with the said Laws, who then had the negro in his possession after the time he was alleged to have been taken from Peterman. The affiant is well satisfied that he can clearly prove, that the said negro, so seen in possession of said Laws, was in fact then the property of said Laws, and had been his property for several years, which fact, if proved, he is advised and believes will be very material to his defence. He also expects to prove that he was in the State of North Carolina at the time the offence is charged to have been committed; which facts he is now unable to prove, because of his recent arrest and confinement in Jail." The motion was overruled by the Court, and the prisoner put on his trial, convicted and sen-

tenced to five years imprisonment in the Penitentiary.

The Writ of Error is asked for on the ground, that the Superior Court erred in over-ruling the motion for a continuance.

A motion for a continuance, is addressed to the sound discretion of the Court; but whether the decision of a Superior Court, on such a motion in a Criminal case, is subject to the revision and correction of this Court, is a question which has never yet been decided here; nor is it necessary now to *decide it, for be that as it may this Court being unanimously of opinion that the affidavit of the prisoner, and the matters therein set forth, were not sufficient to entitle the prisoner, to a continuance of the cause, the Writ of Error must necessarily be refused.

James G. Pinner & al. v. Edwards, Administrator of Price.

Samuel Overfield v. Alexander Handerson.

November, 1828.

Dismissal of Suit—Damages.—The damages of five dollars, given by the Act of Assembly, in case of non-suits, ought to be awarded in all cases of dismissals, and discontinuances, produced by a voluntary abandonment of the cause by the Plaintiff, after the Defendant's appearance, whether in the Office, or in Court, and such dismissals ought to be entered up as non-suits.

Same—Same—Failure to Secure Costs.—But the dismissal of a suit for a failure to give security for costs, is not such a voluntary failure to prosecute, as authorises this Judgment.

Retrait—Damages.—In the case of a Retrait, these damages ought not to be awarded.

The first of these cases was adjourned to this Court by the Superior Court of Law for Surry County. The Plaintiffs appeared by Attorney, and dismissed their suit, which was an action on the case; whereupon the Defendant, by his Counsel, moved the Court to enter a non-suit in the case, and award him five dollars for the same, besides his costs. The Court adjourned to this Court the following question: "Whether the Plaintiff, after an appearance, or issue joined, as in this case, in any action, is entitled to dismiss it without paying to the Defendant, five dollars besides his costs?"

676 *The second case was adjourned by the Superior Court of Wood County. The Defendant, in an action of Covenant, appeared in Court at the April Term, 1828, and on his motion, an order was entered, that, it appearing to the satisfaction of the Court that the Plaintiff was not an inhabitant of this State, the suit be dismissed at the next Term, unless security for the payment of such costs and damages as may be awarded the Defendant, and also of the fees which will become due from the Plaintiff to the officers of the Court, be given with the Clerk within sixty days from this time. At the September Term, 1828, the following entry was made. "This cause having been dismissed for want of security for costs, and the Plaintiff failing to set aside said dismissal by giving such security, the same is confirmed. Therefore, it is considered by the Court, that the cause be dismissed, and the Defendant, by his At-

*See monographic note on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

†The principal case is cited in *Railway Co. v. Long*, 26 W. Va. 699; *Henry v. Ohio River R. Co.*, 40 W. Va. 237, 21 S. E. Rep. 866.

torney, prays Judgment against the Plaintiff for five dollars besides his costs, as and for a non-suit, and the Court being of opinion that the seventy-second section of the "Act for the limitation of actions, &c." ought to be settled by the General Court, adjourns to that Court the following questions: 1st. Ought five dollars damages to be taxed on every Office dismissal, or such only as are entered up as non-suits? 2d. If the Plaintiff dismisses, or discontinues his cause, ought damages to be given as for a non-suit?"

SUMMERS, J. delivered the opinion of this Court.

These cases, presenting questions of practice, arising under the 28th and 72d sections of the "Act for the limitation of actions; for preventing frivolous and vexatious suits: concerning Jeofails, and certain proceedings in civil cases," were considered together.

The seventy-second section, in general terms declares, that "if the Plaintiff shall at any time fail to prosecute his suit, he shall be non-suited, and pay to the Defendant, or Tenant, besides his costs, five 677 dollars." *This provision, justly imposing a penalty on the Plaintiff for vexing his adversary with a suit, which is afterwards abandoned, and giving some remuneration to the Defendant, for the expense and trouble to which he has been exposed, extends, in our opinion, to all cases of a voluntary desertion of the cause by the Plaintiff after the appearance of the Defendant, whether that desertion shall happen in a failure to declare; to answer his adversary in any of the subsequent stages of the cause before issues are formed; or shall be occasioned by the dismissal, or discontinuance of the suit after an appearance, in all which cases, Judgment of non-suit should be entered for the five dollars given by Law.

When the cause is dismissed on failure of the Plaintiff to give security for the costs, a majority of the Court is of opinion, that it is not a voluntary failure to prosecute the suit, but is rather the result of an obstruction to the progress of the cause, occasioned by the act of the Defendant, and which the Plaintiff may not have it in his power to overcome. Another reason for this difference is, that the twenty-eighth section of the Act before referred to, does not in terms require such dismissals to be entered as non-suits and they are not within the reasons of the seventy-second section.

To the rule before adverted to, there will perhaps be found an exception in the case of a Retraxit. There, it is true, that the Plaintiff also voluntarily abandons his cause, but as he goes further, and admits that he has no cause of action, he entitles the Defendant to a Judgment as beneficial to him, as if rendered on a general verdict in his favor. The Court can, therefore, perceive no good reason for giving damages in the one case, which the Law does not warrant in the other. To do so, would be to compel a Plaintiff, willing to submit to a final Judgment in favor of his opponent, to incur the useless expense of impaunelling a Jury, for the sole purpose of avoiding

the amercement. A non-suit is not a final disposition of the cause: the 678 *Plaintiff may commence it anew.

A Retraxit is a final disposition of it, and the Plaintiff cannot again commence his action. There is, therefore, good reason why in the former case, the damages should be allowed, and not in the latter.

Jones v. Timberlake.

November, 1828.

Escape Warrant—What It Should Show.—Although an Escape Warrant ought regularly to show on its face that the person who issues it, is a Justice of the Peace, yet, on a Habeas Corpus sued out by the person arrested under it, if it is proved that he is a Justice, the prisoner ought not to be discharged.

On the petition of David Jones, to the General Court, setting forth that the petitioner, a resident of Fluvanna County, having arrived in the City of Richmond, on the 18th November, was arrested on the day following by the Serjeant of the said City, and that he is now illegally detained in the custody of the said Serjeant. A Writ of Habeas Corpus was awarded, directed to the said Serjeant, returnable on the next day. In obedience to the Writ, the Serjeant produced the body of the petitioner, and made return, that he had taken the said Jones into his custody, by virtue of two Escape Warrants, issued by J. Currin, who is said and believed to be a Justice of the Peace for the County of Fluvanna, and he produced the Escape Warrants. The Warrants were dated in 1825. By one of them it appeared, that David Jones was charged in execution at the suit of Timberlake & Magruder, and other creditors named; and by the other, that he was charged in execution at the suit of Thomas Boyd. They were in the usual form, reciting the cause of the prisoner's commitment, and his escape, and were directed to all Sheriffs, 679 Serjeants, &c., *commanding them to seize and re-take the prisoner, and to commit him to prison. The person who issued the Warrants, signed his name J. Currin, without stating himself to be a Justice of the Peace for the County of Fluvanna.

The creditors appeared by Counsel, as well as the debtor. The latter gave in evidence that he was a farmer in Fluvanna, where he resided in 1825, and ever since, without one mile of the residence of the creditors: that he has never concealed himself, and that he has gone at large and been publicly seen at the Court-house, and other public places in Fluvanna, for the last three years, and that he was in the store of the creditors within a few months before his arrest, and that these Warrants have never been executed on him in his own County.

The creditors, proved that the Jail of Fluvanna was consumed by fire in 1826, and has not since been re-built: and that J. Currin was in 1825, and is now a Justice of the Peace in the County of Fluvanna.

Schmidt, for the petitioner, contended: 1. That it ought to appear from the Warrant itself, that it was issued by a Justice of the Peace of the County where the prisoner had been in custody. 1 Rev. Co.

p. 548. That the Court "cannot presume that he is a Justice. 4 Burn's Justice, p. 331. That as the Warrant is the authority for the arrest, it ought to be sufficient of itself to justify the arrest, without extraneous evidence.

"2. That as the Warrant issued in 1825, and the petitioner was seen publicly in his own County, it ought to be presumed that there had been an arrangement of the debt between the parties.

Green, for the creditors, relied: 1. On the fact fully proved, that Currin was, and is a Justice of the Peace for Fluvanna: and that according to the authority of Burn, it is not necessary that the Justice should state himself to be such.

680 "2. He insisted that the presumption of an arrangement of the debt, is repelled by the fact that the Jail of the County was burnt down.

STUART, J. delivered the opinion of the Court.

The application of David Jones to be discharged from the custody of the Serjeant, has been considered by the Court. The petitioner was taken on two Escape Warrants issued by James Currin, on the 22d February, 1825. It is objected, that it does not appear on the face of the Warrants, that Currin was a Magistrate. It has also been urged, that the length of time which has intervened, since the date of the Warrants, has raised a presumption that the debt has been discharged.

On the other hand, it has been proved, that Currin was in fact an acting Justice at the date of the Warrants, and that for some time past there has been no Jail in that County.

The Court is of opinion, that although Escape Warrants ought to be issued by Justices of the Peace, and, that regularly, it ought to appear on the face of the Warrants that they are such, yet in this instance, that defect has been supplied by proof of the fact. They are also of opinion, that the want of a Jail repels any presumption arising from the lapse of time. The petitioner is therefore remanded to the custody of the Serjeant of the City.

Note.—The petitioner afterwards applied to the Court of Appeals for a Writ of Error to this Judgment, which that Court refused.—Note in Original Edition.

681 *Samuel Clemmons v. The Commonwealth.

November, 1828.

Statute.—Regulation of Ordinaries.—Construction.—The 13th section of the Act for regulation of Ordinaries, &c. is not to be construed as permitting persons, from the produce of whose estate ardent spirits are made, or Distillers, to retail them, to be drank at the place where sold.

This was an application for a Writ of Error to a Judgment of the Superior Court of Law for Harrison County. The petitioner was indicted for selling, by retail, without having a license therefor, whiskey and other ardent spirits, at his dwelling-house, to be drank at the place where sold. On the trial, he moved the Court to instruct the Jury, that if, from the evidence, they believe that the liquor charged to have been sold by retail by the Defendant, was

the produce of the Defendant's own estate, or distilled by him, it was lawful for the Defendant to retail the same, to be drank where sold, without first obtaining a license therefor; which instruction the Court refused to give, and he excepted to that opinion. The Defendant was then found guilty by the Jury, and the Court rendered Judgment against him for the fine of \$30, and required him to enter into a recognizance, himself in the sum of \$100, and a surety in the same sum, conditioned for his good behaviour for one year; which was done. Act of Assembly (2 Rev. Code, p. 282,) under which he was indicted, is as follows:

"Sec. 8. If any person, without such license," (that is, such as is provided for by the first section,) "shall open a tavern, or sell by retail, wine, rum, or brandy, or other ardent spirits, or a mixture thereof, to be drank in, or at the place where it shall be sold, or in any booth, arbor, or stall, such offense shall be deemed a breach of good behaviour, and he or she, so offending, shall moreover forfeit and pay the sum of thirty dollars, to the use of the Commonwealth, &c."

"Sec. 13. Provided, always, That nothing in this Act shall extend to be construed to prohibit any person or persons from retailing such liquors as shall actually 682 have been made from the produce of such person's own estate, or brewed or distilled by him, her or them, or those in his, her or their employ; nor to prohibit any merchant, or person keeping store for the sale of merchandise, from retailing liquors, so that such liquors be not drank or intended to be drank, at the house or plantation where the same shall be sold."

Duncan, Counsel for the petitioner, sent in a written argument.

He contended, that in order to constitute the offence created by the 8th section, it is not merely necessary that there should be a selling by retail without a license, but that the liquor should be sold "to be drank in, or at the place where sold." Any person may sell liquor by retail without incurring the penalty provided the liquor was not sold to be drank in, or at, the place where sold.

The 13th section was in part intended to create an exception in favor of the grower, and distiller of grain converted into liquor. It certainly could not have been contemplated by the Legislature, by the enactment of the 13th section, that it was only a permission to the grower and distiller to sell their liquors by retail, provided it was not sold to be drank where sold; for, this was a permission which they in common with every person enjoyed under the 8th section: That an exception, exclusively in favor of the grower and distiller, was intended by the 13th section, is manifest; and he contends, that the liquor, (the produce, &c.) may be sold by them to be drank where sold, without incurring the penalty created by the 8th section. If such is not the proper construction of the 13th section, then the grower and distiller are left exactly where the 8th section placed them, and the 14th section is unnecessary and useless. This

would be adopting a principle of construction, which the Courts ought to avoid.

The difficulty in construing the Statute, has arisen from the clause in the 13th section relating to merchants, "and the limitation that succeeds it, viz: 'So as such liquors be not drank, or intended to be drank, at the house or plantation where sold.'" It is supposed that the merchant, and the grower and distiller, were to be placed on the same footing, and that the limitation was intended to apply to all of them. That this is not correct, is already shown by the fact, that such a construction would render the 13th section useless, as the persons embraced by it would in that event be in the same condition as if that section had not been enacted.

He contended that, with reference to the grammatical construction of that section, the limitation was intended to operate on the merchants only; and there is good reason for this. The merchants' license permitted sales by retail of goods, wares and merchandises, of foreign and domestic growth, containing no restriction as to the quantity sold, or the use to be made of it. The privilege embraced foreign and domestic liquors: the merchant could, therefore, under his license, sell liquors by retail, to be drank any where. This privilege was, or might be abused: it was an interference with the regular tavern-keeper; to prevent which, and to prevent stores from becoming tippling-houses, and from principles of general policy, and for the revenue, the Legislature deemed it necessary to impose a restriction upon the privileges exercised by the merchants under the merchants' license, and hence the enactment was made, which constitutes a part of the 13th section.

By giving that section the operation here contended for, the grower and distiller have a privilege conferred upon them, which otherwise they would not have, and the privilege of the merchant would be restricted, thus giving an effect to all parts of the section, and that effect entirely consistent with the general provision of the Statute: and we thereby avoid a construction which would declare an entire section of the Law to be utterly useless.

The Court, after a conference on the subject refused the Writ of Error.

684 *SUMMERS, J. delivered the opinion of the Court.

Clemmons was indicted for retailing whiskey, and other ardent spirits, and mixtures thereof, to some person to the Jurors unknown, to be drank at the place where sold, without first obtaining a license as prescribed by Law. On the trial of the cause, he moved the Court to instruct the Jury, that, if they were satisfied from the evidence that the liquor charged to have been sold by retail as aforesaid, was the produce of his own estate, or distilled by him, it was lawful for him to retail the same, to be drank where sold, without obtaining a license. This instruction the Court refused to give, and an exception was taken, and this application is to correct the supposed error.

The Counsel of Clemmons insists, that the

proviso of the 13th section of the Act regulating Ordinaries, exempts persons retailing ardent spirits made from the produce of the vendor's own estate, or distilled by him, from the prohibitions contained in the eighth section of the same Act, although sold to be drank at the place of sale. Such interpretation would evidently defeat the intention of the Legislature, as deducible from the whole Statute. This proviso was intended to secure to agriculturalists, distillers and merchants, the right of retailing ardent spirits, under the particular circumstances therein mentioned, without being licensed as Ordinary-keepers, provided such sales were not made subservient to the vice of tippling, which it was the object of the Legislature to suppress.

The words, "so as such liquor be not drank at the house or plantation where the same shall be sold," in the thirteenth section, are therefore to be regarded as applying to each description of persons previously enumerated therein. It is contended, that this interpretation renders the entire proviso nugatory, as the Act contains no provisions inhibiting the sale of ardent spirits, not to be drank where sold; but this result is produced by the very terms of the section under consideration, as to merchants, and although somewhat in 685 artificially expressed, does not admit of a different application in favor of the other enumerated classes. This proviso probably had its origin in the abundant caution of the Legislature to prohibit the mischiefs about which they were enacting, and should be left in operation, rather than defeat their clearly expressed objects. Application over-ruled.

Note by the Reporter.—The use of the word "plantation," in the latter part of the thirteenth section, seems to prove that the restriction on the right of retailing liquors therein imposed, is not to be confined to merchants who do not usually live on plantations, but is applicable to farmers, from the produce of whose plantations, whiskey and other ardent spirits are made.

Henry Huffman v. The Commonwealth.

November, 1823.

Forgery*—Remanding for Trial—Indictment for Forgery Procuring Instrument.—If an Examining Court remand to the Superior Court for trial, a prisoner charged with forgery, the prisoner may be indicted in the Superior Court, not only for the forgery, but also for procuring the instrument to be forged, and for acting and assisting in the forgery.

***Forgery.**—See monographic note on "Forgery and Counterfeiting" appended to Coleman v. Com., 25 Gratt. 665.

***Same—Remanding of Examining Court—Indictment.**—On this subject, the principal case is cited in Com. v. Adcock, 8 Gratt. 670.

Same—Indictment—Distinct Charges.—There are some cases of felony in which, even though the charges are distinct, the prisoner would not be confounded or the attention of the jury distracted; and in which, therefore, the charges may properly be included in the same indictment and tried together: as, for example, the case of forgery and uttering the same instrument, which are distinct offences, and yet are often charged in different counts of the same indictment. Dowdy v. Com., 9 Gratt. 733 citing the principal case as authority. See principal case also cited in Hausenfluck v. Com., 85 Va. 710, 8 S. E. Rep. 683. See further, monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

Same-Same-Same-Sufficiency of.—It is not necessary to set forth in the count, the persons whom the prisoner procured to forge the instrument, or with whom he acted and assisted in the forgery. A general description, in the words of the Statute, is sufficient.

Same-Indictment-Sufficiency of.—An Indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, &c. is to be understood as charging that he caused it to be done in his presence, and that he aided, being present, in other words, as charging him as principal in the second degree, and not as accessory. See Rasmick's Case, 2 Virg. Ca. 366.

Same-Examining Court-Indictment.—If an Examining Court remand a prisoner, on a charge of passing a forged note, he may be indicted for passing it, knowing it to be forged.

Indictment-Counts-Sufficiency of.—In a Bill of Indictment with three counts, if in the third count it is omitted to be stated that the Grand Jury "on their oath" present (the first two counts being regular in that respect) the objection is obviated by the fact, that the Record states, that the Grand Jury were sworn in open Court.

Forgery-Evidence-Case at Bar.—A forged paper is passed by a prisoner bearing date in 1828: immediately after, with the knowledge of the holder, the prisoner alters the date to 1827. The Indictment sets forth its tenor, and describes it as dated in 1827. The paper is proper evidence to go to the Jury in support of the Indictment, notwithstanding the proof that it bore date in 1828, when passed.

This was an application for a Writ of Error to a Judgment of the Superior Court of Law for Hampshire County, 686 *whereby the petitioner was sentenced to the Penitentiary for the term of two years, on a conviction of forgery.

From the transcript of the Record filed with the petition of the prisoner, the following statement is extracted. A Court was called and held in the County of Hampshire, in March, 1828, for the examination of the prisoner, upon the charge of having "feloniously forged and counterfeited, and passed a single bill or note, purporting to be a note made by William Duling with his seal thereto affixed, for the sum of fifteen dollars, bearing date the 28th December, 1827, and made payable to Henry Huffman, twelve months after date;" it is charged to have been passed "to a certain William Sherrard." The single bill, and assignment by Huffman to Sherrard, thereon endorsed, are in the following words and figures:

"Twelve months after date I promise to pay Henry Huffman or his assigns, the just and full sum of 15 dollars for value received of him. As witness my hand and seal this 28th day of December, 1827.

"William Duling, (Seal.)"

"March 13th, 1828. I assign the within amount to William Sherrard for value received.

"Henry Huffman."

It was proved before the Court of Examination, as appears from a memorandum of the evidence as recorded, that the said single bill had not been executed by William Duling; that the prisoner carried it to the store of William Sherrard, and there sold it for goods. The transaction on the part of

Sherrard, who was not present, was negotiated by Charles Blue, his Clerk in the store. The Court of Examination was of opinion that the prisoner was guilty, and remanded him to Jail to undergo a trial, for the offence with which he stood charged, before the next Superior Court of Law.

At the next Superior Court of Law, the Grand Jury found an Indictment against him containing three counts. The first count charges, that he "feloniously 687 did falsely make, *forge and counterfeited, and did feloniously cause and procure to be falsely made, forged and counterfeited, and feloniously did act and assist in the false making, forging and counterfeiting a certain false writing," &c. describing and setting forth in *hæc verba* the single bill before-mentioned, and averring it to have been done "to the prejudice of the right, and with intent to injure and defraud the said William Duling." The second count charges, that he "feloniously did utter and publish and employ as true for his own benefit, a certain other false, forged and counterfeited writing," describing again the same single bill, and setting it forth according to its tenor and effect, and charging the intent to have been "to injure and defraud the said William Duling," and averring that the prisoner knew it to be "false, forged, and counterfeited." The third count is the same as the second, except that the intent is alleged therein to have been "to injure and defraud William Sherrard." It is not stated upon the face of this count, as it is in the two preceding, that it was found upon the oath of the Grand Jury.

The prisoner, upon his arraignment, and before pleading, moved the Court to quash each count in the Indictment, because "there is no substantial offence charged, and because the offence charged in the Indictment is variant from the charge for which the prisoner was sent on to be tried by the Examining Court." The motion to quash was over-ruled. The prisoner then pleaded not guilty, and was put on his trial by a Jury.

Upon the trial, the Attorney for the Commonwealth offered in evidence a single bill, corresponding with the one set forth in the Indictment. The prisoner objected to its going in evidence to the Jury. The Court over-ruled his objection, and the prisoner filed a Bill of Exceptions to the opinion of the Court, which states, that on the trial of this Indictment, Charles Blue, a witness in behalf of the Commonwealth, produced a single bill, set forth in the Indictment, and testified, "that 688 on the 13th day of March, 1828,

*he was in the employment of William Sherrard, of Hampshire County, in the capacity of clerk in the store of the said Sherrard, who was a merchant; that the prisoner on that day took up sundry goods in the store of said Sherrard, in payment of which, he assigned said paper-writing to William Sherrard; that about half an hour after making the assignment, the witness discovered that the paper-writing was dated in the year 1828; upon which, he stated that circumstance to the prisoner, who remarked to the witness that it had

†Criminal Law-Indictment-Charging Offence in Words of Statute.—Where an Indictment charges an offence in the words of a statute creating the offence, the Indictment as to the description of fact is good. *Brown v. Com.*, 2 Leigh 772, citing principal case as so holding. See further, on this subject, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674. The principal case is also cited in *Mowbray v. Com.*, 11 Leigh 646.

been so dated by William Duling by mistake; and therefore, he, the prisoner, (the said paper-writing being handed to him for that purpose by the witness,) with the assent of the witness, with the pen-knife of the witness, erased the figure 8, and made in lieu thereof, with pen and ink, the figure 7, so as to change the date from 1828 to 1827; and then returned the single bill to the witness. Upon this evidence the prisoner contended, that the instrument had not been properly described in the Indictment, and being variant from the single bill therein set forth, should be therefore excluded from the Jury, which the Court refused.

Samuels, for the petitioner, argued in writing to the following effect:

1. That the motion to quash each count, ought to have been sustained. As to the first count, there was a variance between it and the record of the Examining Court. By the Indictment, the prisoner is charged with three distinct offences: 1st, the forging and counterfeiting; 2d, the causing and procuring the single bill to be falsely forged and counterfeited; and 3d, the acting and assisting in the false forging and counterfeiting the said instrument. But, he was only examined for one of these offences; namely, the forgery. He contended, that the fact of forgery does not *ex vi termini* include the other two facts: that, the Legislature thought it did not so include them, or they would not have provided separately for the other two
689 offences: *that the fact of forgery may exist in the absence of the other two classes of facts, which shows, that it does not include them. He concluded, that as the prisoner was indicted for a greater number of offences than he had been examined for, the Superior Court had no jurisdiction of these latter offences, and that therefore the first count ought to be quashed.

2. That the first count was defective in itself, in not setting forth the person or persons who the prisoner caused and procured to forge the instrument, and those with whom he willingly acted and assisted in the forgery. The persons ought to have been designated, to enable the prisoner to prepare for his defence, and to plead the Judgments in bar of other prosecutions for the same offences.

3. He contended that the first count confounded principal and accessorial guilt. If the procurers or aiders are present, they are principals in the second degree, but if absent, they are accessories, and must be indicted specifically as such, as is agreed by the General Court, in *Rasnick v. The Commonwealth*, 2 Virg. Ca. 356. Here the count does not aver either the presence, or the absence of the prisoner at the procuring or aiding the forgery to be done, and it is therefore entirely uncertain whether the prisoner is charged as principal or accessory. For this want of certainty, the count ought to have been quashed. He drew the distinction between this case and *Rasnick's*. There the prisoner did not demur to the count, nor move to quash it, before plea, but it was on a motion to arrest the Judgment, and the

General Court seems to have proceeded on the ground that "after verdict on such Indictment, the count must be understood as charging the procurers and aiders as principals in the second degree." But in this case there was a motion to quash before plea, and the case is to be considered as on demurrer. If it is supposed that the degrees of guilt are to be ascertained by the evidence, such supposition ought not to avail. The Indictment itself ought to set out the offences charged as criminal,

690 *and they should be so charged as to leave nothing to intendment. Whatever the evidence may be, the vice inherent in this count, that it does not inform the prisoner whether he is charged as principal or accessory, ought to overthrow it.

4. He objected to the second and third counts. In the Examining Court he was charged with passing the instrument. He might have passed it without being guilty of any crime, for he may not have known that it was counterfeit. But the second and third counts go further, and charge that he passed it, knowing it to be false, forged and counterfeited. He is therefore indicted for an offence for which he had not been examined, and both counts ought to have been quashed.

5. The third count is defective in another particular. It commences thus: "And the Jurors aforesaid, do further present," omitting the words, "upon their oath aforesaid," and so it is not a valid Presentment.

6. The single bill ought not to have gone in evidence to the Jury. From the Bill of Exceptions, it appears, that the single bill, when it was passed to Blue, the clerk, bore date the 28th December, 1828, a day then yet to come: that after the bill had been passed, and the goods received by the prisoner, and the transaction closed, it was discovered that the bill was dated on that day; this fact was communicated by Blue to the prisoner, and by the consent of Blue, and in his presence, the prisoner erased the figure 8, and inserted 7 in lieu thereof: by this erasure neither Blue nor Sherrard was defrauded. When the single bill was first passed to Blue, it bore date the day before mentioned. It is charged in the Indictment to have been dated on the 28th December, 1827, and is therefore different from the bill as originally passed, and consummated. If the bill was forged by Huffman, it was so done before it was altered, and the paper described in the Indictment is in fact different from the paper as it was when passed to Blue.

691 *FIELD, J., delivered the opinion of the Court.

[After making the statement prefixed to this report, he proceeded.]

In his petition for a Writ of Error, the prisoner contends, that the Superior Court of Law should have quashed each count in the Indictment for the reasons there assigned; and should have quashed the third count for the additional reason of its not appearing upon its face to have been upon the oath of the Grand Jury. He also contends, that the single bill should have been excluded from the Jury, for the reason assigned in the Bill of Exceptions.

The Court has attentively and maturely

examined and considered the transcript of the Record in this case, and the written argument of Counsel in the Country, filed in support of the petition, and is of opinion that there is no error in the Record. It is an established general rule, that where an Indictment, as this does, charges an offence in the words of the Statute creating the offence, the Indictment as to the description of the fact is good. In Archbold's Criminal Pleading, p. 188, and in Chitty's Crim. Law, vol. 3, p. 1,049, may be found the form of an Indictment upon the English Statute of Forgery of 52 Geo. 3, ch. 138, which our Statute on the same subject resembles. It charges, that the prisoner "feloniously did falsely make, forge and counterfeit, and did cause, and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting, &c.;" with which form, the Indictment in this case corresponds.

The only seeming difficulty upon this point, arose from the Act of Assembly in relation to Courts of Examination, which secures to the prisoner the right of being examined, upon a charge of felony, by a Court of Examination, composed of five or more of the Justices of the County Court, before he shall be indicted and tried for the alleged crime in the Superior Court of Law. The first count of the 692 *Indictment in this case, charges *inter alia*, that the prisoner caused, and procured the forgery to be committed. In the Court of Examination, he was charged with having "feloniously forged, counterfeited, and passed," the single bill in question, which the prisoner contends, does not embrace the accessorial offence of causing and procuring a forgery to be committed by another person. If it were conceded that the charge which was made against the prisoner before the Court of Examination, and upon which he was examined, is not sufficiently comprehensive to embrace a case of accessorial guilt, properly so called, as where one man, being himself absent at the time, causes and procures another to make a forged writing, which at Common Law would constitute the absent procurer an accessory before the fact, still there would be no weight in this objection. The "causing and procuring," charged in the Indictment, contemplates a causing and procuring the forgery to be committed by some other person in the presence of the prisoner, which would render him a principal felon in the second degree, and consequently proof of accessorial guilt could not have been received upon the trial.

In looking into the Record of a trial before a Court of Examination, to see for what offence a prisoner has been examined, the Court should regard the substance of the offence, and not the manner in which it may have been perpetrated; nor should the offence be required to be described there with technical precision. The offence charged against the prisoner, and which was examined into by the Court of Examination, was forgery. Whether that offence was committed by the prisoner alone with his own hands; whether he caused and pro-

cured it to be done by another, or acted and assisted in the commission of the fact, were incidental enquiries. And whatever may have been the proof relative to the main charge of forgery, it was the duty of the Examining Court, if they thought the prisoner ought not to be discharged from further prosecution, to send him on for further trial in the Superior Court of 693 Law. *without undertaking to discriminate as to the grade of the offence, or to designate the mode in which it had been committed. Upon these principles, the Court of Examination acted in this case; and it was competent for the Prosecuting Attorney to prefer against the prisoner such an Indictment as has been found.

As to the objection taken to the third count, of its not appearing on the face of it to have been found upon the oath of the Grand Jury, that difficulty is obviated by the fact of the Grand Jury's having been actually sworn in open Court, before the Indictment was found, as appears from the transcript of the Record filed with the petition; and therefore, the whole Indictment must necessarily have been found upon the oath of the Grand Jury.

The only remaining objection to be considered, is that which arises from the Bill of Exceptions. If the single bill therein mentioned, were in its original form a forged writing, it did not cease to be so, by the alteration in the date of the year, as mentioned in the Bill of Exceptions. And if it were in either shape a forged writing, as it corresponded in tenor and effect with the single bill described and set forth in each count of the Indictment, there was no cause shown for excluding it from the Jury. The Writ of Error is refused.

694 *The Commonwealth v. Dickerson Wyatt.

November, 1828.

Criminal Law—Statute—Punishment by Stripes—Constitutionality.—The Act of Feb. 1823, which directs that the person convicted may be imprisoned for a time not less than one, nor more than six months, and may receive stripes, at the discretion of the Court, to be inflicted at one time, or at different times, provided the same do not exceed thirty-nine at any one time, is not unconstitutional.

Same—Same—Same—Discretion—Character of.—The discretion therein delegated is a sound discretion, and if the Judge abuses the power conferred, making it to subserve motives of oppression, or his own vindictive passions, he is liable to be impeached.

Same—Same—Same—Same—Same.—The discretion thereby conferred on the Superior Courts, is of the same character with the discretion exercised by the Common Law Courts in imposing fines and imprisonment.

Same—Statute—Gaming—Construction of.—The distinctive feature in the character of the games called A. B. C. and E. O. and Faro Bank is, that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the games, or tables. If other games resemble those standard games

***Pleading and Practice—Matter Referred to Discretion of Court.**—In all cases where by law, whether statute or common law, a subject is referred to the discretion of the court, that must be regarded as a sound discretion, to be exercised according to the circumstances of each particular case. *Harris v. Harris*, 31 Gratt. 16, citing the principal case.

***Criminal Law—Statute—Gaming—Construction.**—The construction of the gaming act, as contained in the last headnote of the principal case, has met

in that distinctive feature, they come within the terms of the 17th section of the Gaming Act, being "gaming tables of the same, or like kind," and are liable to the penalties denounced against those standard games, whatever may be the denomination of those other games, and whether played with cards, dice, or in any other manner. Under this construction, the exhibitor of a gaming table called Hap-hazard, alias Blind-hazard, alias Snickup, &c. held to be liable to the same punishment with the exhibitor of Faro Bank.

This was a case adjourned from the Superior Court of Law for Chesterfield County to this Court. A complete statement of the case is to be found in the opinion of the Court.

The Attorney General, argued for the Commonwealth.

Leigh, for the Defendant.

DANIEL, J., delivered the opinion of the Court.

This is an adjourned case from the Superior Court of Law of the County of Chesterfield, from which it appears that the Defendant was presented on the sixth day of June, in the year 1826, by a grand Jury upon their oath, "for keeping and exhibiting a gaming table commonly called
695 *Blind-hazard, alias Hap-hazard, being a table of like nature or kind, with a Faro Bank, &c., at the muster ground, on the premises of a certain Dickerson Wills, situate in the County aforesaid, on a muster-day and within six months (then) last past."

On this Presentment of the Grand Jury, an Information was regularly filed, which charged (besides having two other counts not necessary to be particularly noticed,) "that the said Dickerson Wyatt, of the County of Chesterfield, on the 8th April, 1826, with force and arms, at the house of one Dickerson Wills, in the County aforesaid, unlawfully, wilfully, and wickedly did keep and exhibit a certain unlawful gaming table called Hap-hazard, otherwise called Blind-hazard, otherwise called Snickup, otherwise called Sweat, being a gaming table of the same, or like kind with Faro Bank, whereon and whereat divers persons did then and there, together with the said Dickerson Wyatt, the keeper thereof, unlawfully, wickedly, and wilfully play, and the games then and there played thereon, being games played with cards," &c. The Defendant pleaded not guilty. The Jury returned a verdict: "We of the Jury, find the Defendant guilty, but ignorantly so, he not knowing at the time that the Law embraced this case, and do therefore recommend him to the mercy of the Court." And thereupon, the Defendant moved the Court for a new trial, and afterwards, submitted, in addition, a motion "to arrest the Judgment, because the matter stated in the Information warrants no Judgment against the Defendant, or at most, a Judgment for a fine of twenty dollars only." Upon this state of the case, the Judge of the Superior Court of Law, with the consent of the Defendant, ad-

journed for novelty, and difficulty, to the General Court, the following questions: "1st. Is the offence charged in the Information, a violation of the 19th section of the Act to prevent unlawful gaming, in the first volume of the Revised Code, p. 567? 2d. Do the facts prove to the Jury, amount in Law, to a violation of the
696 *said section of the said Act?

3d. What Judgment or Order should be made or given in this case?" And by consent, a statement of the case, made in writing, and signed by the Judge, is made a part of the Record in this case, and to be regarded as if spread at large upon the motion for a new trial. The statement is as follows: "On the trial of this case, the evidence proved that the Defendant exhibited the game charged in the Information, at the time and place charged. The game played with cards in the following manner. The exhibitor seated himself at a table with a pack of cards, showing at the same time a small stake of cash on the corner of the table by him; he then, in the presence of those surrounding the table, (inclined to bet) cut the cards off the pack into an indifferent number of parcels, and every one who chose to adventure, pointed out to the dealer or cutter, the parcel on which he should stand; the wager was, that the bottom card of the player's parcel is higher than that of the dealer's parcel, the dealer having the advantage of winning on equal cards. The game of Faro Bank was described by the evidence, and the Court instructed the Jury that the question whether the game was one of a like nature, or kind with Faro Bank, was a question of fact for them to decide, but however strong the resemblance might in other respects be, if the game in question is not one usually resorted to for the sake of gain, it did not come within the meaning of the Act under which the Defendant is prosecuted, but if the resemblance is in both particulars proved to the Jury, the Defendant should be found guilty. The evidence fully proved the exhibition in this case to have been for the sake of gain, and the game itself may be fairly termed one of the numerous expedients resorted to at public places for obtaining money, by inducing others to bet at unequal games; though as proved in this case, had been often publicly and openly played by men of good character, and not professed gamblers, and sometimes exhibited merely to gratify curiosity, this particular game being
697 one of the *lower order, calculated to win money in very small sums generally."

The instructions which were thus given by the Court to the Jury, cannot be complained of by the Defendant. Perhaps they are more favorable to him than the Law would strictly warrant.

The first and second questions propounded in reference to the nineteenth section of the Act of the General Assembly to prevent unlawful gaming, show evidently a mistake; perhaps it is a clerical mistake. Those questions become immaterial in this case, and therefore require no further notice, because the motions to arrest the Judgment, and for a new trial, (together

with the approval in *Huff v. Com.*, 14 Gratt. 650; *Nuckolls v. Com.*, 32 Gratt. 895.

See further, *monographic note* on "Gaming" appended to *Neal v. Com.*, 22 Gratt. 917.

Same New Statute—Effect on Offences Committed before it Went into Effect.—On this subject the principal case is cited in *Com. v. Pegram*, 1 Leigh 571; *Allen v. Com.*, 2 Leigh 731.

with the statement made part of the Record,) and the third question referred to this Court, bring up the whole subject of Law which affects the case. The third question is, "what Judgment or Order should be made or given in this case?"

To answer this question, this Court must enquire what is the Law? What is the offence charged in the Information, and of which the Defendant stands convicted by the Jury? Was the Jury authorised, from the evidence set forth, to find the Defendant guilty of that offence? What punishment, if any, is prescribed by Law for the offence described in the Information?

With respect to the first branch of this enquiry, we find in the 1st vol. Rev. Co. ch. 148, § 17, that "every keeper or exhibitor of any of the tables commonly called A. B. C. or E. O. tables, or Faro Bank, or any other gaming table of the same, or like kind, under any denomination whatsoever, or whether the same be played with cards or dice, or in any other manner whatsoever, shall, upon conviction, be sentenced to hard labour, and imprisonment in the Public Jail and Penitentiary-house, for any period of time, not less than one, nor more than two years," &c.

As to the second branch of the enquiry, we find from the Information, that the Defendant is charged, that he "did keep and exhibit a certain unlawful gaming table, called *Hap-hazard, otherwise called Blind-hazard, otherwise called Snickup, otherwise called Sweat, being a gaming table of the same or like kind with Faro Bank," &c.; and this charge so set forth in the Information, the Jury by their verdict have said is true. And this brings up the third branch of the enquiry: Does the evidence warrant the finding of the Jury? This Court taking the evidence as set forth by the Judge before whom the cause was tried, can see no just grounds upon which the Jury could have found a verdict in favor of the Defendant.

The last branch of the enquiry is, what punishment, if any, is prescribed by Law for the offence described in the Information, and of which offence the Defendant is found guilty?

In the Act of the General Assembly, already quoted, it is seen, that that Act prescribes that the person convicted shall "be sentenced to hard labour, and imprisonment in the Public Jail and Penitentiary-house, for a period of time not less than one nor more than two years." But there is a subsequent Act of Assembly, which passed 21st February, 1823, further to amend the Penal Laws of the Commonwealth, which prescribes, in § 1, "that henceforth when any person shall be convicted of any crime, or offence, now punishable by imprisonment in the Public Jail and Penitentiary-house, for a period not exceeding two years, such person shall, instead of the punishment now prescribed by Law, undergo imprisonment in the Jail of the County or Corporation where such conviction shall take place, for a period not more than six months nor less than one month, at the discretion of the Court, and

be there kept on low and coarse diet, as prescribed by the Law for Convicts in the Penitentiary, and shall moreover be punished with stripes, at the discretion of the Court, to be inflicted at one time, or at different times during such confinement, as such Court may direct, provided the same do not exceed thirty-nine at any one time," &c. Sess. Acts of 1822, ch. 32, § 1.

The punishment, therefore, to be inflicted on the Defendant *by the Judgment of the Superior Court of Law of the County of Chesterfield, must be in conformity to the Act of Assembly last recited, if this Court shall so direct in answer to the question, "What Judgment or Order should be made or given in this case?" For, although this last Law is now happily repealed by the Act of 1827, ch. 36, § 4, as to all offences of the character now under consideration, which may have been committed since the date of the repealing Act, yet it is still in force as to offences previously committed.

This brings up fairly the main question, what Judgment shall be given in this case? and opens the way for the consideration of all the arguments which have been so ably, and earnestly urged before this Court, in opposition to rendering any Judgment against the Defendant under this prosecution.

The arguments of the Defendant, made by his Counsel, rest mainly upon two propositions. The first is, that the Law applicable to this case, to be deduced from the several Acts of the General Assembly, would be unconstitutional.

The second is, that the provisions of the Act, by which the offence stated in the Information is supposed to be designated, are too vague and uncertain to be made applicable to any but the three enumerated games of A. B. C. and E. O. and Faro Bank, and therefore Judgment ought to be given for the Defendant.

The first proposition involves a question of the greater magnitude, which should never be lightly and unnecessarily introduced into the deliberations of this Court. Whether this Court has authority to declare an Act of the General Assembly to be unconstitutional, and therefore void, is a question which admits of a great variety of opinion. Judicially to assert or to deny such authority, unless upon an occasion which palpably required such an opinion by the Court, would expose it to the censure of all, without calling to its support the talents and influence of those who might concur in the principle asserted, if such principle *were palpably applicable to the case decided. This Court therefore declines the discussion, not because it would not firmly meet it if a palpable case were to require it, but because the case now under consideration does not require it, further than the notice now to be taken of it.

It is urged that the Act of 1823, already referred to, while it properly limits the authority of the Court to a reasonable extent of punishment to be inflicted on the party convicted, by imprisonment not less than one nor more than six months, yet authorises the Court to inflict the lightest pun-

ishment by stripes imaginable, or the most cruel, even necessarily extending to death itself, for an offence of the same character and grade. For that, as the Court may impose an imprisonment for six months, and may also direct the party imprisoned to receive any number of stripes, at different times, not exceeding thirty-nine at any one time, during his confinement, at the discretion of the Court, it is perfectly evident that the Court, by virtue of this Law, might exercise its discretion to subserve vindictive passions, and so as to direct the party convicted to be subjected to thirty-nine stripes every day of the six months, which would inevitably terminate in death; a death produced by the most cruel torture. That by the Bill of Rights, properly regarded as part of the Constitution of Virginia, the General Assembly is restrained from authorising by Law, "cruel and unusual punishments (to be) inflicted," and that therefore the authority delegated to the Courts, as above described by the Act aforesaid, being prohibited to the Legislature, by the Constitution, cannot by it be delegated to the Courts, and that the Act aforesaid is therefore void, and ought so to be regarded by this Court.

It may be allowed, that the Act in question might be regarded as less objectionable, if the aggregate number of stripes, which might be inflicted for any one offence, had been limited as the term of imprisonment is; but this imperfection, if one, does not involve the consequences contended for, nor is it allowed that the discretion of the Court mentioned

701 "in the Act, can rightfully be regarded as unlimited. The responsibility of the Court might have been lighter, if the Act had been more cautiously dictated; but in all cases, where by Law, whether Statute or Common Law, a subject is referred to the discretion of the Court, that must be regarded as a sound discretion, to be exercised according to the circumstances of each particular case. If the Judge should not so limit the authority of his discretion, but extend it further to subserve motives of oppression, or his own vindictive passions, he might and would be impeached. The punishment of offences by stripes is certainly odious, but cannot be said to be unusual. This Court, regarding the discretion delegated by the Act in question, as being of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations, does not feel itself at liberty in this case to refuse to obey the Legislative will, nor to execute that will by its Judgments.

The second proposition, which is, that the act charged in the Information is not sufficiently designated by the terms of the Law in question, as an offence, and therefore, for want of certainty, ought not to be subjected to the penalties prescribed against the games of A. B. C., E. O. or Faro Bank, remains to be considered. The Jury have found the Defendant guilty of keeping and exhibiting a gaming table "of the same or like kind with Faro

Bank;" and the evidence upon which the verdict was rendered, is stated, which proves the gaming as charged in the Information and states also the manner in which the game is played, and the chances in favour of the keeper or exhibitor of the table; and the question to be decided by this Court is of a mixed character, depending upon the terms, "same or like kind," and whether the game described by the evidence, is a game of the same or like kind with Faro Bank?

702 "The words of the seventeenth section of the Act of Assembly, which affects this subject, have been already recited. That section enumerates the games of A. B. C. and E. O. and Faro Bank, as games prohibited, and subject to penalties, and making the distinctive characters of those games as the standard and example of the kind of game prohibited, subjects all games of the same or like kind, to like penalty and prohibition. Before we can say that the game described in the Information, is of the same or like kind with those enumerated in the Act, it is necessary to settle some notion of the kind or class of gaming to which the latter belong. This Court is not advised that there is, or can exist but two kinds or classes of games of chance. The first is, where the chances are equal all other things being equal. The second is, where all other things being equal, the chances are nevertheless unequal, that is, in favor of one side. The standard games enumerated, so far as they are understood by this Court, are of the second class, and in all three of them the chances are in favor of the exhibitor of the game or table. Now, the playing charged in the Information, is at a game, which by the evidence is proved to be a game wherein the chances are unequal, and in favor of the exhibitor of the table. It must, therefore, belong to the same class, and be of the like kind of gaming to which the enumerated games belong. The advantages or chances in favor of the player or exhibitor of the table, are not the same in each case, but in each case the chances are in his favor; and this is the distinctive character which marks them as games "of the same or like kind;" and when of the same or like kind, as classed above, it matters not by what denomination they are distinguished, nor whether they are played with cards, or dice, or in any other manner whatsoever. All such games, when played or exhibited *lucri causa*, are prohibited by the Act under consideration, and subject to the penalties prescribed; but, if exhibited and played, nor for the purposes of gain, they may, or may not be offences

703 "against the General Law prohibiting gaming at cards, &c., according to circumstances.

The following is to be entered as the Judgment of the Court.
This Court is of opinion, and doth decide, that the motion in arrest of Judgment, and also the motion for a new trial, ought to be over-ruled, and that Judgment should be rendered against the Defendant, of imprisonment and stripes, according to Law.

704 *Robert Mendum v. The Commonwealth.*

November, 1828.

Criminal Law—Third Term after Commitment—Statute—Construction—Case at Bar.—A prisoner is committed for examination, two days before the regular Court of the County in December, but the Examining Court is called to meet seven days thereafter: it falls to meet, and the Examining Court stands adjourned till the regular Court in January: by that Court the case is continued till the February Term, and by that Court till March, without the application of the prisoner, when the examination takes place, and the prisoner is remanded for trial:—Within the meaning of the proviso to §6, ch. 169, 1 Rev. Co. the January Court was the first, and the March Court the third, after his commitment.

Same—Continuance—Absent Witness—Affidavit May Be Required.—Under particular circumstances, a Court may require that the affidavit of an absent witness, setting forth his testimony, shall be produced as the ground-work of a continuance: and the refusal to grant a continuance, (even though the prisoner swears to the materiality of the witness, and specifies what he expects to prove by that witness, and due diligence has been used, and the witness is too sick to attend) will be justified by that Appellate Court under those circumstances.

Evidence—Expert.—When the opinion of an expert is offered in evidence, and it is objected to, because he is not an expert, the Court may hear evidence to ascertain whether he is so, or not, and on being satisfied that he is an expert, may allow his opinion to be given in evidence.

Same—Minute and Remote Circumstances.—For a case in which it is proper to allow minute and remote circumstances to be given in evidence, see the second Bill of Exceptions during the trial.

Criminal Law—Evidence—Confession.—If the Prosecutor for the Commonwealth, on the examination of the prisoner in the Examining Court, give in evidence the confession of the prisoner, but on the trial before the Superior Court, he does not give that confession in evidence, it is not competent for the prisoner to prove what the Commonwealth had proved in the other Court, touching the said confession.

Same—Testimony of Witness in Examining Court.—If the Commonwealth introduce a witness on the trial, who gives his evidence, it is not competent for the prisoner to prove what another witness of the Commonwealth swore to in the Examining Court, that other witness not being a

*For monographic note on Expert and Opinion Evidence, see end of case.

†Criminal Law—Third Term of the Commitment—Statute—Construction.—In *Kemp v. Com.*, 18 Gratt 975, it is said: "The other ground of the motion to quash is, that the commitment, as shown by the certificate of the justice, was made on the 18th of Dec., 1866, and that the examination was had by the county court, at a regular term held on the same day. This objection is based on the authority of *Mendum's Case*, 6 Rand. 704. That decision, however, was made under the law as it stood in the revised Code of 1819, and has no application to the provision of the present Code. By the Code of 1819, ch. 169, the committing justice was required to issue his warrant summoning the justices to meet for the examination of the fact, on a certain day not less than five, nor more than ten days after the date of the warrant. If the justices failed to meet, the examination stood adjourned to the next regular term of the county court. The court might continue the examination from term to term, provided such continuance, unless on the application of the prisoner, should not be beyond the third term after his commitment for examination. Mendum was committed two days before the December term. The examining court was called to meet seven days after the December court day. It failed to meet, and so stood adjourned to the January term. The general court held, that the January term was to be counted as the first term after the commitment, so that the examination at the March term was regular. This, of course, involved a decision that the examination could not regularly have been had at the December term; and obviously it could not, because five days did not intervene between the day of the commitment and December court day, and also because an examination could not be had at a regular term, unless the called court failed to meet, or adjourned to the regular term."

*Same—Continuance—Absent Witness.—See monographic note on "Continuances" appended to *Hartman v. Howe*, 27 Gratt. 676.

witness in this case, nor summoned, though living in the adjoining County.

Superior Court—Duration of Term.—A Judgment is rendered in the Superior Court of Chesterfield, on the 15th November, the day on which the General Court is directed by Law to be held at the Capitol: the distance is judicially known to be not more than three hours moderate ride from one place to the other. It does not appear on the Record but that the Judgment might have been rendered in time to enable the Judge to close that Court, and attend at the Capitol to his duties as one of the General Court, on the same day.—The Superior Court of Chesterfield had jurisdiction to render the Judgment on that day.

The prisoner was indicted in the Superior Court of Law for the County of Powhatan, for the murder of Elbert Mosby.

The first count charged the murder to 705 have been *committed by means of a dirk, by which a mortal stab in the left side was given; the second count charged that it was done by a horseman's pistol, by which divers mortal wounds and blows were inflicted on the head of the deceased; the third count charged that the offence was committed by means of a club.

The prisoner was arraigned at the Superior Court of Powhatan, on the 13th May, 1828, and before pleading, moved the Court to quash the Indictment against him, on the ground that his examination before the County Court had not been regular and legal, and he produced the Record of the Examining Court in support of his motion. The following is a brief history of the proceedings before that Court.

The Examining Court first met on the 17th January, 1828, and on the motion of the prisoner, and because some of his witnesses were absent, the case was continued till the 18th, and on that day, for the same cause, it was continued till the 19th, and on that day, on the same motion, and for the same cause, it was continued till the next Court.

On the 20th February, the Court again assembled, and on the prisoner's motion,

§Courts—Duration of Term.—The law has fixed no limit to the terms of the circuit superior court, except that the judge holding the court shall adjourn in time to hold the next court in his circuit at the time appointed by law. And the judge may continue the session of his court until the latest period which will allow him time to get to the next court by 4 o'clock P. M. of the third day of the term. *Hill v. Com.*, 2 Gratt. 595, 613, 627, citing the principal case to sustain the proposition. And in the absence of proof to the contrary, it must be presumed that there was sufficient time after the entering of judgment, for the judge of a circuit to have reached the courthouse of an adjoining county, by the ordinary course of travel, before 4 o'clock, p. m. on the third day after the period fixed by law for the term to commence. *Boice v. State*, 1 W. Va. 333, citing principal case to the point. On the same subject the principal case is cited in *Whiteford v. Com.*, 6 Rand. 725; *Brown v. Hume*, 16 Gratt. 468. See further, monographic note on "Courts" appended to *Cropper v. Com.*, 2 Rob. 842.

Criminal Law—Juries—Competency—Preconceived Opinion.—On this subject the principal case is cited in *Jackson v. Com.*, 23 Gratt. 931; *State v. Baker*, 33 W. Va. 324, 10 S. E. Rep. 641. For further information on the subject, see monographic note on "Juries" appended to *Chaboon v. Com.*, 20 Gratt. 733.

Same—Jury—Custody of Sheriff—What Record Must Show—Oath of Sheriff.—The Sheriff is *ex officio* bound to keep the jury when adjourned in a criminal case, and it is not indispensably necessary that he should be sworn; but if it were necessary to swear him, it would be presumed that he was sworn, in a case where the record does not show the contrary. *Bennett v. Com.*, 8 Leigh 745, 752, citing the principal case to the point. To the same effect, the principal case is cited in *Barnes' Case*, 92 Va. 807, 23 S. E. Rep. 784. See further, monographic note on "Juries" appended to *Chaboon v. Com.*, 20 Gratt. 733.

and for the same cause, the examination was postponed till the 21st. On that day, the prisoner moved to continue the cause till the next Court, and in support of his motion, produced a Subpoena for fifteen witnesses, and another Subpoena directed to the Sheriff of Amelia, directing him to summon three other witnesses, William Milestone, Thomas Carsley, and Polly A. Carsley, and the prisoner swore that these three witnesses were material; that he could not prove by any other what he expected to prove by them, and that he could not go safely to trial without them. It appeared, however, that the Subpoena had not been taken out of the Office, nor applied for by the prisoner, or any person for him. The Court refused to continue the case till the next Term, but did postpone it till the next day. On the 22d, the

706 prisoner again moved for a continuance till the next Term, and produced a Subpoena directed to the Sheriff of Cumberland, commanding him to summon eight witnesses. It was executed on all but one. He swore to the materiality of two of the witnesses so summoned, and one not named. The Court refused to continue it, there being present fifty-four witnesses on the part of the Commonwealth, and twenty-two on the part of the prisoner, and proceeded to the examination, and after some progress, adjourned till the 23d, and then till Monday, the 25th, on which day, one of the Justices being sick, the further examination was necessarily deferred till the next Term.

On the 19th March the Court again met. The prisoner again moved for a continuance till the then next Term, on account of the absence of four witnesses, who do not appear to be any of those mentioned in the preceding motions. The motion was over-ruled, and on that day, and on the 20th and 21st March, proceeded with the examination of the witnesses for the Commonwealth. After that evidence closed, the prisoner again applied for a continuance till the April Term, because of the absence of the witnesses mentioned by him on the 19th. Those witnesses had been summoned, and did not attend, but the prisoner had not applied for any other process to coerce their attendance. The Court over-ruled the application, and the prisoner not calling any witnesses to be examined, the Court remanded him for trial to the Superior Court of Powhatan.

It appeared that the Warrant of Commitment was dated the 18th December; that the regular County Court of Powhatan sat on the 20th; and that the Examining Court was called to meet on the 27th of December; it did not meet on that day, and stood adjourned by Law till the regular Term in January. The Act of Assembly authorises the County Court to continue the examination from Term to Term, "provided, that such continuance, unless on the application of the prisoner, shall not be beyond the third Term after he shall have been committed for examination." The objection made by the prisoner to the regularity of the Examining

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*Court, was, that the December Court was the first Term after his com-

mitment, and the February Term the third, and that it was not on his application that it was continued beyond the third Term. The Superior Court decided that the December Term was not the first. That Court had no cognizance, either to examine or continue the examination, having been held within less than five days after his commitment, and, therefore, according to the express directions of the Act, had no jurisdiction of the case; and that the January Court was the first Court, after his commitment, that could take cognizance of the case, and the March Court the third. The motion to quash the Indictment was, therefore, over-ruled.

The prisoner then pleaded to the Indictment, and was put on his trial. But, the venire being all challenged for cause, and the bystanders who were summoned, being also challenged for cause, and the Court, satisfied that an impartial Jury could not be had, ordered that the trial of the prisoner should be changed to the Superior Court of Chesterfield.

On the 5th of June, 1828, the prisoner was brought before the last mentioned Court, and on his motion, the trial was continued till the then next Term.

On the 8th November, 1828, the prisoner was led to the Bar, and applied to the Court for a continuance till the next Term, which was refused, and the prisoner excepted. The Bill of Exceptions sets out a Subpoena for Polly A. Carsley, which was returned executed by the Sheriff of Powhatan. The prisoner also swore to her materiality, and her absence. The Court required him to state what he expected to prove by her, and in conformity to that requisition, he stated that he expected to prove by her, that she was present at the prisoner's house on Friday the 7th December, 1827, the day previous to the night on which Elbert Mosby was killed, and that she saw the prisoner's wife then dressing the wound on the breast of the prisoner:

708 he also introduced a witness who proved that she heard the *absent witness, Polly A. Carsley, say that she was at the prisoner's house on Friday the 7th December, 1827, and that she then saw the wife of the prisoner taking fur from a hat which the wife of the prisoner said she was going to apply to a wound on the prisoner's breast. It was proved, to the satisfaction of the Court, that the absent witness, Polly A. Carsley, was too sick to attend Court, without danger to her life. The Court overruled the motion, and ruled the prisoner into trial, because the prosecution was continued on the prisoner's motion at the last Term; at which time, although the nature of the accusation, the enormous expense of the prosecution, together with the fact, that at the Examining Court none of his witnesses had been examined, and the necessity of a change of venue in this case, admonished the Court against lending too willing an ear to the prisoner's motions for continuances; yet, the Court, without requiring him to disclose any of the facts of his defence, granted the continuance, but at the same time, the Court admonished the prisoner, that upon a second motion of the same

kind, the affidavit of the witness, on account of whose absence the motion should be made, must, if practicable, be produced, that the Court might judge of the materiality of the witness: and because as the ill health of the witness, who is the daughter of the prisoner, has been of some considerable duration, the husband of the witness who gave evidence of what might probably be the evidence of the said absent witness, being the son-in-law of the prisoner, and an active and intelligent man, and apparently zealously engaged in preparing the prisoner's defence, could easily have taken the affidavit of the said witness: and because, there being upwards of thirty witnesses summoned for the prisoner, it is the opinion of the Court that every probability is against the future attendance of many of said witnesses, who are now in attendance on the Court.

Before the panel of the Jury was completed, one Daniel Chalkley was called as a venire-man, and being sworn to
709 *answer questions, said that he had never heard any detailed account of the evidence that had been, or would be, adduced against the prisoner; that he had heard nothing more than that the prisoner had been charged with killing a man, and that the impression made on his mind was, that if guilty, he should be punished, but if not, that he should be acquitted. On cross-examination, he said he had an impression on his mind, made by what he had heard, and that he did not know, if sworn on the Jury, that he should be able to render a verdict in the cause free of influence from the impression now and heretofore existing on his mind; but, on further examination, he stated that the impression on his mind, and which he thinks will remain, is as to what ought to be done with persons guilty of such offences, and not whether the prisoner is guilty or not; saying also, that he felt prepared to hear the evidence, and to decide the case by it. The prisoner challenged the said venire-man for cause, but the challenge was over-ruled by the Court, and the prisoner subjected to the necessity of challenging him peremptorily, or of being tried by him; to which opinion of the Court, the prisoner excepted. The venire-man was challenged peremptorily.

During the trial, the prisoner filed four several Bills of Exceptions to the opinions of the Court, which are as follows:

The first Bill states, that Doctor Abner Crump was introduced as a witness to prove the appearance of the dead body of Elbert Mosby, and the wounds upon the body, who, in describing the wounds, stated that he was of opinion that some of them, which he examined on the body of the said Mosby, has been made with a dirk, especially one on the side. The Counsel for the prisoner objected to the opinion of the witness being given in evidence to the Jury, upon the ground that the witness did not possess such a degree of skill and experience as a Surgeon, as to entitle his opinion to the weight of evidence. This objection required evidence to be
710 given to the Court, as to *skill and experience of the witness as a Sur-

geon. It was proved by himself and others, that he was a regular graduate of the University of Pennsylvania, at which institution, ample means of practical instruction in Surgery existed, when Doctor Crump graduated: that he practised Surgery and Medicine ever since he graduated, now about seventeen years; about five years in Manchester, and the rest of the time in Powhatan County: that cases of Surgery are not so frequent in the Country as in the City practice, but that he has been called on to perform Surgical operations, and has performed them without the aid of others, and has been sometimes called to the aid of others in the performance of Surgical operations. He admitted, that he had not been called on to amputate a leg, or an arm, or to perform any operation for a calculus in the bladder; and he could not say whether he had performed three Surgical operations in the course of a year since he graduated: that he had frequently been called on to examine injuries to the human body, in cases in which no Surgical operation was required: and it was proved, that he stood high as a Physician in his neighborhood, and that he would be confided in as a Surgeon by the people: and it was also testified by Doctor Archer, that from the standing and character of Doctor Crump, he is equal as a Surgeon to any Medical man in the County, who has attended only to the cases arising within the range of his own practice. The witness, Crump, also stated, that from his general acquaintance with the human body, and his knowledge of the practice and principles of Surgery, he entertained no doubt that he could form a correct opinion as to the difference between wounds made with a knife or dirk by stabbing, although he had no recollection that he had ever seen and inspected a wound made by a stab with a dirk or knife. The Court over-ruled the objection to the competency of the said evidence, and permitted the opinion of the witness to be given to the Jury as evidence, and the prisoner excepted.

711 *The second Bill of Exceptions states, that on the trial, Henry Flournoy was introduced as a witness by the Commonwealth, who proved that some two or three days before the Fall Term of the Superior Court of Powhatan, in the year 1827, the prisoner lent to the witness a dirk, which, on the first day of the said Superior Court, he returned to the prisoner: the dirk he has never had since. The Commonwealth then introduced a witness, John Seayres, who proved that a dirk, which he verily believes, to be the one now exhibited in Court, from the general appearance of the dirk, was found by the witness, without the cap now on it, under the boxing to the stable of Robert Mosby, on Monday morning, after breakfast, of the 10th December, 1827, which stable is about — yards from the place at which Elbert Mosby's dead body was found, and about — yards from the house where Robert Mosby now lives, and where Elbert Mosby did live. There was no appearance of blood on the said dirk. The Commonwealth further proved by the said Henry Flournoy, that the dirk lent by the prisoner

to him, had a metallick handle, and was the only one he ever saw; and he remembered, before he saw the dirk now produced in Court, that the one which he had borrowed, had upon the handle the letters J. C. or J. H., but did not remember which. The witness being asked, said he did not know the dirk, either with or without the cap, to be the dirk he had borrowed from the prisoner, except from its general appearance, and cannot say that the dirk now produced in Court is the same he borrowed. The Commonwealth also proved by Jacob Mosby, that the cap, now exhibited in Court, with the letters J. H. engraved upon it, was handed to him, sometime after the death of the said Elbert Mosby, and within one month from that time at his own house, a mile and a half, or two miles from the place where the said Elbert was killed, by a negro belonging to the estate of the witness's mother, but how the negro became possessed of it, he does not know.

This cap being applied to the handle
712 *of the dirk in Court, apparently fits the same. The Commonwealth also proved by Hugh French, that some sixteen or seventeen years ago, he purchased for James Hickman, a half brother of the prisoner, a dirk, on the handle of which were engraved the letters J. H., but he has not seen the dirk since he handed it to the said James Hickman, soon after the purchase, and cannot now say that the dirk now exhibited in Court, is the dirk he so purchased: does not remember what kind of handle the dirk had which he purchased, nor does he know that the prisoner ever was possessed of the dirk so purchased by him for James Hickman, or the dirk now produced in Court. The witness also proved, that the said James Hickman died unmarried and without children, but whether testate or intestate, he knows not. The Commonwealth further proved by Robert Mosby, that he once saw, in the possession of the prisoner, a dirk, which, as well as the witness remembers, the prisoner told him was the only property he ever received that belonged to his brother, James Hickman. The witness does not remember whether the dirk he saw in the prisoner's possession had a metal, or ivory handle; and although he remembers the letters J. H. were engraved on the handle, he does not remember whether they were made in the form of the letters on the cap of the dirk now produced in Court, or not. There was no evidence produced before the Court, which tended to prove that the prisoner had ever been at the place, or near the place, where the said dirk was found, other than that herein-before stated. Which facts and evidence the Counsel for the prisoner moved the Court to exclude from the Jury, as illegal evidence, and not tending to prove the use of the said dirk in the killing of the said Elbert Mosby; but, the Court over-ruled the motion of the prisoner's Counsel, and permitted the said evidence to go to the Jury, for them to decide, whether the dirk, so found, be the property of the prisoner; and if they find to a certainty, that the said dirk is the
713 property of the prisoner, *then the fact, that the prisoner's dirk was so

found, is to be considered by them as a circumstance to be weighed with the other facts and circumstances given in evidence; but, the Jury will observe, that when guilt is attempted to be proved by circumstantial evidence, there ought to be no doubt of the facts used as circumstances. To the opinion of the Court the prisoner excepted.

The third Bill of Exception states, that the Commonwealth introduced Mozes Cardozo to prove that some three or four months before the death of Elbert Mosby, he borrowed a horseman's pistol of Thomas Scott, jr., to lend, and did lend the same to the prisoner, who said he was going to the Western Country: that the said pistol had never been returned by the prisoner to the said Cardozo. The Commonwealth also introduced the said Thomas Scott, jr., as a witness, who proved that he did lend a horseman's pistol to the said Cardozo, which had never been returned to him by the said Cardozo, or the prisoner. No evidence having been offered in this Court of the prisoner's confession, the Counsel for the prisoner offered to prove by the said Thomas Scott, jr., what disposition the prisoner had stated to the said Scott and Doctor Hening, since the death of Elbert Mosby, he had made of the said pistol, the Commonwealth having introduced the said Hening before the Examining Court, to prove, and by him did prove, the confession of the prisoner as to the disposition which he, the prisoner, had made of the said horseman's pistol; but the Court refused to allow the prisoner to avail himself of the benefit of his confession proved by the Commonwealth, and attempted to be used against the prisoner before the Examining Court. To which refusal the prisoner excepted.

The fourth Bill of Exceptions states, that on the trial of the cause, the Commonwealth introduced evidence to prove that a knife exhibited in Court, was picked up on the ground, not far from where the dead body of Elbert Mosby was found, on the morning of the second day after
714 *he was killed. The Commonwealth also introduced Allen Jenkins to prove, that the said knife was lent by him to the prisoner, on the second day of October Cumberland Court, 1827, in the orchard on Hezekiah Ford, about one mile from Cumberland Court-house, the said Jenkins admitting in his evidence given on this trial, that he had been examined before the committing Justice, and Examining Court in this case, not less than three times, and that he had in each examination before the present, sworn that he lent the knife, which he verily believes to be the one exhibited in Court, on the second day of Cumberland September Court, 1827: the prisoner then offered evidence to prove that evidence was introduced by the Commonwealth on two several occasions before the Examining Courts in this case, to sustain the evidence given by the said Allen Jenkins, in his first three examinations in this case, to wit: the evidence of one William Maxcy, who proved before the said Examining Courts, that he saw the prisoner in possession of the said identical knife, now produced in Court, some time in the latter

part of August, or the early part of September, in the year 1827, as far as the said Maxcy could swear to the identity of a knife from its general appearance. The said Maxcy not having been summoned by the Commonwealth, or the prisoner, to this Court, the Court excluded from the Jury any evidence of what the said Maxcy had sworn to, in relation to the identity of said knife, and the time at which he saw it in the possession of the said prisoner, as illegal evidence to show, or tending to show, the means resorted to, to sustain this prosecution, or for any other purpose, the said Maxcy being now living, and residing in the county of Powhatan. To this opinion of the court, the prisoner excepted.

The court commenced this case on Saturday the 8th of November, and on Monday the 10th, the panel of the Jury was completed; the trial continued on the 11th, 12th, 13th and 14th November. On the last mentioned day, the Jury retired to consult
715 of their verdict, and after some time returned, and found the prisoner guilty of murder in the first degree. The transcript of the Record furnishes this memorandum. "It was after midnight when the Jury rendered their verdict in this case."

On Saturday the 15th November, the Court again met, and passed sentence of death on the prisoner. The hour of the day on which this sentence was passed, is not noted on the Record.

The prisoner applied to the General Court for a Writ of Error to the Judgment, assigning as errors: 1st. The refusal to continue the cause; 2d. The refusal to reject Chalkley, as an unfit Juror; then the opinions which are set forth in the four Bills of Exceptions filed during the trial; and 7th. "Because the verdict of the Jury, and Judgment of the Court thereupon, were rendered and pronounced against your petitioner, after the Term of the said Superior Court had been legally ended, and when the Jury had no lawful authority to render such verdict, and the said Superior Court no lawful authority to pronounce such Judgment, to wit, on the 15th November, 1828, the first day of the present Term of this (General) Court. See 1 Rev. Co. p. 219, sect. 1, and p. 229, sect. 3."

S. Taylor for petitioner, and the Attorney General for the Commonwealth, submitted the case.

BOULDIN, J. delivered the opinion of the Court.

After stating the case, he proceeded:

Every error assigned has been carefully examined by the Court, as also the point which arose on the prisoner's motion to quash the Indictment. But except the first and seventh of the errors assigned the Court see nothing whereon to raise a doubt.

Whether the Superior Court of Chesterfield ought to have continued the cause, will now be considered. On examining the Record, we find that the Record of
716 the Examining Court is made a part of it. On inspection, it appears at once that the prisoner meant not to be tried as long as he could get continuances.

The list of witnesses to whose materiality he swears on several occasions, is numerous, and yet on the final examination, when those to whose materiality he had sworn at the former Courts, do not appear to have been absent, not one of them was called on by him to give evidence in his behalf. This shows distinctly that the continuances moved for in that Court were not that he might have the benefit of the evidence of witnesses on his examination. At the first Term of the Superior Court of Chesterfield, he moved for a continuance, and it was granted to him, but he was informed by the Court, that on repeating that motion at a subsequent Term, he must prove the materiality of the absent witness, by producing the affidavit of the witness, if it could be procured. The circumstances of the case called for this caution. The evidence expected from the witness was short and simple; her affidavit might easily have been taken. If it had been taken, the prosecutor might have admitted it to go to the Jury. If the circumstances in any case can warrant such a conclusion, they will in this, that the affidavit was kept back either because the witness would not swear to what was expected, or that the prisoner preferred the chance for a continuance to the use of the evidence.

A reason which appears to have had influence with the Judge below is not without weight. There were more than thirty witnesses present on the part of the prisoner. For aught that appears, each of them might be able to give evidence having some remote bearing on the evidence given against him. No precise rule can be laid down as to the influence this circumstance ought to have in any case upon a motion for a continuance, but it is easy to see that such a number of witnesses lays the ground work for motions of this sort to be endless, and calls on the Court for circumspection in granting them. Upon all the circumstances here developed, the Court is unanimously of opinion,
717 *that the prisoner's motion for a continuance was properly over-ruled.

The question arising from the seventh error assigned, is whether the November Term of the Superior Court of Chesterfield was at an end when the verdict was rendered, and the Judgment given in the case. This depends on the true construction of the third section of the Circuit Court Law, 1 Rev. Co. p. 229, taken in connection with other sections of the same Act, and the General Court Law. The first section, p. 226, enacts, "that one Judge of the General Court shall hold a Court in each year at the Court-house, &c., at the times, and in the manner hereinafter directed." The second section arranges all the Counties into Circuits, and appoints the day of holding the Courts for each; thus, "a Court shall be holden in—Chesterfield on the second day of June, and the second day of November." Then comes the third section. "Each of the aforesaid Courts shall sit until the business thereof shall be dispatched, unless the Judge holding the same be compelled to leave the Court, in order to arrive in time at the next succeeding Court of his Circuit, or at the General

Court." The eighth section of the same Law, p. 230, declares that, "if the Judge shall not attend on the first day of any Circuit Court, such Court shall stand adjourned from day to day, until a Court shall be made, if that shall happen before four of the clock in the afternoon of the third day." The General Court Law, p. 219, sect. 1, enacts, that "the General Court shall consist of (fifteen) Judges, &c. a majority of the whole number of the said Judges shall be necessary to constitute a General Court for the transaction of business in Term time, except as herein is excepted. The said Court shall be holden at the Capitol in the City of Richmond. The said Court shall be holden twice in every year, namely, on the fifteenth day of June, and fifteenth day of November. If a sufficient number of Judges should not attend on the first day of any Term, any one of the said Judges may adjourn the Court from day to day, for six days successively."

718 "In the language of the third section, there is certainly no express limitation of the Term: each Court is to sit until the business is dispatched, and two of the Judges (Brockenbrough and Summers,) are strongly inclined to think that the qualifying words, "unless the Judge be compelled, &c." are to be considered as directory, or permissive only, and that of the necessity to go to the next Court, or to finish what is before him, and what has been already begun, he is to judge, and on his own responsibility to decide whether a compliance with the express order of the Legislature, to dispatch the business before him, or to go to the next Court as the Law permits, will best subserve the public interest. And they argue that it is right it should be so, or else there would often be a failure of justice. In some of our Courts, it sometimes happens that cases of the most important character could not be finished, and consequently would never be tried, unless the Judge have the power to run into the Terms of the next Court to which his duty calls him, and as the Legislature fixed no precise limit, the construction which best fulfils their general purpose is the right one. They argue that the state of things at the first organization of the Circuit Court System, shows that theirs is the true rule. At that time the General Court was held on the 9th of June, and November. Many of the Superior Courts were held late in May, and October. In the distant Courts, situated more than three hundred miles from Richmond, the Judge must close his last Superior Court at least as early as the last day of the preceding month, to arrive here on the first day of the session of this Court. But that day finds him closely engaged in a difficult and important cause, which cannot yet be finished for a week. Had he no discretion to finish that cause because the Law required him to attend at Richmond on the 9th? Was every thing that he did there void, and coram non iudice, because of that injunction of the Law? They cannot think so.

But, whether that opinion be right or not, and they do not deem it necessary

to press it) those Judges concur with 719 "five other Judges now present, in the opinion, that no limitation of the Term of the Court, which can be implied from the words of the third section, makes the Judgment now under consideration, void or erroneous.

If the Judge of the Superior Court of Chesterfield, after closing that Court on the 15th instant, did arrive, or could arrive at this Capitol at any time on the same day, he would have been "in time" to hold, in concurrence with seven others, if so many attended, a General Court on that day, or to adjourn the General Court to the next day, if he only attended: the verdict in this case was rendered in the night of the 14th, although after midnight, and for aught that appears, the Judgment was rendered early the next morning. It is judicially known of this Court that Chesterfield Court-house is not very remote from this Capitol, and that three hours moderate riding would bring the Judge here. If, when that Judgment was rendered, there was not time for the Judge to arrive at the General Court on the 15th, that matter ought to have been shown by exception. Some of the Judges of this Court are in the habit of finishing the business of one Superior Court, in the morning of the first day of the next succeeding Superior Court, and sometimes of doing a good day's business in the latter Court on the same day.

Suppose the Act of Assembly to be construed as if in place of the words "unless," &c. it had been thus written: "but so soon as it becomes necessary for the Judge to leave the Court, in order to arrive in time at his next Court, his power to hold the former Court shall cease." If such had been the language, the Judgment under consideration would still have been good. It appears from this Record, that the Judge rendered the Judgment on the 15th, and it cannot be intended, as it does not so appear, that he did not leave himself time to arrive here on the same day.

It has been argued, that the Act appointing particular and several days whereon the same Judge shall hold several 720 "Courts, excludes the idea that he may on the day he is directed to hold a Court in one County, be holding it in another. It is true that the first and second sections do declare that Courts shall be held in one County on a particular day, and in another county on another day, and those sections say nothing about the duration of the Term. If the Act had stopped there, it may be doubted whether in strictness the Courts could be held for a longer period than the day so appointed, or whether any adjournment could take place, even to the next day; but then the third section comes in, and does not leave this matter to conjecture, or construction. It in effect, directs that adjournments shall take place, from day to day, until the business is done, "unless the Judge holding the same be compelled to leave the Court in order to arrive in time at the next succeeding Court, or at the General Court." To construe this permissive language as if it had been, "provided the business can be

dispatched before the day on which the next Court is to be holden," would be to depart from the latter, not to further, but to defeat, the general objects of the Legislature. That general object is, that the business of both Courts may be done. The natural sense of the language used, does not allow the Judge to leave the business of the Court he is holding unfinished, so long as he can transact the same, and have time to open the next Court on the day appointed by Law.

A majority of the Court do not see any valid objection to taking the time the Law allows the next Circuit Court to stand adjourned to, without the attendance of the Judge, into the account. Thus, according to the eighth section, if the Judge does not attend, the Court stands adjourned from day to day, till four o'clock of the third day. If a trial of a cause in the preceding Superior Court, is greatly protracted, the necessity of the case would justify the Judge, in our opinion, in not closing that Court till the period arrives when he might be compelled to leave the Court in order to arrive at the next Superior Court 721 by four o'clock of the third day.

But it is not necessary to decide that question now, particularly as one of the majority (Saunders, J.) is not entirely satisfied on that point. The Record before us does not show but that the Judge might have so closed his business in Chesterfield, as to have literally complied with his duty to be here in time, on the first day of this Court. The course taken is a literal adherence to the Legislative direction to dispatch the business of the Superior Court of Chesterfield, so long as he could do so, and arrive in time at the General Court.

On this seventh error assigned by the prisoner's Counsel, three of the Court, (Parker, Upshur, and Field, J.) are of opinion, that a Writ of Error should be awarded, but all the other Judges present, being seven in number, are against it.

On all the other points exhibited by the Record, all the Judges are of opinion that there is no error, and the Writ of Error is therefore refused.

EXPERT AND OPINION EVIDENCE.

- I. Definition.
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Cross Reference to Monographic Note.

Insanity, appended to *Boswell v. Commonwealth*, 20 Gratt. 860.

I. DEFINITION.

Who Are Experts.—All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required. *Bird v. Com.*, 21 Gratt. 800. and *note*: *Norfolk & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. Rep. 721. But see *McKelvey v. C. & O. R. Co.*, 85 W. Va. 500, 14 S. E. Rep. 261; *Overby v. C. & O. R. Co.*, 37 W. Va. 524, 16 S. E. Rep. 813.

II. GENERAL RULE AS TO ADMISSIBILITY.

1. OPINION RULE.—No principle of law is better settled than that the opinions of witnesses are, in general, inadmissible, and that witnesses can testify to facts only, and not to opinions or conclusions based upon the facts, for to allow the witness to draw conclusions or inferences from testimony, would be to allow him to usurp the province of the jury which is so jealously guarded by all courts of this country. *Southern Ry. Co. v. Mauzy*, 98 Va. 662, 37 S. E. Rep. 285; *Hanriot v. Sherwood*, 82 Va. 1; *Taylor v. R. Co.*, 33 W. Va. 39, 10 S. E. Rep. 29; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813; *State v. Welch*, 36 W. Va. 690, 15 S. E. Rep. 419; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. Rep. 232; *House v. House (Va.)*, 46 S. E. Rep. 290.

Necessity of Receiving Opinions.—Undoubtedly, however, there are questions upon which non-experts may give their opinions, as, for example, questions of identity, velocity, distances and the like, because such questions usually depend upon a variety of circumstances which are incapable of being presented with their proper force and significance to any but the observer. *Tyler v. Sites*, 90 Va. 539, 19 S. E. Rep. 174; *State v. Welch*, 36 W. Va. 690, 15 S. E. Rep. 419; *Norfolk & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. Rep. 721. See *infra*, this note: "Subjects of Nonexpert Opinion." VII. 3.

Test of Admissibility.—But the opinions of witnesses are never to be received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813; *Tyler v. Sites*, 90 Va. 539, 19 S. E. Rep. 174; *Guarantee Co. v. Bank*, 95 Va. 480, 28 S. E. Rep. 909.

Moreover, the opinion of a witness, who neither knows nor can know more about the subject matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible. *Overby v. C. & O. R. Co.*, 37 W. Va. 524, 16 S. E. Rep. 813.

2. EXPERT-EVIDENCE RULE.—The general rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject matter so far partakes of the nature of a science, art or trade as to require a previous habit of experience or study in it to acquire a knowledge thereof. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813.

Test of Admissibility.—Where the inquiry, however, relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled or scientific witnesses is not admissible. *Overby v. C. & O. R. Co.*, 37 W. Va. 524, 16 S. E. Rep. 813; *Welch v. Insurance Co.*, 28 W. Va. 806; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813; *State v. Hull*, 45 W. Va. 767, 22 S. E. Rep. 241. "The competency of expert testimony in a particular case depends upon the question as to whether or not any peculiar knowledge, science, skill or art, not

possessed by ordinary persons, is necessary to the determination of the matter at issue: * * * that expert testimony is not admissible as to matters within the experience or knowledge of persons of ordinary information, as to which the jury are competent to draw their own inferences from the facts given in evidence before them, without extraneous aid other than the instructions of the court upon questions of law." *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219, 228. The above language was approved in *Southern Ry. Co. v. Manzy*, 98 Va. 692, 37 S. E. Rep. 285.

Hence, if the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form an opinion in reference to them and draw inferences from them as witnesses, then the opinions of experts cannot be received in evidence. *Overby v. C. & O. R. Co.*, 37 W. Va. 524, 16 S. E. Rep. 813.

Negligence.—Where the facts from which negligence is to be inferred are within the range of ordinary human experience, the opinions of the men on the jury, in the eye of the law, is better than those of experts; but, where the injury involves questions of science or skill, expert evidence is admissible. *Parlett v. Dunn* (Va.), 46 S. E. Rep. 467.

Method of Putting Up Hoisting Apparatus.—In an action by an employee to recover damages from his employer for personal injuries resulting from the negligence of the latter in failing to provide for the plaintiff a reasonably safe place in which to work and reasonably safe and suitable appliances or machinery with which to work, it was held that expert evidence was admissible to show the usual method of putting up a hoisting apparatus, because the manner in which such an appliance should be constructed, placed in position, and fastened so as to make it reasonably safe and suitable for the work to be done is not within the range of the experience of men unskilled in the use of such an appliance. *Parlett v. Dunn* (Va.), 46 S. E. Rep. 467.

Speed—Space in Which Car May Be Stopped.—Expert evidence is admissible to determine within what space a car running under certain conditions may be stopped. *Norfolk Ry. & Light Co. v. Corletto*, 100 Va. 856, 41 S. E. Rep. 740.

But the speed of a passing train is not a question of science, but of observation, and anyone possessing knowledge of time and distance is competent to testify in relation thereto. *McVey v. Chesapeake, etc., R. Co.*, 46 W. Va. 111, 33 S. E. Rep. 1012.

Purpose of Expert Testimony.—The object of all questions to experts should be to obtain their opinion as to matters of skill or science which are in controversy, and at the same time, to exclude their opinions as to the effect of the evidence in establishing controverted facts. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813.

Province of Jury.—While the admission of the opinions of experts necessarily gives rise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law axiomatic with reference to them, as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus completely usurp the peculiar province of the jury. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813; *State v. Hull*, 45 W. Va. 767, 32 S. E. Rep. 241.

3. WEIGHT OF EXPERT TESTIMONY.—The testimony of experts is not entitled to any greater weight as a matter of law than that of other witnesses unless it appears that the expert has had better means and opportunities of knowing whereof he speaks than the nonprofessional witness, otherwise it is to receive only such weight and credit as

the jury deem it entitled to when viewed in connection with all the circumstances. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. Rep. 488, citing and explaining many Virginia and West Virginia cases.

Testimony of Physician on Mental Capacity.—In accordance with this rule it was held to be error to instruct the jury that the evidence of physicians testifying as experts only, on questions of mental capacity, is entitled to great weight. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. Rep. 488.

III. QUALIFICATION OF EXPERTS.

Source of Knowledge.—Expert knowledge may be derived from the study of a profession or from mental application, as in the case of a surgeon who derives his knowledge from the study necessarily incident to acquiring a knowledge of his profession. *Mendum v. Com.*, 6 Rand. 704.

Degree of Expertness Required.—The rule seems to be that an expert need not have all the knowledge possible for one in his class to entitle him to speak, but may testify unless it clearly appears that he was not qualified at all. *Richmond Locomotive Works v. Ford*, 94 Va. 637, 27 S. E. Rep. 509.

Proof of Expertness.—When the opinion of an expert is offered in evidence, and it is objected to, because he is not an expert, the court may hear evidence to ascertain whether he is so or not, and on being satisfied that he is an expert, may allow his opinion to be given in evidence. *Mendum v. Com.*, 6 Rand. 704.

But the mere expression of belief by a party that he is an expert is not sufficient to constitute him such; he must further testify as to some information, skill or experience in a certain line, to bring him within that class. *Com. v. Larkin*, 88 Va. 423, 13 S. E. Rep. 901.

Discretion of Trial Court.—The question of the qualifications of a witness to testify as an expert is largely in the discretion of the trial court, and although it is not altogether clear that the witness had sufficient knowledge upon the subject to be considered an expert, still the action of the trial court will not be reversed for admitting such testimony unless it clearly appears that he was not qualified. *Richmond, etc., Works v. Ford*, 94 Va. 637, 27 S. E. Rep. 509.

IV. EXPERT AND NONEXPERT CONTRASTED.

The nonexpert testifies as to conclusions which may be verified by the court or jury; the expert as to conclusions that cannot be; the nonexpert gives the result of a process of reasoning familiar to every day life; the expert gives the results of a process which can be mastered only by special scientists. *McKelvey v. C. & O. R. Co.*, 35 W. Va. 500, 14 S. E. Rep. 261.

V. KINDS OF EXPERTS.

Priests.—A priest familiar with the marriage laws and usages of a foreign jurisdiction may be permitted to prove them by his own evidence. *Bird v. Com.*, 21 Gratt. 800.

Physicians and Surgeons.—Likewise, when it is proven that a witness is a practicing physician, he is competent to express an opinion, as an expert, upon a medical question. *Livingston v. Com.*, 14 Gratt. 592; *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. Rep. 148.

Cause of Death—Effect of Wounds.—Upon a trial, for homicide, the commonwealth may introduce as witnesses physicians and surgeons to give their opinion upon a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been inflicted on the deceased, as to whether such wound or beating

would be a cause adequate to produce death, or was the actual cause of death; but the questions put and the answers given should be so put or given as not to elicit or express an opinion by the physician on the credit of the witnesses or the truth of the facts testified to by others. *Livingston v. Com.*, 14 Gratt. 562.

Effect of Drugs.—Whether criminal charges preferred by a female patient against a physician are the result of an hallucination, while under the influence of chloroform and ether, is a question that must be determined by expert medical evidence, as it is not a matter of ordinary human experience or knowledge. *State v. Perry*, 41 W. Va. 641, 24 S. E. Rep. 634.

Instrument of Infliction.—A surgeon is competent to state, from his general knowledge of the human body, and of the practice and principles of surgery, that he had no doubt of his ability to form a correct opinion as to the difference between a dirk and a knife wound. *Mendum v. Com.*, 6 Rand. 704.

Life Insurance—Examining Physician—Insurance Expert.—It was held in *Schwarzbach v. Protective Union*, 35 W. Va. 623, that a question asked of the examining physician and of a man engaged in the insurance business as experts, as to what would be the character of the risk of a man's life, if within three months he had a hemorrhage of the stomach, was properly not allowed to be put or answered.

Rape.—Likewise, a medical witness, who is examined as an expert in the trial of an indictment for rape, after stating that he had been called upon to examine the prosecutrix, will not be allowed to express the opinion to the jury that no girl would have voluntarily submitted to the suffering necessary to have brought about this result, because the jury is just as capable of arriving at this conclusion as the physician. *State v. Hull*, 45 W. Va. 767, 32 S. E. Rep. 241.

Whether a person with a wooden leg is incapacitated from kneeling, or thereby rendered incapable of committing an offense in the manner charged, is a subject matter of inquiry, justifying the introduction of expert medical testimony, to assist the jury in arriving at a correct conclusion. *State v. Perry*, 41 W. Va. 641, 24 S. E. Rep. 634, 19 Am. & Eng. Enc. Law (3d Ed.) on Expert and Opinion Evidence, and note 15 on p. 453.

Hypothetical Question.—Where the conclusions called for by an hypothetical question from a medical man, who is being examined as an expert, depend upon facts, the evidential weight of which can only be determined by those familiar with that specialty, then those conclusions may be given by an expert in such specialty. *Bowen v. City of Huntington*, 35 W. Va. 662, 14 S. E. Rep. 317. But see *Guarantee Co. v. Bank*, 35 Va. 480, 28 S. E. Rep. 900.

Insanity—Value of Testimony.—The opinion of a witness, as to the sanity of a person, depends, for its weight, on the capacity of the witness to judge, and his opportunity. Physicians are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from the course of their education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore, to be able to discriminate more accurately; especially a physician who has attended the patient through the disease, which is supposed to have disabled his mind. *Burton v. Scott*, 3 Rand. 399, 403; *Opinion of Carr, J.*; *Cheatham v. Hatcher*, 30 Gratt. 65; *Montague v. Allan*, 78 Va. 592. Compare *Ward v. Brown (Va.)*, 44 S. E. Rep. 468.

Example.—For example where the defence, in a trial for murder, is insanity, it is competent to ask

a medical expert such a question as this: "Suppose a man had inherited a predisposition to insanity, would great mental anxiety, loss of property, or the honor of one's family, and losses of other kinds be likely to develop the disease?" *Dejarnette's Case*, 75 Va. 867.

Proximate Cause.—Where a party, suffering from paralysis, institutes an action for damages against a city, claiming that the disease is the result of injuries inflicted by the negligence of the city, and the city wishes to defend on the ground that it is the result of a disease of long standing, it is competent for a medical witness, in response to an hypothetical question, to state his conclusions as to the proximate cause of the paralysis. *Bowen v. City of Huntington*, 35 W. Va. 662, 14 S. E. Rep. 317.

Surveyors.—The opinion of a surveyor as to the location of a certain tract of land, where he does not mention a single fact to enable the court to determine the location of the land in question, but merely says that he is satisfied as to its identity, is clearly insufficient to locate the land in question, because it amounts to nothing more than the opinion of a witness. Moreover, the purpose of evidence is to satisfy the court and not the witness. *Randolph v. Adams*, 2 W. Va. 519.

Notaries.—The evidence of a notary, taking the acknowledgment of a deed, who is also a competent physician and expert as to mental diseases, that the grantor was competent to execute it, is entitled to very great weight. *Farnsworth v. Noffsinger*, 45 W. Va. 410, 33 S. E. Rep. 246. See also, *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. Rep. 201.

Merchants.—It was held in *James v. Adams*, 15 W. Va. 245, that the opinions of dry goods merchants are admissible to prove the market value of a remnant of dry goods, at the time the party agreed to accept it, although they are not acquainted with the particular stock of goods, but who testify to the per cent. they have depreciated, on the ground that they consist of the less saleable portion of the goods, and because they are injured by being kept a considerable time in a store.

Engineers.—But a locomotive engineer, who has no knowledge derived from study or experience, in the construction or repair of locomotives, is not an expert, and his opinion is not admissible. *McKelvey v. C. & O. R. Co.*, 35 W. Va. 500, 14 S. E. Rep. 361. But see *Norfolk & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. Rep. 721.

Farmers.—Although a person has, all his life, been familiar with the effect of a dam upon the channel of a stream, and has twice superintended the putting up of the dam, and is also familiar with the effect upon the channel of the stream when the dam is washed away, but who is not a millwright or mechanic of any sort, but only a farmer and owner of the mill, still he is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county thirty miles away. *Ellis v. Harris*, 32 Gratt. 664.

VI. SUBJECTS OF EXPERT TESTIMONY.

1. **GENERAL RULE.**—When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in the particular science, art or trade, to which the question relates, are admissible in evidence. *State v. Musgrave*, 43 W. Va. 673, 23 S. E. Rep. 813; *Overby v. C. & O. R. Co.*, 37 W. Va. 594, 16 S. E. Rep. 813; *Welch v. Ins. Co.*, 23 W. Va. 306.

2. OPINIONS BASED ON EVIDENCE OF OTHERS.

a. **Hypothetical Questions.**—When a medical witness is introduced and examined as an expert it is proper to propound to him an hypothetical question,

reciting certain facts which the evidence in the cause tends to prove, and such recital need not contain all the facts which the evidence has a tendency to prove, but counsel may embody in the question such facts as tend to support his theory of the case in order to elicit the opinion of the witness based upon the testimony of other witnesses in the cause, or upon scientific principles applied to the facts so testified to. *Bowen v. City of Huntington*, 36 W. Va. 682, 14 S. E. Rep. 217.

But where the facts and circumstances shown in evidence are such that men in general are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom, then the opinion of an expert, founded upon an hypothetical state of facts, is inadmissible. *Guarantee Co. v. Bank*, 95 Va. 490, 28 S. E. Rep. 909.

Question Put How.—On a direct examination the questions put to an expert must be framed hypothetically, unless there is no conflict of evidence as to the facts, or unless the expert is personally acquainted with them. *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991.

Presence of Witness at Trial.—In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts, not testified to by himself, either the witness must be present and hear all of the testimony, or the testimony must be summed up in the question put to him, and in either case the question is put to him hypothetically. *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. Rep. 996.

Conflict in Evidence.—Although an expert may have heard all the testimony in the case, he cannot be asked to give his opinion, based merely upon his having heard such testimony, whenever there is a conflict therein, unless the same is hypothetically propounded to him. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813. See also, *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991.

Doubtful Facts.—An expert cannot be asked to give his opinion upon doubtful facts in the case on trial, which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. Rep. 813.

Hypothesis Must Be Clearly Stated.—The opinion of medical experts, founded on testimony already in the case, can only be given on a hypothetical case; and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *McMechen v. McMechen*, 17 W. Va. 683.

Assumption of Facts.—In putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with their theory of them; it is not essential that he state the facts as they exist, but the hypothesis must be based on a state of facts which the evidence in the cause tends to prove. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

Opinion on Credibility of Witnesses.—Upon a trial in which expert medical testimony is competent and proper, the physician or expert may give his opinion on any hypothetical state of facts which the evidence tends to prove, but his opinion must be based upon the state of facts as testified to by himself or other witnesses, but not upon his knowledge of other facts not testified to by himself or others. In such case, the questions put and the answers given should be so put and so given as not to elicit or express an opinion by the physician or other expert on the credit of the witnesses, or the truth of the facts testified to. *Bowen v. City of Huntington*, 36 W. Va. 682, 14 S. E. Rep. 217; *Living-*

ston v. Com., 14 Gratt. 592; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *McMechen v. McMechen*, 17 W. Va. 683.

3. CLASSIFICATION OF SUBJECTS.

Hogs.—An experienced drover of hogs, accustomed to butchering and weighing them, who was present when the hogs were weighed, and saw them and attended to the weighing of them, may give to the jury his opinion as to the weight of each hog. *McCormick v. Hamilton*, 23 Gratt. 561, and *note*.

Damages.—"There is no objection to taking the opinion of witnesses as to either the amount of damages or as to the amount of the benefit. It is the usual practice in this state and Virginia." *Per GREEN, J. Railroad Co. v. Foreman*, 24 W. Va. 663.

Burning of Wool.—The opinion of witnesses as to whether a quantity of wool burned could have been completely destroyed in the burning of a building of a certain size, is not admissible, for this is not a question which requires expert testimony to understand. *Welch v. Ins. Co.*, 23 W. Va. 288.

Opinion as to Value Both before and after Injury.—Opinions of witnesses as to the value of property before and after a change in a street's grade, are admissible as evidence in actions against municipal corporations for damages flowing from such change. *Blair v. City of Charleston*, 43 W. Va. 63, 28 S. E. Rep. 346.

Present Damages.—In an action for damages for diverting water a witness may state from facts within his knowledge, what, in his opinion, was the amount of damages suffered by the plaintiff because of such diversion of the water; and to authorize the giving of such opinion it is not necessary that the party be an expert. *Hargreaves v. Kimberly*, 26 W. Va. 787.

Future Damages.—But a witness in an action for damages for diverting water, cannot state, from facts within his knowledge, what in his opinion will be the future damages to the plaintiff from the act of the defendant. *Hargreaves v. Kimberly*, 26 W. Va. 787; *Rogers v. Coal River Boom & Driving Co.*, 39 W. Va. 272, 19 S. E. Rep. 401.

Proof of Damages.—It was held in *Lawson v. Conway*, 37 W. Va. 159, 16 S. E. Rep. 564, in an action against a physician for malpractice, that the testimony of a witness that he was "well acquainted with the physical ability of the plaintiff to perform manual labor, both before and since the breaking of his arm, that he was an able-bodied man before the injury, and that since the injury he could perform no more than one-half a man's work, and that the witness and plaintiff were both farmers, and lived near together," is competent, and ought not to have been excluded.

Probability of Damage.—In an action by a riparian owner to recover damages for the overflowing of the plaintiff's land, alleged to have been caused by an insufficient water way under the defendant's bridge, the opinion of the plaintiff, as to whether any damage would have been done, if certain alterations had not been made in the bridge, is incompetent. *Taylor v. B. & O. R. Co.*, 33 W. Va. 39, 10 S. E. Rep. 29.

Management of Craft.—Where a witness is called and examined as an expert as to whether a steamboat was properly landed for the purpose of discharging a passenger, as to what officers were required to properly man such a boat, it must not only appear that the witness has such knowledge and experience in reference to the subject matter under consideration, but that he is acquainted with the class and dimensions of the boat, and the character and condition of the river and the shore where the landing was made, or has heard the

same described by witnesses in a case, before he can be allowed to express his opinion as an expert. *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. Rep. 994.

Divorce—Danger of Bodily Harm to One Consort.—In a suit by a husband against his wife for divorce *a mensa et thoro* upon the ground that she had attempted to take his life and he had reasonable ground to fear serious bodily hurt, the opinion of witnesses, that from their knowledge of the character or reputation of the parties they did not believe that the husband could with safety cohabit with his wife, is inadmissible. *House v. House*, 102 Va. 235, 46 S. E. Rep. 299.

Railroading.

Moving Heavy Wheels.—A witness having sufficient knowledge may testify as to the general practice of machine shops in moving large wheels, and the comparative safety of different methods, but his testimony is not competent to show that the different methods of another shop are better than those of the defendant. *Richmond, etc., Works v. Ford*, 94 Va. 627, 27 S. E. Rep. 509; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. Rep. 285.

Loading Cars.—But witnesses cannot express an opinion as to the best and safest mode of loading car wheels on a flat car, for expert testimony is not necessary to explain or elucidate such a matter, since the question of danger or safety in loading car wheels in a particular mode is one which any person of common intelligence and observation can as readily determine as a so-called expert. *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. Rep. 285.

Bridges.—A witness may give his opinion as to whether certain stone and mud, at the foot of the abutments of a bridge, contracted the channel of the stream or not. *Taylor v. B. & O. R. Co.*, 33 W. Va. 89, 10 S. E. Rep. 29.

Signal Posts—Hypothetical Facts.—But a question "If there had been any signal post, with signals and a watchman, as the contract requires, and as is now there, could there have been any accident on that occasion?" is inadmissible, on the ground that it calls for an expression of a mere opinion upon the part of a witness as to a conclusion upon an hypothetical state of facts. *Norfolk & C. R. Co. v. Suffolk, etc., Co.*, 92 Va. 418, 23 S. E. Rep. 737.

Ordinary Care.—The question of what is "ordinary care" is one for the jury to pass upon under all the circumstances of the case, the age of the plaintiff being one of the facts considered, and cannot be shown by expert testimony. *City of Roanoke v. Shull*, 97 Va. 419, 34 S. E. Rep. 24.

Cancellation of Words.—The question whether certain words in a paper have been cancelled, is a question of fact, and the evidence of experts ought to be permitted to go to the jury upon such a matter, unless it is entirely clear on the face of the paper, that certain words have been stricken out and cancelled. *Beach v. O'Riley*, 14 W. Va. 55.

Thawing Dynamite before Open Fire.—The opinions of scientific experts are not necessary upon the question as to whether thawing dynamite before an open fire is safe or not. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 23 S. E. Rep. 869.

Price of Wheat.—It seems that the testimony of a witness is inadmissible to prove the price of wheat per bushel; by having the price of flour per barrel given him, without other proof that such person is an expert, because wheat and flour are articles of such universal acquaintance and use in this country, that the presumption is that every man (not proved to the contrary) is in some sort an expert in that matter, but this is probably the extreme limit of the rule. *Hood v. Maxwell*, 1 W. Va. 219.

Handwriting—Present Rule.—Expert testimony is

admissible to test the genuineness of disputed writings by comparison of writings which are admitted to be genuine with writings which are alleged to be forged. *Hanriot v. Sherwood*, 82 Va. 1; *Tower v. Ulup (Va.)*, 44 S. E. Rep. 179. See also, *Ware v. Starkey*, 80 Va. 204; *Cody v. Conly*, 27 Gratt. 313, and *note*. But see the opinion in *Hanriot v. Sherwood*, in which LACY, J., distinguishes and explains the former cases upon this subject.

It was held in *Brown v. Hall*, 85 Va. 146, 7 S. E. Rep. 182, that the refusal to allow a witness, acquainted with the handwriting of the propounder of an alleged holographic will, which was alleged to have been forged, to testify that the will is in the handwriting of the propounder, is error, though the witness did not know the testator's handwriting.

But it has been held that an expert, who has no personal knowledge of the handwriting of the person whose writing is in question, cannot give his belief as to its genuineness merely by comparison of two writings. *Clay v. Robinson*, 7 W. Va. 348.

Former Rule.—But the rule formerly was that a witness could not prove the genuineness of writings in question by comparison with other proved specimens, although he declares himself perfectly familiar with the person's handwriting, and the circumstances upon which he founds this belief. *Rowt v. Kile*, 1 Leigh 216; *Burress v. Com.*, 27 Gratt. 984.

Competency of Evidence.—To render a person a competent witness to testify as to the handwriting of another, it is not sufficient to show the receipt of friendly letters purporting to come from such person alone, but some admission or acquiescence equivalent to an acknowledgment that she was the writer of such letters must be shown on the part of such person, independent of their receipt and contents. *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. Rep. 870.

Refreshing Memory.—The evidence of a witness as to handwriting, who has formed an acquaintance with it, from seeing the party write, or from a course of correspondence, is not rendered incompetent, nor its weight impaired, by his having referred to papers in his own possession, known to be written by the party, to refresh his memory. *Redford v. Peggy*, 6 Rand. 316.

Statutory Rule.—It was held in *Commonwealth v. Weller*, 83 Va. 721, 1 S. E. Rep. 102, that the act of January 21, 1886, forbidding expert evidence to prove the genuineness of any instrument made by machinery, etc., is not repugnant to art. 1, § 10 of the U. S. Constitution, for this section has no application whatever to rules of evidence prescribed by the law-making power of the state to govern proceedings in her court. See also, *Newton v. Com.*, 83 Va. 647; *Com. v. Booker*, 82 Va. 964, 7 S. E. Rep. 831; Va. Code, § 412.

4. TIME FOR ADMISSION.—Expert testimony should not be allowed after the parties have announced that they are through, or after the case has been submitted to the jury, except under very extraordinary circumstances, and for good cause. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 23 S. E. Rep. 869.

VII. NONEXPERT OPINION.

1. GENERAL RULE.—Though we have seen that opinion evidence, as a general rule, is not admissible, still when the facts are such, that it is manifestly impossible to present them to the jury with the same force and clearness as they appeared to the observer, then opinion is admissible as to the conclusions and inferences to be drawn therefrom. *Tyler v. Sites*, 90 Va. 542, 19 S. E. Rep. 174; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. Rep. 529; *State v. Welch*, 36

W. Va. 690, 15 S. E. Rep. 419; State v. Musgrave, 43 W. Va. 673, 28 S. E. Rep. 818.

2. BASIS OF NONEXPERT OPINION.—On questions of insanity, a witness, who is not an expert, is allowed to express his opinion where he has personal knowledge of the facts on which his opinion is based. State v. Maier, 36 W. Va. 767, 15 S. E. Rep. 991.

3. SUBJECTS OF NONEXPERT OPINION.

Age.—It is inadmissible to ask a witness his opinion as to the age of another from his appearance. Valley Mutual Life Ass'n v. Teewalt, 79 Va. 431.

Appearance, Conduct and Demeanor.—A witness cannot give his opinion, in an action against a railroad for killing a person walking on its tracks, whether there was enough in the deceased's appearance to indicate to the engine man that he was bereft of his faculties, for this is a question for the jury to determine for themselves upon the facts of the case, and not upon the opinions of witnesses. To allow a witness to give his opinion as to another's mental condition is a very different thing from allowing him to say what, in his opinion, some one else ought to have thought. Tyler v. Sites, 90 Va. 539, 19 S. E. Rep. 174.

Identity of Person.—A witness who testifies that he knows the person in question may be asked his belief as to the identity of such person. It is not a case of "expert testimony," but depends upon the observation and knowledge of the particular witness in the given case, to go to the jury for what it is worth, no matter what his science, skill or experience may be in the matter of identifying a person. State v. Harr, 88 W. Va. 58, 17 S. E. Rep. 794. See also, Hopper's Case, 6 Gratt. 684.

Identity of Land.—Where witnesses admit that they cannot identify a tract of land from the entries or memoranda in the books of patents, deeds and other documentary evidence, they cannot give it as their opinion that it is included in the boundaries of the land in dispute, for this is not knowledge, nor is it the statement of a fact, but merely an opinion, and hence inadmissible. Holleran v. Meisel, 91 Va. 143, 21 S. E. Rep. 658.

Hypothetical Case—Probability of Accident.—A non-expert witness cannot express an opinion as to the probability of an accident under a different and hypothetical state of facts. Norfolk & C. R. Co. v. Lumber Co., 92 Va. 413, 23 S. E. Rep. 787. See *infra*, this note, "Opinions Based on Evidence of Others," VI, 2.

Depression in Bed.—A witness may give his opinion that a depression in a bed was, from its shape and appearance, caused by the head of a person; he having seen and examined it. State v. Welch, 36 W. Va. 690, 15 S. E. Rep. 419.

Bloodstains.—A witness may give his opinion that stains seen by him are bloodstains, and that a certain large stain seen by him upon bedclothing was the stain of a pool of blood. State v. Welch, 36 W. Va. 690, 15 S. E. Rep. 419. See also, State v. Baker, 33 W. Va. 319, 10 S. E. Rep. 639.

Insanity.—Where nonprofessional witnesses are conversant with the life of the person whose sanity is drawn in question, his disposition and habits, and have long been on terms of familiar intercourse with him, their testimony is regarded as being entitled to greater weight than that of scientific witnesses who have not had such opportunities of forming an opinion; nor does its value depend upon the number of the witnesses, but upon their intelligence, means of knowledge, and the reasons they give for their testimony. Cropp v. Cropp, 88 Va. 753, 14 S. E. Rep. 529.

Testamentary Capacity.—The opinions of witnesses, who have long been acquainted with a testator and have had peculiar advantages of knowing

as to his capacity, are admissible in a suit to set aside a will; but except in the case of experts, their testimony is entitled to little weight unless founded on facts, because such evidence is a mere matter of opinion, and is generally conflicting. Whitelaw v. Sims, 90 Va. 588, 19 S. E. Rep. 113; Young v. Barner, 27 Gratt. 103.

Personal Injuries—Dangerous Locality.—And in an action for personal injuries, witnesses cannot be allowed to express their opinions as to whether the locality at which the injury was inflicted was dangerous or not. Childress v. Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. Rep. 424; Whitelaw v. Sims, 90 Va. 588, 19 S. E. Rep. 113; Young v. Barner, 27 Gratt. 103, and *note*.

Appearance as Indicating Insanity.—Where witnesses are examined by the state in rebuttal on the question of insanity, who have had transactions with the prisoner, and have known him well for months and years, immediately preceding the killing, the prosecution may ask such witnesses whether or not they had ever observed anything about the prisoner, or in what he said or did that indicated insanity. State v. Maier, 36 W. Va. 767, 15 S. E. Rep. 991.

Value of Testimony.—The mere opinions of witnesses, not experts, as to sanity and competency to do a given act, are of little weight, unless based on facts which give good reason for such opinions; and, if the facts are frivolous or unimportant, the opinions of such witnesses, based upon them, are of little weight. Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. Rep. 246; Jarrett v. Jarrett, 11 W. Va. 584; Dower v. Church, 21 W. Va. 60; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. Rep. 493.

The evidence of nonprofessional witnesses, as to the sanity of a party, whom they have approached on business, is clearly admissible, and entitled to great weight, where they give the grounds upon which they base their opinions. Fishburne v. Ferguson, 84 Va. 87, 4 S. E. Rep. 575.

Whiteford v. The Commonwealth.

November, 1923.

Murder in First Degree—What Constitutes—Premeditated Design—How Long It Must Exist.—To constitute murder in the first degree, it is not necessary that the premeditated design to kill should have existed for any particular length of time. If, therefore, the accused, as he approached the deceased, and first came within view of him at a short distance, then formed the design to kill, and walked up with a quick pace, and killed him without any provocation then, or recently received, it is murder in the first degree.

Same—Same—Statute—Enumerated Instances.—The Legislature, in their description of offences which constitute murder in the first degree, has at first enumerated some of the most striking instances of deliberate and cruel homicide; but, finding it

***Murder.**—See monographic note on "Homicide" appended to Southern v. Com., 7 Gratt. 673.

†Murder in First Degree—What Constitutes—Premeditated Design—How Long It Must Exist.—In Wright v. Com., 75 Va. 920, it was said: "It was held by this court, in *Whiteford v. Com.*, 6 Rand. 721, which case has been followed ever since as correctly laying down the law of murder, that the premeditated design to kill need not to have existed any particular length of time, but if the design at the time of killing was then formed, and the killing was done without provocation then or recently received, it is murder in the first degree. This decision has been followed in many cases. See Jones' Case, 1 Leigh 598; Howell's Case, 26 Gratt. 995; Mitchell's Case, 33 Gratt. 872, and cases referred to in these cases." And in *McDaniel v. Com.*, 77 Va. 284, it is said: "Now to constitute a 'wilful, deliberate and premeditated killing,' it is necessary that the killing should have been done on purpose, and not by accident, or without design; that the accused must have reflected with a view to determine whether he would kill or not, and that he must have determined to kill, as the result of that reflection, before he does the act—that is to say, the killing must be a predetermined

impossible to enumerate all of them, then proceeded, by general words, to embrace all kinds of wilful, deliberate and premeditated killing. It is improper to interpolate the word "such," in that general description.

Murder in Second Degree.—Instances:—The offence of homicide, by a workman throwing timber from a house into the street of a populous city, without warning, or of a person shooting at a fowl *animo furandi*, and killing a man, are instances of murder in the second degree.

This was an application for a Writ of Error to a Judgment rendered against Joseph Whiteford, the petitioner, by 722 the *Superior Court of Chesterfield, on the 15th November, 1828, sentencing him to be hanged by the neck until dead, for the murder of William Anderson. The case is fully stated in the following opinion of the Court.

Samuel Taylor for the petitioner.

The Attorney General, for the Commonwealth.

BROCKENBROUGH, J. delivered the opinion of the Court.

The petitioner was indicted of the murder of William Anderson, by shooting him with a gun. The Jury convicted him of murder in the first degree, and he was sentenced to be hanged. During the trial, the Jury having retired to consult of their verdict, were for some time unable to agree, and came into Court to ask of the Judge to instruct them. He did accordingly instruct them, and the prisoner by his Counsel excepted to the Court's opinion, and it is that opinion which is now to be reviewed. He said to them, "that to constitute murder in the first degree with reference to this case, there must be a premeditated, or previously formed design to kill, but it is not necessary that this premeditated design to kill should have existed for any particular length of time. It is only necessary that it should be a course determinately fixed on, before the act done, and not brought about by provocation at the time of the act, or so recently before, as not to give time for reflection: neither is it necessary to prove this formed design by positive evidence: like every other fact, it may be established by circumstantial evidence, which, beyond rational doubt, convinces the minds of the Jury that this previous determination to kill did in fact exist. If the prisoner, as he approached the deceased, and when he first came in view of him, at the distance of about fifty yards, then formed the design, and came

killing upon consideration, and not a sudden killing upon the momentary excitement and impulse of passion, upon provocation given at the time, or so recently before, as not to allow time for reflection: and this design to kill need not have existed for any particular length of time. It may be formed at the moment of the commission of the act. *King's Case*, and *note*, 2 Va. Cas. 84; *Whiteford's Case*, 6 Rand. 721; *Jones's Case*, 1 Leigh 598; *Hill's Case*, 2 Gratt. 525; *Howell's Case*, 26 Gratt. 995; *Wright's Case*, 33 Gratt. 881; *Wright's Case*, 75 Va. R. 914." On the same subject, the principal case is cited in *Com. v. Jones*, 1 Leigh 812; *Howell v. Com.*, 26 Gratt. 1007; *Price v. Com.*, 77 Va. 396. No particular length of time for deliberation or premeditation is necessary to constitute murder in the first degree. *State v. Welch*, 36 W. Va. 701, 15 S. E. Rep. 422.

*Murder.—See monographic note on "Homicide" appended to *Souther v. Com.*, 7 Gratt. 673.

*Murder in the Second Degree.—Instances.—For the instances of murder in the second degree set out in the last headnote, the principal case is cited in *State v. Morrison*, 49 W. Va. 210, 38 S. E. Rep. 483.

to the determination to kill the deceased, and in pursuance *of this design, walked in a quick pace, the said distance of fifty yards, and killed the deceased, without any provocation then received, it was murder in the first degree."

Murder is defined to be the killing any reasonable creature in being, "with malice aforethought, expressed, or implied;" and there cannot be any doubt, that at Common Law, if one man kills another without a previously formed design to kill, that it is murder, although the design may have been formed only the moment before the fatal act is committed: and if there be no provocation whatever given at the time of the act, or if the provocation be very slight, and the act be committed with such weapon as is calculated to produce death, or if there have been a provocation, so long before the act, as that the blood has had time to cool, and the mind to reflect, and the deadly purpose is then effected, it is murder. But, it is urged by the Counsel for the prisoner, that such a killing is not murder in the first degree: that the Legislature have enumerated particular cases which constitute murder in the first degree: thus, that murder perpetrated by means of poison, by lying in wait, or by duress of imprisonment, or confinement, or by starving, or by wilful, malicious and excessive whipping, beating, or other cruel treatment, or torture, is murder in the first degree; that a general provision is then made, that murder, by any other kind of wilful, deliberate, and premeditated killing, shall be murder in the first degree; 1st Rev. Code, p. 616; and it is argued, that the word "such" ought to be interpolated, so as to make it "any other such kind of wilful, deliberate, and premeditated killing;" and that without such interpolation, the previous particular enumeration was unnecessary.

We do not see the propriety of that interpolation. We do not think that the intention of the Legislature, or the interest of society, requires that the Judiciary should interpose a word which the Legislature have not thought proper to use. They have enumerated some of the most 724 *striking instances of deliberate, cruel, and premeditated homicide; but, finding that a particular enumeration of all the instances which may happen in the ever-varying circumstances in which men are placed, would be impracticable, they have by general words declared, that all kinds of wilful, deliberate, and premeditated killing shall be murder in the first degree. The enquiry, then, always must be, is the killing wilful, deliberate, and determined on before the act. If it is, it proves that degree of malice which places the act in the highest grade of the offence. If a man wilfully and deliberately points a pistol, or a gun, which he knows to be loaded with powder and ball, at another's head, or heart, fires it, and kills him, not having received any provocation from him, surely there is as much malignity in his heart, there is as little excuse for him, and there is evidence as wilful, deliberate, and premeditated a purpose to kill, as if he had

waylaid him, or had imprisoned him, or starved him, without intending to kill. So, if there had been a previous provocation, but sufficient time had passed off to allow his blood to cool, and his reason to resume its influence, then the deliberate act of shooting down his adversary, with the determined purpose to kill him, is murder from malice aforethought. Every act of murder, which the Jury are satisfied is of the character mentioned in the general clause, must be murder in the first degree, although the preparation for the fatal act may not have been so long present to the mind, nor the means of producing death so long protracted, as in the enumerated cases.

There are many instances in which the act would not be considered so wilful, deliberate and premeditated, as to make it murder in the first degree; yet, it would be murder at Common Law, and, therefore, by the Statute, would be considered as murder in the second degree. If a workman throws a stone, or a piece of timber from a house, in a populous city, into the street, where he knows people are passing, and gives them no warning, and kills

725 a man, it is *murder; yet, if it is from criminal carelessness instead of a wilful design to kill, or do great bodily harm, it is murder in the second degree: so if a person shoots at a fowl with the felonious intent of stealing it, and kills a person, he is guilty of murder, but it wants the ingredient of a wilful killing, and, therefore, is only in the second degree. But, these are acts very different from those which the instruction supposes.

The latter part of the instruction seems to have been intended to apply to the very case then before the Court. It may be supposed that when the Judge said, that if the prisoner, when he first saw the deceased at a short distance, then formed the design of killing him, and in pursuance of that design, stepped up to him, and shot him, "without any provocation then received," that he was guilty of murder in the first degree; that he did not, in his instruction, provide for the case of a provocation recently before that time received; so recently as that there was no time for reflection, nor for the blood to cool. If this part of the instruction stood alone, we should question its correctness; but, it would not be treating the Court fairly to separate it from its context. It must be taken in connection with the first part of the instruction. The Judge had almost in the same breath explained the effect of a recent provocation, and the latter part is explained by the former part of the instruction. We see no error in the opinion given.

The other error suggested in this Record, to wit, that the Judgment was rendered after the Term of the Court had been legally ended, has been fully considered, and just decided in *Mendum's Case*, and the reasoning of the Court need not be now repeated. The Court is unanimously of opinion, that there was no error in the instruction given; and a large majority is of opinion, that the second error assigned is not tenable. The Writ of Error is, therefore, refused.

726 *The Commonwealth v. Conrad Webb.

November, 1828.

Public Nuisance—Indictment—Sufficiency of—Case at Bar.—In an indictment for a public nuisance in damming up and stagnating the waters of a creek, whereby the air is corrupted and infected, and sends forth noisome and unwholesome smells, it is not sufficient to lay it to the common nuisance of "all the citizens of the Commonwealth, not only residing and inhabiting there, but also going, returning, passing and re-passing by the same," nor to the common nuisance "of all the citizens of the Commonwealth;" but to maintain a public prosecution for a nuisance, it is necessary to allege and prove, that the obstructions placed in the creek, produced a stagnation of the waters, and corrupted the air, in or near a public highway, or in some other place in which the public have a special interest.

This was an adjourned case from the Superior Court of Nottoway. The opinion of the Judge gives a full statement of the case.

Spooner and Johnson, argued the case for the Defendant, and the Attorney General, for the Commonwealth.

DANIEL, J. delivered the opinion of the Court.

The Defendant was presented by the Grand Jury for the Superior Court of Nottoway County, for a public nuisance, in erecting a mill-dam across Little Creek, in the said County, without lawful authority.

On this Presentment, an Information was filed containing two counts, charging in both, that by means of the said dam, the waters of the said creek had been rendered stagnant, and the air impure; concluding the first, to the common nuisance of all the citizens of the Commonwealth, residing in the neighborhood; and concluding the second, to the common nuisance of the inhabitants around the pond, naming them particularly, and all other citizens of the neighborhood. To this Information, the Defendant pleaded not guilty, on which issue was taken, and two trials were had before the Jury, who, in both instances, disagreed.

727 *At a subsequent Term, the Attorney for the Commonwealth, by leave of the Court, amended his Information, charging in substance the same fact, and concluding the first count, "to the great damage, and common nuisance of all the good citizens of this Commonwealth, not only there residing and inhabiting, but also going, returning, passing and re-passing by the neighborhood of the said pond;" the other count concludes, "to the common nuisance of all the citizens of the Commonwealth."

To this Information, the Defendant demurred generally, and the Attorney for the Commonwealth joined in the Demurrer. The said Superior Court adjourned the case to this Court for novelty and difficulty, on the question, "What Judgment ought to be given upon the said Demurrer?"

The decision of this question calls for a more precise discrimination between public and private nuisances, than was necessary

*See monographic note on "Nuisances" appended to *Dimmett v. Eskridge*, 6 Munf. 306; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

for the decision of the case of the Commonwealth against Faris, 5 Rand. p. 691.

In making this discrimination, the Court has been ably assisted by the Attorney General, and the Counsel for the Defendant, and the conclusion to which the Court has arrived, is this: That to constitute a public nuisance, the act done, or duty omitted, must affect injuriously, something, or right, in which the community as a body politic, have a common interest, and the facts producing this injury, and connecting it with such special public right, or interest, must be both alleged, and proved. To carry this matter further, would obliterate every line that now marks the difference between public and private wrongs. The community have an interest in the preservation of the health and lives of its members; they have a right to see and provide that each shall breathe the air as pure as nature gives it. But this interest, and this right, in no manner differs from the interest in, and right to secure, the welfare of all its members, in every private relation. Both are provided for by private actions, or public prosecutions, according to *the nature of the case. As it regards the case before us, we find it every where laid down, that things done, or duties omitted, which affect the public interest, are public nuisances; those, on the contrary, which affect particular individuals, are private nuisances, and redressed by private actions. We cannot find in any decided case, the precise question before us considered, but this results from the fact, that no attempt has been made to maintain a public prosecution for a nuisance, arising from a local fixture, the effects of which are not alleged, and proved, to be injurious to some distinct public right or interest, as contradistinguished from that interest which the public have in each of its members enjoying his own right. No precedent can be found of a prosecution of this character, which is not distinctly based on this idea. No adjudicated case condemns the allegations which thus connect the fact with the public interest, as a surplusage or unnecessary.

But, it has been strongly argued, that notwithstanding these averments are constantly found in the Indictments, in the reasoning of the Judges upon the actual wrong committed, the principal stress seems to be laid on the injury done to the neighbouring inhabitants, and the inconvenience to the public by the effect produced on highways, &c., is lightly regarded; from hence this public injury is called the shadow, while the injury to the neighbours is the real substance whereon the public prosecution is founded. It is readily conceded, that on the question of the quantum of punishment, this argument is generally substantially correct, but we should find no difficulty in confining this punishment to the public grievance only, in every case where the parties more immediately concerned, are prosecuting their private remedies, or will not forego them. The practice of the Courts, on Indictments for breaches of the peace, furnishes the rule which should govern in such cases. The

fact, that the injury to surrounding individuals is principally regarded in estimating the grade of the Defendant's delinquency, may be well likened to 729 the action *of a father for debauching his daughter and servant, whereby he lost her service, the latter is the gist of the action, without which it cannot be maintained; but, in estimating the damages, the injury to the feelings and character of the father and his family, together with the decree of impropriety of the Defendant's conduct, are almost exclusively regarded. The necessity of thus restricting public prosecutions for nuisances, is strongly enforced by a rule of Law, which we find no where contradicted, that no private action can be maintained for a public nuisance, without special damage done to the party complaining. By special damage, we understand, an injury different in kind from that of which the public complains. If a local fixture, which renders the air impure, or uncomfortable to a neighbourhood, without affecting any public right, as before described, could be made the subject of a public prosecution, it must be because all the citizens of the Commonwealth are liable to be so affected. The injury thus sustained by any particular individual, is of the same kind with that to which the public are thus liable, arising from the same cause, and affecting the same local situation. From the above rule it follows, that if this be a public offence, no private action in such case could be maintained; but, if we suppose that the public prosecution is founded on the injurious effects of such fixture on the highway, or other public right, then the private individual, who, on his own land, off the said highway, sustains an injury from the same fixture, on account of its injurious effects on his habitation, complains not at all of an injury common to himself and the rest of the community, but of one to himself alone, and for which he of course may have his private remedy. For these reasons, we conclude, in the language of some of the Judges who decided the aforesaid case of the Commonwealth against Faris, that to support the prosecution, on the Information before us, it ought to be alleged and proved, that the obstructions placed in Little Creek, in the County of Nottoway, produced a stagnation 730 *of the waters thereof, in or near a public highway, or some other place, in which the public have such special interest. The general conclusion, that the stagnation of the said waters does injure all the citizens of the Commonwealth, will not cure the want of such special averment, because the facts stated do not warrant that conclusion. The attempt made, in some of the Books referred to, to reconcile the cases, which require this precise conclusion, with those which regard the Indictment as good without, is unsatisfactory. It supposes, that the general conclusion is called for only in cases where the public nature to the offence is not alleged in the special averments with sufficient certainty, but no where supposes that the absence of such averments may be so supplied.

The consequence is, that the amended information filed in this case is not sufficient, and that the Defendant's Demurrer to it should be sustained, and Judgment rendered for him.

731 *The Commonwealth v. Robert Craig & al., Sureties of Laney Gentry.

November, 1828.

Recognizance—Rule against Sureties—Witness.—In a recognizance of bail, for the appearance of a prisoner to answer an indictment, if the principal be bound in a particular sum, and the sureties be separately bound in a like sum, and the principal make default, upon a rule against the sureties to show cause why a Sci. Fa. should not be awarded against them, the principal recognizer is not a competent witness for them to show that the Sci. Fa. should not be awarded.

Same—Principal Sick—Effect.—If at a subsequent Term, of a Court after the default of the principal has been recorded, the sureties, on a rule against them, can show to the satisfaction of the Court, that the principal was rendered unable to appear at the proper Court, by reason of wounds, and sickness, the Court, in the exercise of a sound discretion, may spare the recognizance, and decline awarding the Sci. Fa. especially if the prisoner be then in custody to answer the indictment.

Same—Same—Showing Cause against Rule—Affidavits—Admissibility of.—In showing cause against the rule, affidavits are admissible, without requiring the presence of the witnesses in Court, if the Court be satisfied that they have been fairly taken.

This is an adjourned case from the Superior Court of Montgomery. The case is fully stated in the following opinion.

BROCKENBROUGH, J. delivered the opinion of the Court.

The Defendant had been indicted for bigamy in Montgomery Superior Court, and by order of that Court he had entered into a recognizance in the sum of \$500, with sundry sureties in a like sum, before two Justices in September, 1827, conditioned for his appearance at the next Term of the said Court, to be held in April, 1828, to answer to the Indictment, and not to depart thence without leave of the Court. At the ensuing Term he failed to appear, and his default was recorded. A rule was then entered against him, and his sureties, returnable to the next Term in September, to show cause why a Scire Facias should not be awarded against him, and them. At the following Term in September, 1828, he appeared in custody, and on the motion of the Attorney for the Commonwealth,

732 he was "taken into custody. The sureties then offered him as a witness to prove, that some time previous to the April Term, when he ought to have appeared, he has been engaged in a rencontre, by which he was so severely wounded and maimed that his life was despaired of, and he was thereby rendered unable to attend at the April Term agreeably to his recognizance. They also offered to prove by sundry affidavits, and other evidence, that he was rendered unable by the causes aforesaid, to attend. Whereupon, the Superior Court adjourned to this Court the following questions for decision:

1st. Is the said Laney Gentry a competent witness to prove his inability to attend, and ought the Court to hear him on this motion?

2d. If the affidavits to prove his crippled and wounded state, and his inability to attend, is that a sufficient excuse to discharge the sureties from their recognizance, and ought the Court to discharge them, upon the above facts being proved, either by Gentry, or other evidence?

3d. Are affidavits sufficient, without requiring the presence of the witnesses in Court?

On the first question, the Court is of opinion that the said Gentry is not a competent witness in behalf of his sureties, seeing that by discharging them, he discharges himself from the payment of the sum for which the sureties are bound to the Commonwealth. If they should be compelled to pay the amount of the recognizance for which they are bound, they, as his sureties, would have a right to recover from him the amount so paid. Although he does not discharge himself, by his evidence in their favor, from the \$500 for which he is severally bound, yet by discharging them from the payment of the like sum for which they are bound, he prevents them from recovering against himself the said sum, and therefore is directly interested.

On the second question, it appears clear that the Courts of Oyer and Terminer have the right, at any time before

733 *a recognizance is estreated, either to estreat, or spare it. This is a discretion vested in them, for the obvious purpose of remitting the obligation in a hard case. Estreats are strictly speaking, not known in this State, but by analogy to the practice in England, the Courts here, have certainly the power to spare the recognizance, at least, at any time before the Scire Facias awarded. If the Court of Montgomery was satisfied by competent evidence, that the recognizer was disabled by his wounds from attending the Court, it is reasonable and just that his misfortune should not be visited upon him, and his sureties, particularly, as by his appearance afterwards, the ends of public justice will be answered: and in such case, the Court ought not to award any Sci. Fa. against them.

3. As a motion like the present is addressed to the sound discretion of the Court, and there is yet no suit depending in which witnesses could be required to attend, by any compulsory process, it is proper to receive either affidavits, or the testimony of witnesses examined in open Court, or both, as may be convenient. The Court should be well satisfied, in relation to the proof by affidavits, that they have been fairly taken, and show fully and clearly the matter relied upon as cause for sparing the recognizance.

The Judgment of this Court is to be certified to the Superior Court of Montgomery, conformably to the opinion now expressed.

*See principal case cited with approval in Caldwell v. Com., 14 Gratt. 706.

APPENDIX.

¹²⁷ The two following Cases, which were decided in August, 1827, were not intended for publication, because the Court consisted of only three members, and one of the Judges dissented from his brethren on one of the important points decided. But as the question discussed and decided by the two Judges, are of great importance, and reference has been had to them in subsequent Cases, it has been recently thought advisable to report them.

Thomas Shirley v. Joshua Long.

August, 1827.

Insolvent Debtor—What Property Vests in Sheriff.*—

When a debtor takes the insolvent oath, and delivers in a schedule, the Sheriff is vested, by the Act of Assembly, with all the insolvent's estate, rights and interests, whether they are named in the schedule, or not, and whether the property be in the possession of the debtor, or in that of any other person.

Same—Same—Statute—Construction*—Case at Bar.—

The clause of the Act, "for such interest therein as such prisoner hath, and may lawfully part withal," is borrowed from the English Statutes of Bankruptcy, and has been used in all of our Insolvent Laws, from 1726 to 1748, inclusive, as applying to partial interests in real estate, such as fees tail, life estates, estates for years, remainders, reversions, &c., and not to personal estate. It is still to be so understood in the Act of 1769, and in the Revised Laws of 1792 and 1819, and is not to be taken as a restriction on the vesting in the Sheriff of the whole of the debtor's chattels, whether he may part with, or deliver possession of them, or not. Therefore, if an insolvent debtor, having made a fraudulent gift of a slave to a child, still retaining possession thereof, in his schedule disclaims all title to the said slave, the Law vests in the Sheriff the legal title to the slave, the gift being void, and he may recover it in a Court of Law from the debtor.

Same—Rights of Sheriff—Sale of Property by.*—The

Sheriff has the right to sell, and to pass by Deed, a slave, or other chattel, which the insolvent debtor has made a fraudulent gift of to his child, (but of which he retains the possession,) and the purchaser under such sale may recover the slave, or other chattel, although the Sheriff had not possession of it, at any time. By two JUDGES, CARR and GREEN. JUDGE CABELL dissented.

Same—Same—Same.*—If the property so fraudulently given, be not in the possession of the insolvent debtor, but of some other person, although the title vests in the Sheriff, it seems that he cannot sell the property in such case, but must proceed by summons against the person holding it, under the 35th and 36th sections of the Act.

⁷⁸⁶ ***Same—Same—Same—Effect.*—**But, even if the spirit of the Act were violated by selling the chattels of the insolvent, before they come into the possession of the Sheriff, yet as the legal title is vested in him, if he does sell, the sale is not void, and the purchaser may recover. The Sheriff is a Trustee for the creditors and for a violation of his trust, he may be responsible, but that does not prevent the legal title from passing to the purchaser. By two Judges.

Same—Same—Same—Deed from Sheriff—Description—Sufficiency of.*—A Deed from a Sheriff, which con-

***Insolvent Debtor—What Property Vests in Sheriff—Right to Sue for Property.**—For the proposition that upon taking the oath of insolvency, all the property and rights of the insolvent debtor are immediately vested by operation of law in the sheriff, who as representing the creditors, is entitled to assert the legal and equitable rights of the creditors, and to set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditors, the principal case is cited with approval in *Tate v. Liggott*, 2 Leigh 106; *Beverley v. Brooke*, 2 Leigh 448; *Ruffners v. Lewis*, 7 Leigh 738; *Staton v. Pittman*, 11 Gratt. 103.

Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the act in 1 R. C. of 1819, ch. 184 § 34, p. 538, so completely vested in the sheriff of the county wherein such lands lie, that an ejectment for such lands

veys all "the right, title and interest, vested in the Sheriff by Law, in and to eight negroes, conveyed by a debtor to his children," without naming the negroes is sufficiently descriptive to pass them. The identity of the negroes is matter of proof, and as soon as they are identified, the Deed operates on them.

Thomas Shirley brought Detinue in the Superior Court of Law for Spottsylvania County, against Joshua Long, to recover a slave, named Sarah. The general issue was pleaded, and on the trial, the Plaintiff tendered a Bill of Exceptions, which was signed and sealed by the Court. It set forth, that the Plaintiff gave in evidence, a copy of the schedule of the Defendant, who had taken the oath of an insolvent debtor on the 23d June, 1821. The schedule, after giving a list of various tracts of land, lots, houses, and sundry articles of personal property and slaves, all variously incumbered, and divers rights and interests, thus proceeds: "The above is and every thing that can recollect except eight negroes give to my four oldest children, Durrett, William, Elizabeth, and Joanna; their names in the writing that they have in positions (possession.) I disclaim all title to this property, those who claim it for me must contest the right of my children under the conveyances which are older than any of those claims." The Justices who administered the oath, certified, at the foot of the schedule, that no property was delivered to the Sheriff, they deeming it unnecessary. The Plaintiff also gave in evidence, a Deed from the Sheriff of Spottsylvania to the Plaintiff, dated 8th November, 1821, reciting, that Long had taken the oath, and been discharged as an insolvent debtor, and had given in his schedule, and had, on the 23d June, 1821, conveyed to the said Sheriff all the lands comprised in the schedule, and that the Sheriff had proceeded to sell, after due advertisement, on the 17th August, 1821, ⁷³⁷ "to the highest bidder, for cash," "all the property contained in the said schedule, subject to all claims, charges, and incumbrances, existing upon the said property, or any part thereof;" and that the Plaintiff became the purchaser of all the right, title and interest which the said Sheriff had, by virtue of the premises, in and to the following property, to wit: "One tract of land," &c. (specifying two tracts, and a house and lot and wharf, in Fredericksburg.) also, all right or interest arising from the property named in the following sentences written in

cannot afterwards be maintained on the demise of insolvent debtor, while the execution remains unsatisfied. *Syrus v. Allison*, 2 Rob. 200, 205, citing the principal case as containing language consonant with the opinion expressed in the case under discussion. See principal case distinguished in *Cockrell v. Williams*, 12 Leigh 510.

See further monographic note on "Bankruptcy and Insolvency" appended to *Dillard v. Collins*, 25 Gratt. 348.

The principal case is also cited in *Grove v. Zumbro*, 14 Gratt. 512; *National Valley Bank v. Hancock*, 100 Va. 107, 40 S. E. Rep. 613.

the schedule, in the following words, to wit: "5. A contract, &c.; also, the following slaves, to wit, Moses, &c.; also, all the said Joshua Long's interest in the estate of Durrett Long; all his interest in Eli Austin's estate; all his interest in some leather; all his interest in his growing crops; also, a yoke of oxen; all his interest in the estate of William Long; and all his interest in eight slaves conveyed to his children, and all his interest in the real estate and personal estate conveyed to R. Patton, &c." for the sum of fifty-eight dollars and fifty cents. The Deed then proceeds: "Now this Indenture witnesseth, that for and in consideration of the premises, and of the said sum of money to me (the said Sheriff) in hand paid, I have granted, bargained and sold, transferred and assigned, and by these presents do grant, bargain and sell, transfer and assign, to the said Thomas Shirley, his heirs, &c., all the right, title and interest which is vested in me by virtue of the Deed aforesaid, from Joshua Long to me, or by virtue of the Act of Assembly for the relief of insolvent debtors, both in Law, and Equity, of, in, and to all the real and personal estate, so as aforesaid described, as purchased by the said Thomas Shirley."

The Plaintiff also gave evidence to prove, that for several years before Long swore out of Jail, the negro Sarah, mentioned in the Declaration, was in the possession of Long, and he exercised over her the same acts of ownership as he did over his others slaves: that she was in his possession at the time he took the insolvent debtor's oath, and thereafter,
738 *till after the institution of this suit; and that Joanna Long, his daughter, in 1821, was eighteen or twenty years of age, and lived as she had always lived in her father's family. The Defendant proved by a witness, Mrs Proctor, that she, about the year 1815, hired Sarah from Joshua Long, as the property of his daughter Joanna, and Joshua Long told her she might keep her until Joanna came of age, or married, or demanded her: that she kept the slave eighteen or nineteen months, and then returned her to Joshua Long, and paid the hire to Mrs Long, the wife of Joshua Long, in butter, fowls, and other necessities for the family. Other witnesses, on the part of the Defendant proved, that about the time of his hiring Sarah to Mrs Proctor, and up to 1817, he said he had given Sarah to his daughter Joanna. On the part of the Plaintiff, the Overseers of Long, (one of whom boarded in his house in 1819,) were examined, and testified that they, from 1817 to 1821, never heard the slave Sarah represented in the family as the property of Joanna.

The Counsel for the Defendant, thereupon moved the Court to instruct the Jury, that the said slave Sarah was not included in the aforesaid schedule, and that the Plaintiff acquired no right or title to the said slave, either by the schedule, or the Deed aforesaid from the Sheriff to the Plaintiff, which instruction the Court gave.

And thereupon, the Plaintiff offered to prove, that the said slave Sarah was sold, (at the same sale at which all of the estate of the said Long, under the schedule aforesaid, was sold, and as part of the said insol-

vent's estate,) by the said Sheriff of Spottsylvania, (he not being in possession of the said slave,) and purchased by the Plaintiff. But the Court being of opinion, that any interest of the said insolvent debtor, not contained in his schedule, could not pass from the Sheriff to the purchaser, except by Deed, and that the Deed aforesaid did not pass his interest in the said slave, refused to permit the Plaintiff to prove the same to the Jury. To which opinions, and in-
739 struction of the *Court, the Plaintiff excepted. Verdict and Judgment were rendered for the Defendant, to which Judgment the Plaintiff obtained a Supersedeas from this Court.

Hay, and the Attorney General, for the Appellant.

Stanard, for the Appellee.

August 22. JUDGE CARR.

After stating the case, he proceeded:

The Court instruct the Jury, that the slave Sarah was not included in the schedule. By this I understand the Judge to mean, (not that Sarah was not one of the eight slaves which the schedule mentions as having been given to Long's children, this being a question for the Jury exclusively,) but I presume he intended to say, that the insolvent, in his schedule, disclaiming all title to these eight slaves, Sarah, as one of them, could not be claimed by the Sheriff, in virtue of the schedule.

I do not consider the Sheriff as claiming under the schedule at all, but under the Law. That vests in him all the estate of the prisoner, as well that left out of the schedule, as that included in it. The schedule was necessary to bind the insolvent, for he swears it contains all his estate of every kind: it was proper, also, as a guide to the Sheriff, because the prisoner must be supposed to know best, what and where his property was: but the schedule neither gave to the Sheriff any right to the property it contained, nor limited his rights to its contents. Immediately on the insolvent's taking the oath, the Law divests him of everything but his necessary apparel, and utensils of trade, and casts upon the Sheriff, all his estate, rights, and interests. This has been the Law ever since 1769. 8 Hen. Stat. 326. Nor was there at any time before January 4th, 1799, any Statute requiring the prisoner to deliver up the personal, or convey the real, estate. An incon-
740 venience *arose, however, from the difficulty the Sheriff sometimes encountered, in finding and getting into his actual possession, the personal property; and to remedy this, a section was added to the Execution Law, in the Session of 1798-9, saying, that all the personal estate contained in the schedule, shall be transferred and delivered by the debtor, and all the real estate conveyed to the Sheriff, under the direction of the Court, or persons administering the oath, before such insolvent debtor shall be discharged. Why the conveyance of the real estate was required, it is difficult to imagine; for the Law had already completely conveyed it: the title was of record, and the land could not be removed. It certainly was not its purpose, or effect, to narrow the operation of the Law, which vests in the Sheriff, "all the estate which shall be

contained in such schedule; and any other estate which may be discovered to belong to the prisoner." These are the very words which have been in every Revisal from 1769 to the present day. The section introduced in the Session of 1798-9, I consider as merely directory to the Court, or Magistrates, before whom the oath is taken. And though the prisoner should be released without delivering up an atom of his personal goods, or conveying a foot of his land, the whole of both would be completely vested in the Sheriff. The Court, then, in deciding that the slave Sarah was not included in the schedule, settled a question of no moment in the cause. But the Court further instructed the Jury, that the Plaintiff acquired no right or title to Sarah, by the Deed from the Sheriff to the Plaintiff, and refused to admit evidence to prove that she was actually sold among the other property, being of opinion, that not being in the schedule, she could only pass from the Sheriff to the purchaser by Deed, and that the Deed aforesaid did not pass her. In my mind, her being in or out of the schedule, cannot make a Deed more or less necessary to pass the Sheriff's right and title to the purchaser. However this may be, the Plaintiff claims under the Deed alone, and by that he must stand or fail.

741 *In considering whether Sarah passed to the Plaintiff by the Sheriff's Deed, we must take these facts for granted: 1st: That Sarah is one of the eight slaves whom the Defendant, in his schedule says he had given to his children by conveyance, older than the claims of his creditors; 2d. That she had continued in his possession, and was used as his own property up to the bringing this suit; 3d. That Sarah was actually sold by the Sheriff to the Plaintiff, according to the forms of the Act of Assembly. It is proper to take these facts as proved in testing the correctness of the Court's opinion; because, being matters for the Jury, if the proof of them to the Jury's satisfaction, would have rendered the opinion improper, it ought not to have been given. If the Deed of the Sheriff did not pass to the Plaintiff, any title in the slave Sarah, it must be either, 1st. Because he had no title to pass; or, 2d. Because the Deed was not sufficient in Law to pass his title.

1st. As to the Sheriff's title. "All the estate which shall be contained in such schedule, and any other estate which may be discovered to belong to the prisoner, for such interest therein as such prisoner hath, and may lawfully depart withal, shall be vested in the Sheriff of the County wherein such lands, tenements, goods and chattels shall lie, or be found." Does this Act vest in the Sheriff, title to a slave which the prisoner states in his schedule that he has given to a child by Deed, but which Deed has never been recorded, and the possession of which slave has always remained with the donor? Now we know, that both by the Act of 1787, ch. 22, concerning gifts of slaves, and by the Statute of Frauds, such a gift would be void: but it is said, that the estate of the prisoner vests in the Sheriff only for such interest therein as such prisoner hath, and may lawfully depart withal, and that these

words do not comprehend an interest like this, claimed by another under a Deed from the prisoner, and disclaimed by the prisoner himself. If this be so, it must strike every one, that there is a glaring defect in 742 this Law. The insolvent *debtor is in that very situation which holds out the strongest temptations to make a fraudulent disposition of his property, upon secret trust, to friends or children: the Law comes in to the aid of creditors, takes from the prisoner all his property, rights and interests, and vests them for the creditors in the Sheriff, makes him the Trustee of the creditors, the only medium through which they can vindicate their rights, or question the veracity of the prisoner's oath; and yet this Trustee, has no power vested in him to claim, for the creditors, property fraudulently given away, or colorably disposed of by the prisoner, provided he disclaims in his schedule any interest in such property, and another claims it!

The resemblance, which the Sheriff's character, in cases of insolvency, bears to that of assignees, in bankruptcy, naturally turns our attention to those Laws, and we were referred to them in the argument, as containing language similar to that of our Statute. In Cook's and Cooper's "Bankrupt Laws," these Acts are set out at large. In 34 and 35 H. 8, (the oldest Statute of Bankrupts, and said to be the foundation of all the rest,) we have, first, a statement of the mischiefs to be removed, then the Act declares, that the Lord Chancellor, (and others named,) upon complaint made in writing, shall have power and authority, to take by their wisdoms and discretion, such orders, &c., as well with the bodies of such offenders, &c., as also with their lands, tenements, fees, annuities, and offices, which they have in fee simple, fee tail, term of life, term of years, or in right of their wives, as much of the interest, right and title of the same offender shall extend, or be, and may then lawfully be departed with, by the said offender: and also with their money, goods, chattels, wares, merchandizes, and debts, wheresoever they may be found or known. And to cause their said lands, &c., goods, &c., to be searched, viewed, rented and appraised, and to make sale of the said lands, tenements, fees, annuities, and offices, as much as the same of-

743 fender may then lawfully *give, grant, or depart with; or otherwise, to order the same, for true satisfaction, and payment of the said creditors. The Statute 13th Eliz. ch. 7th, after enumerating those which shall be considered acts of bankruptcy, empowers the Chancellor, or Keeper, to appoint Commissioners, upon any complaint made, &c., who shall have power, &c., to take, order, &c., with the bodies of such bankrupts, &c., as also with all his or her lands, tenements, hereditaments, as well copy, or customary hold, as freehold, which he or she shall have in his or her own right, before he or she became bankrupt, and also with all such lands, tenements, and hereditaments, as such person shall have purchased or obtained for money, or other recompence, jointly with his wife, children or child, to the only use of such offender, or offenders, or of, or for such use, interest, right or title, as such offender then shall have in the same,

which he may lawfully depart withal, &c. And also with his money, goods, chattels, wares, merchandises and debts, whosoever they may be found, or known, &c. In these Statutes, we find the very words which have been introduced into our Insolvent Laws, for such interest therein as such prisoner hath, and may lawfully depart withal: and we find them applied solely to real estate, intended to describe those lesser estates, and partial interests, which a man may hold in lands and tenements, either by himself, or jointly with others: to goods and chattels they are not applied in the slightest degree; nor indeed could they, for in that day there was no such partial interest in personal estate known to the Law: passing the title for an hour, passed it for ever.

If we look into our early Insolvent Laws, we find it equally clear, that these words were intended to apply to real estate exclusively. Thus, in the Act of 1726, (Hen. Stat. vol. 4, 166,) sec. 31, it is enacted, "That all the lands, tenements and hereditaments, which shall be contained in such schedule, for such use,

744 interest, right or title, as such prisoner then shall have in the same, *which he or she may lawfully depart withal; and also, all goods and chattels whatsoever, in such schedule also contained, shall be vested in the Sheriff of the County," &c. The words here, can only be applied to real estate. The same words are repeated in the Law of 1748, and again in a Bankrupt Law, passed in November, 1762, but repealed in May, 1763, before it had gone into operation. In the subsequent Revisals, instead of keeping the subject of real and personal estate separate, they are blended into one sentence; ("all the estate, &c.") and the words "for such interest therein, as such prisoner hath and may lawfully depart withal," are so used, as to render it doubtful at first view, whether they do not apply as well to personal, as to real estate: but when we consider, that the words are taken literally from the Bankrupt Laws; that in our Laws, they were used in exactly the same sense; that as applied to real estate, they have a clear meaning, and an effect in accordance with justice, and the other enactments of the Law; but, that if we understand them as applicable to personality and say that wherever the debtor has made a fraudulent disposition of goods, which would bind him, it shall bind the Sheriff, and consequently the creditors, we make the Law defeat its own purposes, and commit rank injustice. When we look at these consequences, I think we are bound to conclude, that no change in the application of the words was intended; but, that this blending of the two subjects, has proceeded from inattention, added to that desire to condense, so visible in our Revisal; and which, in other instances, is carried so far, as to sacrifice, in some degree, clearness to brevity. This renders it often necessary to the understanding of a Law, that we should look back to its origin, and trace its progress; and for this purpose, the Statutes at Large by Henning, are invaluable. I consider these words, then, as applying only to real estate, and meaning to say, that the same quantity of estate, which the insolvent possessed in his own right, shall vest in the Sheriff for the creditors. As to the personality, I

745 *consider the Statute as vesting in the Sheriff, for the benefit of the creditors, all the rights, interests and property of the insolvent. In this respect, the Sheriff, I think, occupies a station, and performs functions a good deal like those of assignees of bankrupts, and the English Cases might be referred to. I believe, however, there are not many that turn on the power of assignees to set aside fraudulent conveyances made by bankrupts; for, one of their early Statutes declared a fraudulent conveyance to be itself an act of bankruptcy, which of course would overreach and avoid the conveyance. In *Anderson v. Maltby*, 2 Ves. jr. 244, the Lord Chancellor says, "The assignees have all the equity the creditors have, and may impeach transactions which the bankrupt himself would be stopped from impeaching." This applies equally to the Sheriff: indeed, the doctrine seems to me to stand on the plainest principles of reason, law, and justice. The Sheriff is interposed by the Law, to receive, secure and distribute, among the proper creditors, all the estate of the insolvent. He represents both the insolvent and the creditors. Would it not be strange, then, to say, that if the insolvent were to convey away half his property, and this most manifestly fraudulent, this curator and trustee, could do nothing, bring no suit, take no step to recover this, and bring it into a division among the creditors? He is a poor representative, if this be so, and the Law has done little in raising him up to protect the interests of the creditors. They could have taken much better care of themselves. I consider it clear Law, then, that under the Act of Assembly, the Sheriff is vested with all the property and rights of the insolvent; and that as representing the creditors, and possessing their legal and equitable rights, he may set aside fraudulent conveyances of the insolvent, and recover the property.

But it may be said, that even supposing the Sheriff has this right, he has not pursued it properly in this case: instead of suing to set aside the fraudulent gift, he has at

746 *once sold the slave. The same section which vests in the Sheriff all the estate of the insolvent, proceeds to say, "and such Sheriff is hereby authorised, empowered and required, within sixty days after the taking the said oath, ten days previous notice of the time and place of sale being given, to sell and convey the same to any person or persons whatsoever, for the best price that can be got for the same." It is said, however, that this sale is meant to embrace property only which is surrendered to the Sheriff, and to which there is no dispute: and that this is proved by the next section, which enacts, that when the debtor is discharged, and the schedule contains articles of money or tobacco, due to such prisoner, or goods, chattels or estates, belonging to him, in the possession of another, in that case the Clerk may, at the instance of the creditor issue a summons against each of the persons named as debtors, or who have possession of any goods, chattels or estates of the property of the prisoner, &c., going on to direct the manner of proceeding in such cases. There is another section, which gives the prisoner, in a certain case, the right to proceed

against the garnishee, and another gives the right to any creditor, but I understand that all these proceedings must be in the name of the Sheriff, in whom all the rights and estate of the debtor are vested. As to the proceedings contemplated by these sections, against garnishees, it is clear to me, that the case before us does not come within them. They speak of property, which, by the schedule, the debtor claims, and states to be in the possession of another: here, the schedule disclaims all title to the slave, and she is not in the possession of another, but of the debtor himself. The Statute never meant that the Sheriff should issue a summons against the debtor himself, as garnishee, for property in his own possession. Of all such property, I have no doubt, the Sheriff might take possession, without any process. But has the Sheriff in such case, a right to sell such property, at the general sale of the insolvent's effects?

747 The schedule says, the *debtor has given her to his child; but she has remained in his possession: the Sheriff finds her there: the Law says such a gift passes no interest: if so, the property was in the insolvent, and the Law has cast it upon the Sheriff. What shall he do with her? Give her up to the child, and then sue for her, or hold her till the child may choose to sue him? I incline to think that the Sheriff would violate no duty, in selling such slave with the rest of the debtor's property. But, suppose that in selling her, while the claim hung over her, and she was not in his actual possession, the Sheriff violated the spirit and meaning of the Law, still I think that his sale and conveyance of her would transfer his title to the purchaser, if the Deed were sufficient in Law. I think so, because I consider the Sheriff completely clothed with the legal title; as much so as any Trustee whatever: and having the legal title, his Deed would convey it, though in doing so he violated his trust.

But, the question still remains—Is the Deed of the Sheriff sufficient in Law to convey the title of this slave to the Plaintiff? That such was the intention of the Deed, is expressed too clearly for doubt. If the intention be not effected, it must be because the description of the property is too uncertain. The Deed conveys "all the right, title and interest vested in the Sheriff, by the Act of Assembly for relief of insolvent debtors, both in Law and Equity, of, in, or to, eight negroes conveyed by Long to his children. The negroes here, are not named, to be sure; but, a name is only one kind of description, and any other which enables the parties to identify the property, will do. Long, in his schedule, says, there were eight negroes which he had given to his children, their names in the writing; the Deed of the Sheriff follows this description. Now, proof that this slave Sarah, is one of those given to the children, identifies her at once. The writing by which Long states that he conveyed the slaves, and in which they are named, is not produced, though it behoved the Defendant to have produced it, and he had notice to do so; but, he
748 himself supplied *evidence, by two or three, that they had often heard him declare, that he had given Sarah to his

daughter Joanna; thus showing that she was one of the eight. This, however, was a question for the Jury. Upon the reason of the thing, I have no doubt that the description is certain enough to pass the property: the Law of the case is as clear as the reason. If a man bargain and sell all his land in D., the land will pass with all houses, woods, &c. 4 Co. 87, b.; Cro. Eliz. 476; 2 Roll's Abr. 49, 57; Owen, 75; Noy, 49; Cro. Eliz. 905; Perkins, 114. A mortgage of "all the lands, tenements and hereditaments to me belonging in the province of New-York," held to be good. Jackson v. De Lancey, 11 Johns. Rep. 365. Same Case, in Error, 13 Johns. 537. This Court has also decided the same principle in a case not long since. I think, therefore, that the instruction of the Court was wrong; that the Judgment must be reversed, and the cause sent back for a new trial, on which no such instructions are to be given.

JUDGE GREEN.

After a full statement, proceeded:

The Plaintiff rested his title upon these grounds: That Sarah was one of the slaves mentioned in the schedule and deed, under the description of eight slaves conveyed by Long to his four eldest children: that Long was in possession of the slave when he gave in his schedule, and continued in possession until after the suit brought: that the conveyance of the slave by Long to his daughter, Joanna, was fraudulent and void as to creditors, under the Statute of Frauds: that the legal title to the slave, whether she were contained in the schedule, or not, was vested by Law in the Sheriff: that the Sheriff sold and conveyed that legal title to him: and that the title passed effectually by the Deed to the Plaintiff. The Deed in terms conveys all the right, title and interest, vested in the Sheriff by the Act of Assembly, for
749 the relief of insolvent *debtors, in and to the eight slaves conveyed to his children by Long, and mentioned as so conveyed in his schedule. The Deed from Long to the Sheriff, professed only to convey the lands, and not any of the personal property mentioned in the schedule; and under that Deed, the Sheriff did not profess to claim title to any of the personal property mentioned in the schedule. The intent of the Sheriff's Deed to pass these negroes, if he had any right in him, is clear; and that the title to them would pass by the Deed, is equally clear. If the Sheriff had any title which he could transfer in this way to another, unless the Deed were void, as to these negroes, for uncertainty in the description of them. A conveyance of all my slaves, in such a County, or on such a plantation, or which are claimed under a Deed by such an one, or in the possession of such an one, or all my furniture, or plantation utensils, would be good. In all these cases, parol proofs must be resorted to, for the purpose of showing the identity of the property intended to be conveyed, and that being ascertained, the Deed would operate upon it. In a late case, it was decided here, that a Deed conveying property specified by particular names and description, and also, all the grantor's estate, passed his equitable right to a slave then in the adverse possession of another, and not named in the Deed. The

Deed under consideration, is not so vague and uncertain in the description of the property intended to be conveyed, as that was, nor more so than in the cases above supposed. Proof that the slave in question was one of those conveyed by Long to his four elder children, and mentioned in his schedule, at once identified the property intended to be conveyed. Whether the proof offered on this point, was or was not sufficient to identify the property, was exclusively for the consideration of the Jury; and the opinion of the Court must be taken to be, that even if the property claimed was identified to be that intended to be conveyed, the Deed did not convey any title to it.

750 *If the Sheriff had title to the property in question, and it was embraced in the Deed, the title passed to the Plaintiff, unless the Sheriff was disabled by the Statute from transferring any title, vested in him, to property under the circumstances in which this was placed, that is to say, to property not in the possession of the Sheriff, but in that of the insolvent debtor, and claimed by another as belonging to him.

The Statute directs, "that before taking the oath prescribed, the prisoner shall subscribe, and deliver a schedule of his whole estate, and shall, before he shall be discharged, transfer and deliver, all the personal estate contained in the schedule, to the Sheriff of the County where it may lie or be found. And all the estate which shall be contained in such schedule, and any other estate which may be discovered to belong to the prisoner, for such interest therein as such prisoner hath, and may lawfully depart withal, shall be vested in the Sheriff of the County wherein such lands, tenements, goods or chattels, shall lie, or be found: and such Sheriff is hereby authorised, empowered, and required, within sixty days after taking the oath, ten days notice being given, to sell and convey the same to any person or persons whatsoever, for the best price that can be got for the same."

The Act further provides, that if the schedule contains any articles of money, or tobacco, due to the prisoner, or goods, chattels, or estates, belonging to him, in the possession of any other, the creditor may proceed upon summons against the garnishee, in the name of the Sheriff, for the recovery thereof, and the garnishee shall be called upon for a discovery on oath, and if judgment is obtained against the garnishee, the Sheriff may levy the execution, and dispose of the money, or tobacco, or goods, chattels, and estate, so recovered, in the same manner as the estate contained in the schedule is thereby directed to be disposed of.

Another clause of the Statute provides, that if the garnishee, on oath, denies the claim made upon him, in whole, *or
751 in part, the Sheriff or prisoner may claim the residue against the garnishee, by legal process: And another clause authorises any of the creditors to proceed against the garnishee.

This Statute is very inaccurately penned, but upon the whole Statute, the fair construction is, that the prisoner, or creditor, proceeding against the garnishee under the two last clauses above cited, must proceed in the name of the Sheriff, in whom the former

provisions of the Statute, had vested all the interest of the prisoner (which was within the operation of the Statute,) in all property, whether it was embraced in the schedule or not, or whether it was in the possession of the prisoner, or in that of some other person claiming under him, or adversely to him. The Statute could not have intended to give to the Sheriff, the prisoner, and creditor, a concurrent right to sue for the same thing, at the same time. Besides, the fund when recovered, was to be disposed of by the Sheriff, as directed by the Act, in paying the creditors at whose instance the debtor was in custody.

The Act requires the prisoner to deliver a schedule of his whole estate, and to swear that it does contain his whole estate. The prescribed oath is in very detailed terms, to show that it contains all valuable interests, legal and equitable, of all possible descriptions. The clause, directing that before he is discharged, the prisoner shall transfer and deliver the personal estate contained in the schedule, and convey the real estate therein, has not the effect of dispensing with the obligation on the prisoner, to put into his schedule, property (belonging to him, or in which he has an interest,) in the possession of others, whether adversely, or not, or property which he cannot, for any cause, deliver. If it did, then, as to all which he could not deliver, and therefore, did not put into the schedule, he would be required to swear falsely; and the Act supposes, that property in the schedule may not be delivered, or be capable of delivery, and

752 prescribes the means *of getting possession of such property, after the discharge of the prisoner. The true construction of this provision is, that it is directory to the Court, or Magistrates, who act in discharging the prisoner, that they shall be required to transfer and delivery of all, which it appears to them, ought to be, and can be transferred and delivered before the discharge. The failure of the party to put into his schedule property in which he has an interest, whether in his possession, or in that of another, and the failure of the Court, or Justices, to require the previous delivery of all that can be delivered, cannot impair the effect of the Law, which vests in the Sheriff all such interest, whether the property be contained in the schedule, or not, or be in the possession of the prisoner, or some other holding adversely to him.

If, therefore, Long had any interest in this property, which was at all subject to the operation of the Statute, it vested in the Sheriff, and the question is, whether his Deed passed that right to the purchaser under the circumstances which appeared. Although the Statute in terms directs the Sheriff, within sixty days, to sell, at public sale, all the interest vested in him by Law, whether the property is in the schedule, or not, or whether it be in his, or the prisoner's possession, or in that of some other, (and upon the idea that this was the effect of the Law, the Sheriff appears to have acted in this case,) yet I think, upon the whole Law taken together, the fair meaning of it is, that the Sheriff shall sell all that is delivered, or otherwise comes to his possession, and

not that which, although contained in the schedule, is in the possession of others than the insolvent. The directions of the Statute, as to the mode of recovering and disposing, after recovery, of property so situated, leads to this construction. Whether the slave in question was, or was not embraced in the schedule, she did not come within the terms of that clause, which directs the mode of proceeding against a garnishee, having possession of property claimed by the insolvent in *his schedule. The slave was in the possession of the prisoner, and not of his daughter, and there was no person against whom the Sheriff could sue out a summons, or bring an action, but Long himself. The Law could hardly have interded to put the Sheriff, in any case, to the necessity of suing the insolvent for the property in his possession, whether put into the schedule, or not. He might have lawfully taken possession of this property, if any title to it vested by Law in him. If he had taken possession of her, it would perhaps have been inconsistent with the spirit of the Law, to have sold her whilst Long's interest, which was to be sold, was uncertain and disputed. I do not mean to give any opinion, whether if the Sheriff had any interest in this property, so situated, he would have been acting properly, or improperly, in selling that interest as he did, whether he had reduced the property to his possession, or not. But, admitting, that in making such sale, he acted against the terms or spirit of the Statute, then the question occurs, whether his sale and conveyance would be utterly void, and not pass his title. I do not think it would be void. In the case of a public officer empowered to sell the property of another, he has no general property in the subject. The general property remains in the owner until it is divested by a sale and conveyance of the property in the regular mode prescribed by Law; and if the officer is in possession of the property before the sale, he has only a special property, for special purposes, as any other bailee: he has only an authority, to the valid exercise of which, a strict pursuance of the terms of his authority must be shown. If he has not conformed to those terms, he has acted without authority, and his act is not binding or valid. Thus, in a sale for taxes, by a public officer, no title passes, unless it is shown that he pursued the direction of the Law, for he had no title to pass, and was only authorised to pass the title of another, in a prescribed way. But, in the case at Bar, the legal title vested in the Sheriff, according to the express terms of the Statute, (if,

753 indeed, he had any interest *or power whatever in or over the property,) and his conveyance transfers the title, as the conveyance of any other Trustee passes the legal title, no matter how directly he may have acted against the purposes or directions of the Trust. This is fully settled by the decisions of this Court, not on the ground that the Trustee is presumed to have acted according to the terms of his trust, but (even if he had acted directly against them, and if that appeared on the face of the Deed,) because the Deed of him who has the legal title, necessarily carries that legal title to the grantee. The terms of the Act, in relation to the disposition of the insolvent's property, are directory to the Sheriff. If he violates his duty, disregarding those directions, the sale is not, therefore, void, in point of Law, as to the purchaser. But, he is responsible, as any other Trustee, to the parties interested in damages, or, if the circumstances justified it, a Court of Equity would hold the purchases to be a Trustee, standing in the shoes of the Sheriff.

I think, therefore, that if the slave in question was identified as one intended to be conveyed, (a question for the Jury,) that the title of the Sheriff, if he had any, passed to the purchaser. Whether the Sheriff had any title, depends upon the question, whether personal property given to another, by Deed, not recorded, and the possession remaining with the donor, passes to the Sheriff, upon the donor's taking the oath of an insolvent debtor. This I consider as the serious question in the cause. This depends upon the construction of the terms of the Statute, which provides that "all the estate which shall be contained in such schedule, and any other estate which shall be discovered to belong to the prisoner, for such interest therein as such prisoner hath, and may lawfully depart withal, shall be vested in the Sheriff," &c. The doubt arises upon these expressions, for such interest therein as such prisoner hath, and may lawfully depart withal. A fraudulent conveyance is good between the parties, and is not avoided as to purchasers, by the Statute of the 13th *of Elizabeth, which avoids such only, as to creditors: nor, if of personal property, by the 27th of Eliz. which avoids only such conveyances of real property, in respect to purchasers alone; a distinction carefully preserved in our Statute of Frauds; the consequence of which is, that "if a man that is a debtor make a deed of gift of all his goods, to protect the taking of them in execution for his debts, this deed of gift is void against those to whom he was indebted, but against himself, his own executors or administrators, or any man to whom he shall after sell or convey them, it is good. Bacon's Use of the Law, 62. But, such a conveyance might be void as to a subsequent purchaser, at Common Law, under circumstances, as if the donor remained in possession, and afterwards sold to a purchaser without notice, as was the case of *Williamson v. Farley*, Gil. Rep. 15.

The expression under consideration, was taken from the Statute of Bankrupts in England, but in rather a different context. The first Act relating to bankrupts in England, 34 and 35 H. 8th ch. 4. authorises the Lord Chancellor, and other Officers, or any three of them, in case of bankruptcy, to take such orders, and directions, as they may think proper, in their discretions, with the bodies of the bankrupts, "and with their lands, tenements, fees, annuities, and offices, which they have in fee simple, fee-tail, term of life, term of years, or in right of their wives, as much as the interest, right, and title of the same offender shall extend or be, and may then lawfully be departed with, by the said offender, and also with their money, goods, chattels, wares, merchandises, and debts whatsoever. And to cause their said lands, tenements, fees, annuities, offices,

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goods, chattels, wares, merchandises, and debts, to be searched, viewed, rented, and appraised, and to make sale of the said lands, tenements, fees, annuities, and offices, as much as the same offender may then lawfully give, grant, or depart with, or otherwise to order the same, for true satisfaction and payment of the creditors,"

756 *&c. The Act of 13th Eliz. ch. 7, provided that the Commissioners of Bankruptcy might take order and direction at their discretion, with the body of the bankrupt, "and also with all his lands, tenements, and hereditaments, as well copy or customary hold, as freehold, which he shall have in his own right, before he became bankrupt, and also with all such lands, tenements, and hereditaments, as such person shall have purchased, or obtained, for money or other recompense, jointly with his wife, children, or child, to the only use of such offender, or of or for such use, interest, right, or title, as such offender then shall have in the same, which he may lawfully depart withal, or with any person or persons of trust, to any secret use of such offender, and also with his money, goods, chattels, wares, merchandises, and debts, and cause the said lands, tenements, fees, annuities, offices, goods, chattels, wares, merchandises, and debts, to be searched, viewed, rented, and appraised to the best value they may, and to make sale of the said lands, tenements, and hereditaments, and all deeds, writings, and evidences, touching the same, and also of all fees, annuities, offices, goods and chattels or otherwise order the same, for true satisfaction and payment of such creditors," &c.

The Statute of 1st James 1st, ch. 15, declared that the making of any fraudulent grant, or conveyance of lands, tenements, goods, or chattels, to the intent, &c. whereby his creditors shall, or may be defeated, or delayed for the recovery of their just and true debts, should be an act of bankruptcy; and that a conveyance made, or procured to be made by any, who should become bankrupt, to any of his children, or any other person, of any manors, lands, tenements, hereditaments, offices, fees, annuities, leases, goods and chattels; or to transfer his debts into other men's names; except the same be purchased, conveyed, or transferred for or upon marriage of any of his children, both the parties married, being of years of consent, or for some valuable consideration, the same might be conveyed by the Commissioners.

757 *It is obvious that the expressions of these Statutes, in respect to the interests belonging to the bankrupt, and which he might lawfully depart withal, referred only to such partial interests which might be held in lands, tenements, hereditaments, fees, annuities, and office, in all of which there might be particular interests, as for life, in tail, for years, tenancy by the curtesy, and dower; and these words were introduced for the purpose of limiting the power of the Commissioners to any such partial interest which might belong to the bankrupt: accordingly they could not dispose of any thing more in land, in which he had an estate tail, than the bankrupt held, until by the 21st of Jas. 1st, ch. 19, sec. 12, the Commissioners were authorised to convey en-

tailed lands in fee. Those words did not, in the terms of the Statutes, taken literally, apply to money, goods, chattels, wares, merchandises and debts. In these personal subjects, as the Law was then held, there could be no such partial interests, the gift of such for a time, being a gift forever. The discrimination made by the Statutes in the application of those terms, to real, and not to personal property, proves that the Legislature had in contemplation to provide, by the use of that expression, only for the case of partial interests, and not for that of property fraudulently conveyed, whether the conveyance was avoided by the Common Law, or by the Ancient Statutes of 3 H. 7 ch. 4, as to fraudulent Deeds of Gift of goods, and 50 Ed. 3, ch. 6, as to fraudulent assurances of lands or goods. The Statute of the 13th of Eliz. ch. 5, and of the 27th of Eliz. respecting conveyances to defraud creditors and purchasers, had no existence when the first Statute of Bankrupts was passed, and the first of them was passed at the same time as the Statute of Bankrupts of the 13th of Elizabeth.

Our Act of May, 1726, ch. 3, sec. 30-31, for the relief of insolvent debtors, after prescribing the schedule to be subscribed, and the oath to be taken by the insolvent, declares, "that all the tenements, 758 and hereditaments, which shall be contained in such schedule for such use, interest, right, or title, as such prisoner then shall have in the same, which he may lawfully depart withal, and also all goods and chattels, whatsoever, in such schedule also contained, shall be vested in the Sheriff;" thus adopting the precise expressions of the Statutes of H. 8, and of Eliz. of Bankrupts, and using the words, for such use, interest, right and title, as such prisoner then shall have in the same, which he may lawfully depart withal, in the same context, and to the same purpose as in the English Statutes in reference to the partial interests which the prisoner might then have in real property, and to that only.

In November, 1762, ch. 8, an Act of Bankruptcy was passed, which retained the same words, for the same purpose; "and thereupon all lands, tenements, and hereditaments, in such schedule contained, for such use, interest, right or title, as such debtor shall have in the same, which he may lawfully depart withal, or dispose of, and all slaves, goods, and chattels whatsoever, in such schedule contained, and also all outstanding debts, and all the estate real and personal, of such debtor, in possession, reversion, or remainder, and all his effects whatsoever, at the time of executing such schedule, though not contained therein, shall be vested in the assignees," &c. This Act, for the first time, directed the property not contained in the schedule to be vested in the assignees. This Act, which was temporary, did not repeal the Act for the relief of insolvent debtors then in force, and which was re-enacted in November, 1769, ch. 3, sec. 7, 8, 9, and the provision of the Act of 1762, in respect to property not contained in the schedule, was adopted from that Act. In this Act of 1769, the provision for vesting the prisoner's property in the

Sheriff was in the very words of the Act now in force, and has continued so in all the subsequent Revisals of the Laws.

From this re-view of the Laws for the relief of insolvent debtors, compared with the Statutes of Bankrupts, from

759 *which they were in part taken, it is clear, that the Act of 1726, re-enacted in 1748, and of 1769, referred only to the extent of the interest in the debtor, in the real property, in respect to the quantum of his estate, and not to the question, whether property, fraudulently transferred by the debtor, in fraud of his creditors, or subsequent purchasers, should or should not pass to the Sheriff, or assignee. That question was left to be decided, both as to real and personal property, as if the Statutes had simply provided, that all rights, interests and property of the debtor, should vest in the Sheriff, or assignees, for the benefit of the creditors. As to the Act of 1769, and those subsequent, to the same effect, although they use the same expressions as to the interest of the debtor, which he could "lawfully depart withal," in a somewhat different context, so as to be applicable to all the property, real and personal, (and if they had been originally used in that context, might have left it doubtful, whether the Legislature intended thereby to designate the debtor's quantum of interest in the subject, or the quality of his interest in respect to his capacity to convey or transfer it,) yet I do not think the Legislature intended to use these expressions in the latter Laws, in any other sense than they were used in the former, the context being varied in the latter, only for the purpose, always attended to in our Revisals, of condensing the Statutes into the shortest possible compass.

Upon the questions, whether property, fraudulently conveyed or transferred, and the conveyance or transfer void as to the creditors, by the 13th of Eliz. ch. 5, or as to purchasers, by the 27th of Eliz. (from which our Statute of Frauds is in part compiled,) vests in the assignees of a bankrupt, or not, I do not find any very satisfactory authority in the English Books. Those questions could only have arisen in the short interval between the 13th and 27th of Eliz. and the 1st of Jas. 1; for, at the latter period, a Statute passed, declaring that the making or causing to be made, a fraudulent grant or conveyance, was 760 an act of *bankruptcy; so that the title of the assignees overreached by relation, the fraudulent grant or conveyance, yet there might be cases of fraudulent transfers of property, to defraud creditors, which did not amount to an act of bankruptcy, as were all transfers of property, by any means other than by Deed, as by transfer of a Bill of Exchange; and in such cases, the assignees were held, from the time of *Worseley v. De Mattos*, 1 Burr. 467, to be entitled to the property so transferred, the transfer being void as to them, for the fraud. But, in all these cases, the fraudulent transfer was upon the eve of bankruptcy, and with an immediate view to it. *Worseley v. De Mattos*, 1 Burr. 467; *Willson v. Day*, 2 Burr. 827; *Hague v. Rolleston*, 4 Burr. 2, 174; *Alderson v. Tem-*

ple, 4 Burr. 2, 235; *Linton v. Bartlet*, 3 Wils. 47; *Harman v. Fisher*, Cowp. 117. The case, however, of *Anderson v. Maltby*, 2 Ves. jr. 244, was a case in which a father and two sons being in partnership, and their affairs in a critical situation, in 1784, one of the sons then retired from the partnership upon terms, as to the re-payment of his capital with profits, which were manifestly intended to secure the funds of the father and the other son, who continued the business, against their creditors subsequent to the time when the other son retired. Upon these principles, the accounts were settled in 1784, and the retired son received, at different times from 1784, up to 1788, when the firm failed, very large sums; and these transactions were set aside for fraud, and the account directed to be settled upon just principles, upon a Bill filed by the assignees of the bankrupts, the Lord Chancellor declaring, that "assignees have all the equity the creditors have, and may impeach transactions, which the bankrupt himself would be stopped from impeaching." In this case, too, the parties had their final bankruptcy in contemplation, when the impeached transactions took place. But, in all cases, fraudulent conveyances are made in fact, or are presumed in Law, from the circumstances, to be made in contemplation

761 of insolvency, *and to defraud the creditors of the party. Upon the principles of these cases, I should think, that if the Statute of Jas. 1, had not been made, although a fraudulent conveyance in fraud of creditors, would not have been an act of bankruptcy, yet it would have been void as to the creditors represented by the assignees, and the title would have vested in them, the commission of bankruptcy being considered to many purposes a Statutory Execution. *Doe v. Rutledge*, Cowp. 705. Lord Hardwicke, in *Walker v. Burrows*, 1 Atk. 93, seems to countenance this conclusion. The Bill was filed by the assignees of the father, who became bankrupt in 1740, to set aside as fraudulent, a Deed made by him in 1718, it being a voluntary settlement after marriage, for the use of himself for life, for his wife for life, and then to his eldest son, &c. The questions were; first, whether it was void as to creditors under the 13th Eliz. ch. 5? Secondly, whether it was void as to subsequent purchasers under the 27th of Eliz.? And thirdly, whether the property passed to the assignees under the 1st of Jas. 1? Lord Hardwicke held, that it was not void as to creditors under the 13th of Eliz. because it did not appear that the father was indebted when he made the conveyance: that it was void, being voluntary, under the 27th of Eliz. against a purchaser for valuable consideration, but, that assignees of a bankrupt were not purchasers for valuable consideration, they standing in the place of the bankrupt, and bound by all acts fairly done by him, and that the title vested in the assignees by force of the Statute 1st Jas. 1, the conveyance not being made upon marriage, or upon valuable consideration. From this it appears, that this Deed, made twenty-two years before the bankruptcy, (if the father had been

proved to have been indebted at the time of the conveyance, so as to have made the Deed void as to creditors,) would have been void as to the assignees, and the property vested in them under the 113th of Eliz. not as subsequent purchasers, but as clothed with the rights of the creditors.

762 *If property transferred in fraud of creditors, vested in the assignees of a bankrupt by force of the Statutes of H. 8, and Eliz. of Bankrupts, it would vest in the Sheriff, under our Act for the relief of insolvent debtors, for the same reasons, upon the construction of the Statutes of England and our Acts, and upon the general principles of the Common Law applying to both cases.

A creditor, under whose Execution a debtor is taken and discharged, under our acts for the relief of insolvents, could never have had any further remedy upon his Judgment, except against the property of the debtor, acquired since his discharge, until by the Act of 1819, a Ca. Sa. was declared to bind all the debtor's real property, (1 Rev. Co. p. 528, § 10,) and by the Act of 1820, ch. 34, § 4, all his personal property. By force of these Acts, the creditor has a lien on all the property, real and personal, of his debtor, from the moment the Ca. Sa. is executed which he might enforce against property fraudulently conveyed, whether the property vested in the Sheriff or not. But before these Statutes passed, the creditor could have no remedy for recovering satisfaction out of property fraudulently conveyed, unless it vested in the Sheriff, for the satisfaction of the creditor's demand.

And the passing of the Acts of 1819, and 1820, can have no effect upon the construction of the former Acts, which ought to have prevailed before those Acts were passed. The chief object of these Acts being to present a debtor whilst in custody, from disposing of his property in satisfaction of other debts, which he could do before they were passed.

In this case, if it appeared to the satisfaction of the Jury, that the slave in question had always remained in the possession of Joshua Long, the gift to his daughter was void, whether made by parol, or by deed, and whether he was indebted at the time of the gift or not. If by parol, the gift was void as between the parties by the Act of October, 1787, ch. 22. (1 Rev. Co. p. 432, § 51,) or if by deed not recorded, it would be void, by the express provision of our Statute of Frauds. 1

763 Rev. Co. ch. 101. And in either case, the property would vest in the Sheriff, and his Deed would pass the legal title to the purchaser, even if he violated the terms or spirit of the Law, in respect to time, and manner of making the sale. The only question in this case is, whether the Deed does convey the identical property in question to Shirley.

The Judgment ought to be reversed, the verdict set aside, and a new trial awarded. JUDGE CABELL dissented from so much of the opinions of his brother Judges, Carr, and Green, as gives any efficacy whatever to a Sheriff's sale, and conveyance of the property of an insolvent debtor, when that

property was not in the possession of the Sheriff, and had not been claimed by him, "by legal process," against those who were in possession thereof.

764 *Thomas Shirley v. Elizabeth and William Long, and Others.

August, 1827.

Gift of Personality.—Retention of Possession by Donor.—If a father give a slave to a child, and the donor retain possession of the slave, and exercise control over it, the gift is not the less fraudulent because the child always lived with the father, and the slave was always called the child's in the family and neighborhood.

Same.—Parol.—No Possession in Donee.—Effect.—A parol gift of a slave to a child, without possession in the donee, is void, as between donor and donee, and if the slave given be conveyed by Deed, (unaccompanied with possession in the donee,) and without being recorded, it is void as to creditors and purchasers.

Same.—Evidence.—If a Defendant, in his Answer, admit that a slave which he claims as a gift, was always in the possession, and under the control of the donor, with whom the donee lived, proof that the donee had the possession, is inadmissible, since it varies from the admissions of the Defendant.

Chancery Practice.—Injunction.—Bill Multifarious.—When Objection Therefor to Be Made.—If a Bill, which is in part a Bill of Injunction, be multifarious, that objection cannot be made on a motion to dissolve the Injunction. It must be made at the final hearing.

This was an appeal from an interlocutory order of the Chancery Court of Fredericksburg, dissolving an Injunction obtained by the Appellant against the Appellees, and others. The Case is sufficiently stated in the opinion delivered by Judge Green. The case was argued by the same Counsel, and at the same time, as the last Case.

August 22. JUDGE GREEN delivered his opinion.

On the 27th June, 1821, Joshua Long took the oath of an insolvent debtor, and was discharged from the custody of the Sheriff of Spottsylvania. In his schedule were these expressions: "The above is every thing," &c. (See the expressions in the statement of the last case, ante, p. 736,) the schedule also contained the following clause: "Negroes Moses, George, Sam, Peter, Beverly, Clarke, Humphrey, Bill, Ben, and Fontaine, under a Deed of Trust to Major C. Jones." Long was discharged by order of the Magistrates, without surrendering to the possession of the Sheriff, the personal estate mentioned

765 in the schedule. The *Sheriff made a public sale of all the property contained in the schedule, subject to all claims, charges, and incumbrances existing upon

*Right of Personality.—See monographic note on "Gifts" appended to Barker v. Barker, 2 Gratt. 844.

†Same.—Parol.—Want of Actual Possession.—Effect.—In Thomas v. Lewis, 89 Va. 83, 15 S. E. Rep. 889, it is said: "It was decided in this court in *Shirley v. Long*, 6 Rand. 764, that a parol gift of a slave to a son by his father, when they resided together, was void as between the donor and donee, for want of actual possession. See also, *Hunter v. Jones*, 6 Rand. 541; *Slaughter v. Tutt*, 13 Leigh 147; *Tutt v. Slaughter*, 5 Gratt. 364."

See further, monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

‡Chancery Practice.—Injunction.—Bill Multifarious.—When Objection Therefor to Be Taken.—For the proposition laid down in the last headnote, the principal case is cited in *Hanly v. Watterson*, 39 W. Va. 228, 19 S. E. Rep. 589.

See generally, monographic note on "Multifariousness (in Equity)" appended to Sheldon v. Armstead, 7 Gratt. 264; monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

the property, or any part thereof, and executed a Deed on the 8th November, 1821, to Thomas Shirley, he being the highest bidder. (The purport of the Deed is fully set forth in the last case, ante, p. 737.) The property so purchased by Shirley, was very large, but greatly incumbered; in some instances, nay as to the far greater part, it was incumbered beyond its value, as it turned out. He purchased it for fifty odd dollars, but he states in his Bill, (and he proves) that he was a creditor of Long, to the amount of upwards of \$700; that he had no lien on Long's property, and that the object of purchasing was to endeavor to secure his debt, if possible. In this he was perfectly justifiable, and if not, it is a circumstance that can have no effect upon the decision, as to his legal and equitable rights.

Joshua Long, on the 5th January, 1821, conveyed, amongst other property, in trust to indemnify a surety, two negroes, Lewis and Fanny, which were sold under the Deed of Trust, on the 6th August, 1821, and purchased by Shirley, from the purchaser at the sale, on the 28th November, 1821. Lewis remained in Long's possession until this suit was brought, and the Marshal took possession of him, under the order of the Court, made in this cause. Long sold Fanny, and two other slaves, to Thomas B. Adams, on the 11th May, 1821, for a house and lot, which Adams conveyed, at the request of Long, to his three children, Joanna, Mary and Benjamin, and Long told Adams, as the latter states in his Answer, that the reason for having the lot and house conveyed to those children, was, "that he had always told his son Benjamin, that Jim, (one of the negroes sold to Adams, and included in the Deed of Trust to C. Jones, in 1820, as was Beverly, another of the negroes sold to Adams,) should be his property; that he had made the promise to one of his daughters, of Fanny, as her property; 766 both son and daughter, *he said were satisfied with the sale of their negroes, provided they were each one third interested in the house and lot; and Long said, that his other daughter had not received any thing of him she could call her own, and therefore requested that she should be named in the Deed as one third owner of the house and lot."

Long being in possession of the land conveyed in trust for the benefit of C. Jones, and of many of the slaves embraced in that Deed, the equity of redemption of which was sold by the Sheriff to Shirley, and of the negro Bill, (who was mentioned in the schedule as being included in the Deed to C. Jones, but was not,) and Ralph; and the legal title to a part of the land conveyed to C. Jones, being in Garret Minor, this Bill was filed against Joshua Long, Elizabeth, Durret, William and Joanna Long, (the four last being the children to whom Long stated he had conveyed eight slaves,) Mary S. and Benjamin Long, Elijah D. Robins, the trustee in the Deed under which Fanny and Lewis were sold, Thomas B. Adams, Garret Minor, C. Jones, and Robert Patton, the trustee in the Deed for the benefit of said C. Jones.

The objects of the Bill were, to procure a conveyance from G. Minor to Patton, the

Trustee of Jones; to have the sum due to Jones, ascertained, the property pledged for the debt to Jones, sold, and the debt paid, and the surplus, if any, paid to him; and in order to relieve this fund, to compel Adams to pay to Jones, the value of Jim and Beverly, two of the negroes pledged by that Deed, and afterwards sold by Long to Adams, and sold by him; to subject Adams to the payment to him of the value of Fanny, sold by Long to Adams, after the Deed of Trust to Robins, under which Shirley claimed: and to charge the value of the three negroes sold to Adams, on the house and lot conveyed to Long's children, claiming to charge Adams individually, only in the event of the house and lot being insufficient to pay: for a discovery of the names of eight slaves, said to be conveyed to the four elder 767 children *and to set aside the conveyances as fraudulent, so that any of them embraced in the Deed to Patton, might be applied to the payment of Jones's claim: to ascertain, also, whether Fanny and Lewis, sold under Robin's lien, and Bill and Ralph, remaining in Joshua Long's possession, were claimed as conveyed to his children, and if so, to declare Shirley entitled to Ralph, as conveyed to him by the Deed from the Sheriff, as one of the eight slaves mentioned in the schedule, and to Decree that Bill should be delivered to him, as being named in the schedule as one conveyed to Patton, when he was not, upon the ground that the conveyances to the children of Long, if they embraced those slaves, were void, and should be set aside in Equity, for fraud: and to procure an Injunction against Joshua Long, to prevent his committing waste, and against all the parties, in possession of any of the slaves claimed from eluding them.

As to the property conveyed to Patton, there remains nothing to do, since it is admitted that it was insufficient, under any circumstances, to pay Jones's claim. The claim to the value of Fanny against Adams, (or of the house and lot,) upon which the Court below has not decided; the claim to Nelly and Dice, not particularly mentioned in the Bill, but which are the negroes claimed by Elizabeth Long in her Answer; the claim to Billy and Ralph, which have not yet been claimed by any of the children; and the claim to Lewis, who is claimed by William Long, as one of the slaves conveyed by his father to him, are the only subjects remaining to be decided in the cause.

The Court of Chancery, upon the motion of Elizabeth and William Long, who answered, Joshua Long and his other children not having answered, and against whom there was a Decree Nisi, dissolved the Injunction in toto, as to all the parties, upon the ground that Shirley, claiming only under the Deed from the Sheriff, had no title, since he obtained no title but such as Long himself could have maintained, and that Long him- 768 self had by his schedule *disclaimed all title to the eight slaves conveyed to his children, and therefore, the Plaintiff, as purchaser of Long's interest, had no title to them.

The Sheriff's Deed conveys all his interest in the property before described as sold, both at Law and in Equity, vested in him by the Act of Assembly. In the Common Law

case, between the Plaintiff and Joshua Long, the question as to the effect of this Deed has been examined, and it has been declared, that the eight slaves mentioned in the schedule as conveyed to the four children, were intended to be sold and conveyed by the Sheriff, if any title vested in him by operation of Law, and that his Deed would pass to the purchaser the title of such as were so conveyed to the children when that fact was ascertained, if the conveyance was void as against creditors under our Statute of Frauds.

As to the slave Bill, mentioned in that part of the schedule relating to the slaves conveyed to Patton in trust for Jones, he is expressly conveyed by the Sheriff, subject to all incumbrances. None of the children claim him, and if none should claim him, or if claiming him, the title, under which the claim is made, is found to be fraudulent and void, Shirley will clearly be entitled to that slave, he being in the schedule as property belonging to Long, and giving up expressly, and by name.

As to Ralph, if he should be ascertained to be one of those conveyed to the four children, or either of them, and the conveyance be fraudulent and void, Shirley will also be entitled to him, the Sheriff having in that case the legal title, and having conveyed it to Shirley. But, if the slave was not conveyed to the children, or either of them, Ralph still belongs to the Sheriff; or, if he has been so conveyed, and the conveyance be bona fide, and valid, he will belong to the donee.

As to the slave Fanny, claimed by Shirley, under the Deed of Trust for the benefit of Robins, she is claimed by none of the children; and if she shall not be claimed, 769 or if claimed, the claim should be fraudulent and void, Shirley will be entitled to her against Adams, clearly, as he claims under a Deed duly recorded before the sale to Adams.

As to Milley and Dicey, claimed by Elizabeth Long, by virtue of a Deed from her father, Shirley would be entitled to them, if that Deed be fraudulent and void. In respect to the slave Lewis, claimed by Shirley under the Deed of Trust to Robins, he has an unquestionable title, unless the Deed from Joshua Long to William Long for this slave, (and Humphrey, who was conveyed to Patton,) was bona fide and valid, so as to have the preference to the Deed of Trust to Robins.

As to the negroes claimed by Elizabeth and William Long, the conveyances and transfers under which they claim, are clearly void under our Statute. They state that two negroes were given to each of them, respectively, by their father, when they were incapable of knowing the fact, and that afterwards they were conveyed by Deed; and William Long states that Carter, one of those so conveyed to him, was sold by Joshua Long, who substituted Lewis in his place, and gave him a new conveyance about 1816 or 1818, for Humphrey and Lewis. They both admit that the slaves were always in the possession and under the control of their father; but, they rely that being infants, and living with their father, his possession was theirs or for them as the guardian, and that

the negroes were always called theirs in the family and neighborhood. Much evidence is exhibited upon these subjects, and some attempts made to prove an actual possession in these children. But, if the proof went to that point, it would be entitled to no weight, since it would not be competent to the parties to disprove the admissions of the Defendants in their pleadings. The suggestion that the children being infants, and living with their father, his possession was theirs, or for them, is utterly futile, and if countenanced, would frustrate our Acts of Assembly; one,

of which, in order to the validity of 770 a parol gift of a slave, *requires that the slave shall have come into the actual possession of, and remained with, the donee; and the other requires, in the case of a gift by Deed, that the Deed shall be recorded, or the possession really, and bona fide remain with the donee. These emphatic words of the Statutes were used for the purpose of condemning the very gifts in question, and such as these. Besides, Joshua Long treated these slaves as his own and gave Jones a Deed of Trust on one of them, Humphrey, and a Deed of Trust to Robins for another, Lewis. The original gifts of these slaves were void as between the parties, under the General Law declaring parol gifts to be void, without possession in the donee; and as to the subsequent conveyances by Deed, they were void as to creditors and purchasers, under the Statute of Frauds, they being conveyed without any valuable consideration, and the donees never having had a bona fide possession, and the Deeds not being recorded. Shirley is, therefore, entitled to Lewis; and the order dissolving the Injunction, is erroneous in toto.

As to the objection taken to the Bill as being multifarious, it is premature to decide what effect that objection, if well founded, should have at the final hearing of the cause. It ought to have had no influence upon considering a motion to dissolve the Injunction.

JUDGE CARR.

The Plaintiff filed a Bill against Long, his children, and several others. This Bill has various objects in view; among others, to discover from the four children, which of the slaves they claim, that the Deeds of Conveyance may be declared fraudulent, and the slaves decreed to the Plaintiff. Elizabeth, and William Long, are the only children of Long who have answered. She claims two slaves, Nelly and Dice; he two, Humphrey and Lewis. They both state that these slaves were given in their early infancy by parol, and afterwards, the gift confirmed in 1810, 771 *by writing; that the slaves always remained with their father, but that this ought not to impeach these gifts, as they were infants, and their father their natural Guardian, with whom they lived. William states, that his father, wishing to sell Carter, (the slave first given to him with Humphrey,) proposed to give him Lewis, and one hundred and ten acres of land in exchange, to which he agreed, and Carter was sold, and a Bill of Sale made to him for Humphrey and Lewis; that this transaction was in 1816, or 1818; that the

Bill of sale was made soon after the contract, and the Deed for the land in 1820. The Bill had prayed an Injunction to restrain the removal of the slaves, and unless security were given to have them forthcoming, they should be taken into possession by the Marshal. This was granted, and the Marshal under the order took possession of several of them. After the Answers of William and Elizabeth were filed, a motion was submitted by them for a dissolution of the Injunction, and it was accordingly dissolved. This dissolution was, I presume, intended to affect the interests of Elizabeth and William only, or at most the eight negroes claimed under the Deed of the Sheriff, and mentioned in Long's schedule as given to his children. The various other subjects and interests involved in the Bill, I do not consider as affected by it. This idea is founded on the order of the Chancellor, stating "that the Court is of opinion that the Plaintiff, by virtue of his purchase of the effects of Long, as contained in the schedule, obtained such title only as Long himself could maintain, and the said Long by his schedule disclaiming any title to the eight slaves therein mentioned, the Plaintiff, as purchaser of Long's interest, has no right to the said slaves, &c., doth order that the Injunction be dissolved, &c." The remarks made in the action of detinue, show that on this point, I differ from the Chancellor *toto cœlo*. The reasons of that difference need not be repeated.

Still I have felt considerable doubt whether this Interlocutory Order ought to be reversed. I have a pretty strong
772 *impression that the Bill is not sustainable; it strikes me as being multifarious, and also that so far as relates to these negroes, a Court of Law is the proper forum. I consider the pretext, that the Plaintiff did not know their names, merely colourable. There could hardly be a necessity on this point, of a discovery from the claimants. The other seven stood on the same ground with Sarah, for whom the action of detinue is brought, and as I think, properly brought. I feel more doubtful whether these objections should be taken to the Bill in this stage of the proceedings, as there has been no demurrer, or plea. On this point, I will not divide with my brethren, if they should think such objections can only be taken by the Court at the final hearing.

JUDGE CABELL, as in the former case, dissented from so much of the opinions of the other Judges, as gives any efficacy whatever to a Sheriff's sale and conveyance of the property of an insolvent debtor, when that property was not in the possession of the Sheriff, and had not been claimed by him, "by legal process," against those who were in possession thereof.

The objection to the Bill as being multifarious, he thought was premature.

The Decree of the Chancery Court was reversed, and the cause remanded for further proceedings.

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ABATEMENT.

1. See Writ of Right, No. 1, 2.
2. For the rules that govern pleas in abatement, see
Garrard, &c. v. Henry, 110

ADMINISTRATRIX.

1. See Guardian, No. 1.
2. See Widow.

AMBIGUITY.

A latent ambiguity in a written instrument may be explained by parol evidence; or terms used which have no definite legal signification, may be construed by the custom of trade, or the acts of parties; but where there is no ambiguity, parol evidence is inadmissible.

Bowyer v. Martin & Carraway, 525

ANSWER.

If a Defendant in his answer, admit that a slave which he claims as a gift, was always in the possession of the donor, he cannot be allowed to give evidence that he, the donee, had the possession, for such evidence varies from the Defendant's admissions.

Shirley v. Long, 764

APPEAL.

1. If a Chancellor dissolves an Injunction in Court, but directs the order not to go out, and in vacation directs that the order shall go out; although this is an irregular order, an appeal lies from it to the Court of Appeals.

Randolph v. Randolph, 194

2. An appeal lies from a Judgment of a Superior Court, reversing a Judgment of a County Court, and directing other pleadings.

Cowling v. Nansemond Justices, 349

3. See Injunction, No. 6.

4. See Pleas, No. 7.

ARBITRATION.

1. A Court of Law may annul an award, (for misbehaviour of arbitrators, &c.) made by virtue of a submission under a Rule of Court, pending a suit, although the Statute does not apply to such awards.

Graham's Adm'r's v. Pence, 529

2. If arbitrators decline to act, then, at the instance of one of the parties, are prevailed on to act, authorising that party to give notice to his adversary of the time and place for arbitrating the matter; and proceed at the time and place on ex parte evidence, notwithstanding the protest of the other party; this is such misbehaviour as should annul the award. Ibid.

ASSIGNED BOND.

If in debt by an assignee, the Defendant pleads that he has paid the debt to the Plaintiff, it is not allowable to give in evidence any set-off against, or payment to, the assignor: he should also have

pleaded payment to the assignor before notice.

Hatcher v. Cabell, 353

BAIL.

1. A bail bond which recites the Writ at the suit of A. B., Administrator, &c. 774 *while the Writ is at the suit of A. B. Executor, &c. is not an error for which a Judgment against the Defendant and Bail will be reversed.

Payne v. Britton's Ex'or, 101

2. A bail bond given to the Sheriff of — county, without naming the county is good. Ibid.

3. The condition of a bail bond need not designate the time and place of appearance. Ibid.

4. Where a Defendant is permitted to appear and plead without giving special bail, and the Plaintiff joins issue without making any objection, such objection is waived by the Plaintiff, and the appearance bail is discharged.

Culpeper Agricultural and Manufacturing Society v. Digges, 165

BANK OFFICERS.

The sureties of an Accountant of a Bank, are not liable for monies taken by him from the Teller's drawer, without his knowledge, or consent, it appearing that the Accountant is not entrusted with, or put in possession of, any monies of the Bank, as Accountant.

Allison v. Farmers' Bank, 204

BILL OF DISCOVERY.

A Bill of Discovery, to obtain evidence which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown, why it was not filed at that time.

Faulkner's Adm'r v. Harwood, 125

COLLATERAL CONDITION.

See Declaration, Nos. 1 and 2.

CONSTITUTION.

1. A Law which deprives a person of his vested rights in property, without a full indemnity, is contrary to the Constitution of the State, and void.

Crenshaw v. Slate River Company, 245

2. The Act of February 1823, which for certain offences inflicts stripes at the Discretion of the Court, is not contrary to the Constitution of the State.

Commonwealth v. Wyatt, 694

CONTINUANCE.

1. Circumstances under which a continuance may be refused to a prisoner.

Bledsoe's Case, 673

2. A Court may require, under particular circumstances, that the affidavit of a witness, setting forth his testimony, shall be produced as the ground work of a continuance: and may disregard the affidavit of

the prisoner, setting forth the materiality of the evidence, and specifying what he expects to prove, and proving due diligence.

Mendum's Case, 704

CORPORATIONS.

1. A bond executed to the "President and Managers of the Culpeper Agricultural and Manufacturing Society;" may be sued upon by the "Culpeper Agricultural and Manufacturing Society," that being the legal style of the corporation.

Culpeper Agricultural and Manufacturing Society v. Digges, 165

2. Corporations must sue in their true names, but contracts may be made by or with them, by a mistaken name, if the mistake be only in syllabis et verbis, and not in sensu et re ipsa. Ibid.

3. See Mills, No. 1, 2.

COURTS OF LAW.

1. When a question occurs before a Court of Law whether certain evidence be competent or not, the determination of which depends on certain preliminary facts, those preliminary facts must be decided by the Court.

Clayton v. Anthony, 285

2. See Evidence, No. 9.

3. An instruction of the Court to the Jury, that if they believe the evidence (reciting it, in which there is no contrariety), the Plaintiff had a right to recover, not saying any thing of the amount of damages, is not erroneous. It is an instruction on the law, not on the fact.

Pleasants v. Pendleton, 474

4. If an erroneous instruction be given to the Jury, and it appears by other Bills of Exceptions that the question on which that erroneous instruction was given, did not arise in the cause, the Judgment will be affirmed, notwithstanding the erroneous instruction.

Hunter v. Jones, 541

COVENANT.

A covenant to use reasonable diligence in collecting debts, is not a covenant to pay at all events.

Lockridge v. Carlisle, 20

*DECLARATION.

1. In debt on bond, conditioned for the faithful discharge of the duties of an office, the Declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of the Defendant in his office; nor is it necessary to state the damages occasioned by the breaches.

Allison v. Farmers' Bank, 204

2. It is not necessary for the Declaration, after assignment of breaches, to allege that the Plaintiff has been injured by the breaches; it is enough to state that an action has accrued to the Plaintiff to demand and have the penalty of the bond. Ibid.

3. In an action for the penalty of a bond, it is not necessary to state, that in consequence of the refusal of the Defendant to pay, the Plaintiff sustained damage. Ibid.

4. See Special Demand.

5. See Trespass, No. 7.

DECREE.

1. If there be two Decrees on the same day against a Defendant's land, the whole, and not the moiety only, of the land, ought to be directed to be sold, on the ground, that at Law, two Judgments would each have taken a moiety, if it had been extendible.

Coleman v. Cocke, 618

2. If sundry parties claim, that a debtor's land should be sold to discharge their respective liens, an Interlocutory Decree, which does not decide on the validity of the respective liens, nor the order in which they shall be paid, but directs the land to be sold for cash, and to be paid into Bank to the credit of the cause, is erroneous, because it has a tendency to sacrifice the property, by discouraging the creditors from bidding.

Cole's Adm'r v. M'Rae, 644

3. The Decree may be right as to a sale of chattels, they being perishable, and as they may be sold in detail, are not liable to be sacrificed. Ibid.

4. The lands should have been put into the hands of a receiver, to be rented out till the rights of the creditors are ascertained. Ibid.

DEED.

A Deed from a Sheriff, which conveys all the right, title and interest vested in the Sheriff by law, in and to eight negroes, conveyed by an insolvent to his children, without naming the negroes, is sufficiently descriptive to pass them. The identity of the negroes is matter of proof, and as soon as they are indentified, the Deed operates on them.

Shirley v. Long, 736

DEED OF TRUST.

1. If a Deed of Trust be fairly executed, to secure a just debt, it cannot be impeached for fraud for any matter ex post facto.

Clayton v. Anthony, 285

2. If the Deed of Trust, and the sale under it be fair, the Sheriff who levies a Fi. Fa. on the goods sold and in the possession of the purchaser, is a trespasser, and an action lies against him. Ibid.

3. And if the sale be fraudulent, yet as the Deed is good, it still operates, (in the same manner as if there has been no sale,) to protect the property from the execution of the creditors of the original debtor. Ibid.

4. Whatever surplus remains, after paying the debt secured by the Deed of Trust, is liable to the claims of other creditors, but it cannot be reached by Fi. Fa. before a sale under the Deed, for it is an equitable and contingent interest. Ibid.

DEMURRER.

1. See Judgment, No. 1.

2. After issue joined on any plea, it is too late to file a special demurrer.

Roane's Adm'r v. Drummond's Adm'rs, 182

3. Where pleadings terminate in a demurrer on either side, any error in the previous pleadings, on either side, may be taken advantage of. Ibid.

DEPOSITION.

1. If there be no objection made to the regularity of a deposition in a Court of Law, the Court of Appeals will presume it was properly taken, although there is neither a commission nor notice in the record.

Tompkins & Co. v. Wiley, 242

2. A deposition ought not to be read in a Court of Law, unless the party offering it proves that he has used due diligence to find the witness or that he is not within the jurisdiction of the Court and the reach of its process. Ibid.

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*DESCENTS.

1. The Act of Descents of 1785, (since re-enacted,) entirely repealed and abrogated the Common Law Course of Descents, and all the principles thereof. Davis v. Rowe, 355

2. If an intestate dies, (without children, or their descendants, without a father, or mother, brother, or sister, but having had a brother and sister, both of whom died before him,) leaving a niece, the only child of the brother, and two nieces and two nephews, the children, of the sister, the real estate will descend, and the personal estate be distributed to all of these nieces and nephews, per capita, and not in stirpes, they being all of the same degree of consanguinity to the intestate. Ibid.

3. In such case, the estate will not be divided into moieties, to be given, the one moiety to the child of the brother according to the Common Law doctrine of *jus representation* is, and the other moiety to the four nieces and nephews, but it will be divided into five equal parts, each niece and nephew taking one, *jure proprio*. Ibid.

4. If in such case, the two nieces, (children of the deceased sister,) be dead before the intestate, living the two nephews, and the niece, (the child of the brother,) and one of the two deceased nieces has left two children, and the other six children, the estate will still be divided into five parts; of which, one part will be allotted to the niece living, another to each of the nephews, one other part to the two children of the deceased niece, and the other fifth part to the six children of the other niece; and this, on the principle contained in the 16th section, that if a part of those in the same degree be dead, and a part living, the issue of those dead shall take per stirpes, that is, the share of their deceased parent. Ibid.

5. Although the 16th section does not provide, in terms, for the case of a brother and sister dying before the intestate and leaving an unequal number of children, and does not in words declare what portion of the inheritance shall descend to those children, yet the spirit of that section, taken in connection with the first and fourth sections, justify the construction that they will take per capita. Ibid.

DETINUE.

See Trespass, No. 4, 5, 6.

DEVISE.

1. See Distribution.

2. A devise of lands to the son of the

testator for life, 'and in case he should have heirs lawfully begotten, that he shall, or may dispose of the said land to either, or amongst the said heirs, as he shall think proper, but in case that my son should die without such heirs, then my Will is, that the said lands be equally divided amongst my daughters,' gives a fee tail, converted by the Act of Assembly into a fee simple. Ball v. Payne, 73

DISTRIBUTION.

Testator devised 'all the rest and residue of the money arising from the sales of my estate, and debts due to me, to all my dear grand-children, who shall attain their ages of twenty-one years, to be invested in Bank stock by my Trustees, for the use of my grand-children, or such of them as are now born, or may be born before distribution, and who shall attain that age,' &c. The period of distribution above mentioned, means the time when the first legatee shall come of age, and have a right to demand his aliquot part, to the exclusion of all others, who should be born after that period.

Lyoña v. Turner et ux., 41

EMANCIPATION.

1. A promise by a master to emancipate his slave, after the performance of a certain condition, cannot be enforced by a Court of Equity, even though the condition be complied with. The Jurisdiction of Equity extends only to cases where the pauper has a legal right to freedom, but there is some impediment to the assertion of the right in a Court of Law.

Sawney v. Carter, 173

2. A Deed of Emancipation of a slave, executed in 1781, (at which time emancipation was not permitted, except in certain cases, (although it directs the freedom to commence when he should come of age, that is, in 1796, is absolutely void.

Moses v. Denigree, 561

3. The devise in *Pleasants v. Pleasants*, was supported, because the Testator directed that his slaves should have their freedom, when the Laws would permit it;

but here, there is no such condition: 777 *it is an absolute Deed, unlawful when made and not rendered lawful by the circumstance that the Law did afterwards permit emancipation. Ibid.

4. The Act of Pennsylvania of 1780, for the gradual abolition of slavery, clearly includes all negro and mulatto children born of slave mothers after the passage of the Act, except in the cases excepted by the 10th section, such as domestic slaves attending on Delegates to Congress, &c.

Spotts v. Gilaspie, 566

5. If, therefore, a citizen of Pennsylvania, after the passage of the Act bequeath a female slave to a citizen and resident of Virginia, and after the legatee's title has accrued the slave have a child born in Pennsylvania, and the child be then brought to Virginia by its master, the child is free, and may recover its freedom in our Courts. Ibid.

6. But the mother is still a slave, and though her children born in Pennsylvania are free, those born in Virginia are slaves. Ibid.

7. A Deed of Emancipation, by which the master manumits his slaves at his death, but directs that they shall serve him as long as he lives, and at his death go free from all persons, passes a present right to freedom, reserving a right in the grantor to their personal services during his life, as a condition of the emancipation. Therefore, a child born of one of the emancipated females in the interval between the execution of the Deed and the death of the grantor, is free from its birth.

Isaac v. West's Ex'or, 652

8. If the construction of a Deed of Emancipation be doubtful, resort may be had to the rule, that the Deed is to be taken most strongly against the grantor, and to the spirit of the Laws of all civilized nations, which favors liberty. Ibid.

EQUITY.

1. Equity will not interpose to arrest a Judgment at Law, where the point has been fully decided in a Court of Law, unless there has been some surprise, defect of evidence, fraud, or some call for discovery.

Brown v. Street, 1

2. See Fraud, No. 1.

3. There is no case in which a Court of Equity can assign to a creditor a specific portion of his debtor's property.

Auld v. Alexander, 98

4. The doctrine of substitution, how far it extends. Ibid.

5. See New Trial, No. 1, 2.

6. See Bill of Discovery.

7. Under what circumstances, a pauper, who has brought a suit at Law for his freedom and failed, may afterwards go into Equity for the same object, and obtain relief.

Talbert v. Jenny, 159

8. See Emancipation, No. 1.

9. See Execution, No. 1, 2.

10. See Mills, No. 1, 2.

11. See Injunction, No. 1, 5.

12. Where a vendor sells a lot of land by parol, puts the purchaser in possession and receives the purchase money, but conveys a different lot, on a Bill filed by the purchaser, requiring the vendor either to correct the mistake by conveying the lot really purchased, or to refund the money, a Court of Equity, on being satisfied that the vendor had no title to the property sold, will rescind the contract, and decree the money to be refunded.

Lamb v. Smith, 552

13. It is not the province of a Court of Equity to see that justice is done in the abstract in all possible cases, but only to lend its aid, when from any cause without his own default or neglect, a party Defendant at Law, cannot have justice done him in the Courts of Law; and this is true, where the discounts, abatements, or damages which are claimed to be set-off in Equity, arise out of a breach of the same contract on which the Judgment at Law is founded.

Cabell's Ex'ors v. Robert's Adm'rs, 580

14. Therefore, where C. bound himself to pay 100l. to R. for grain to be delivered by him for a fixed price, and within a certain time, and R. bound himself to C. to deliver grain of 100l. value, and R.'s Adm'rs sued

C. on the bond, and recovered Judgment for the 100l., Equity will not relieve C. for his payments, and discounts were a proper subject of defence at Law: or, if R. failed to comply with his contract, C.'s remedy was at Law, on the bond executed by R. Ibid.

15. Equity will not decree the rescission of an executed contract, merely on the ground of an ignorance of Law, where there is neither fraud, concealment, nor mistake, in fact.

Brown v. Armistead, 594

16. See Infant.

17. Where a Plaintiff goes into Equity for a settlement of accounts, on the ground that he cannot substantiate the items in his account, except by the Answer and testimony of the Defendant himself, and in the progress of the suit, it appears 778 by his own showing, *that the account is susceptible of proof by witnesses, in a Court of Law, his Bill should be dismissed.

Meze v. Mayse, 658

18. A Bill in Equity does not lie to recover damages for breach of contract merely sounding in damages. Ibid.

ESCAPE WARRANT.

Although an Escape Warrant ought regularly to show on its face that the person who issues it, is a Justice of the Peace, yet, on a Habeas Corpus sued out by the person arrested under it, if it is proved that he is a Justice, the prisoner ought not to be discharged.

Jones v. Timberlake, 678

EVIDENCE.

1. If two persons combine to effect a given object, in an action against one of the confederates, the declarations of the other, who is not a party to the suit, may be given in evidence as a part of the Res Gesta.

Clayton v. Anthony, 285

2. See Courts of Law, No. 1.

3. See Hand-writing.

4. An Order of Court appointing Commissioners to allot a widow her dower in slaves, although made ex parte, and on motion, is proper evidence, in a suit between a distributee of the intestate, and a purchaser from the widow's second husband, to show that she had only an estate for life; especially where the widow consented to the allotment.

Hunter v. Jones, 541

5. The Answer of a Defendant in Equity is competent evidence against the same Defendant, in a suit at Law against him, although the Plaintiff at Law was not a party to the suit in Equity. Ibid.

6. The declarations of a vendor of a slave, made after the sale, are good evidence against the vendee, if the accord with the acknowledgments of the vendee himself, previously made. Ibid.

7. If a witness introduced by the Plaintiff, speaks of receipts taken by himself, the evidence ought to be rejected unless he can show that they are lost, or out of the power of the Plaintiff.

Hamlin's Adm'r v. Atkinson, 574

8. A bond given by a Guardian, on a

settlement with his Ward, after she comes of age, is no discharge of the Guardian's bond, previously given by the Guardian and his sureties; nor can it be given in evidence, under the plea of conditions performed, in bar of the specialty though it may be given in evidence as proof of what is due. Ibid.

9. When the opinion of an expert is offered in evidence, the Court may hear evidence to ascertain whether he is an expert, and then allow the opinion to be given in evidence to the Jury.

Mendum's Case, 704

10. Minute and remote circumstances may be given in evidence. Ibid.

11. If the Commonwealth gives evidence of a prisoner's confessions, in the Examining Court, but declines giving them on his trial, the prisoner cannot be allowed to give evidence of what the Commonwealth proved in the Examining Court touching those confessions. Ibid.

12. The prisoner cannot be allowed to prove what an absent witness, but who is within the reach of process, swore to on the examination. Ibid.

13. See Recognizance, No. 1.

14. See Answer.

15. See Forgery, No. 3.

16. See Frauds—Statute of, No. 2.

EXAMINING COURTS.

1. If an Examining Court remand to the Superior Court, a prisoner charged with forgery, he may be indicted not only for forgery, but for procuring the instrument to be forged, and for acting and assisting in the forgery.

Huffman's Case, 685

2. So, if he is remanded for passing a forged note, he may be indicted for passing it, knowing it to be forged. Ibid.

3. What is the first Court after a prisoner's commitment.

See Mendum's Case, 704

EXECUTION.

1. It is a general rule, that where slaves are improperly taken in execution, the owner may claim the aid of a Court of Equity to prevent their sale.

Randolph v. Randolph, 194

2. But, if the slaves have no peculiar value in the eyes of the owner, being regarded by him merely as other property, Equity ought not to interfere. Ibid.

3. Where distribution has been made to distributees, or legatees, with the assent of the Executor or Administrator, a creditor of the decedent cannot levy his Execution on the personal property so distributed, under a Judgment obtained against the personal representative. Ibid.

4. See Deed of Trust, No. 2, 3, 4.

779 *5. According to the equitable and correct construction of our Statute concerning Executions, (section 3,) if a creditor, by Judgment or Decree, sues out a Fi. Fa. which is levied, and returned satisfied in part only, he may take out another kind of Execution, as the Elegit, without pursuing the Fi. Fa. to a return of Nihil.

Coleman v. Cocke, 618

6. See Decree, No. 1.

EXECUTOR.

1. Where the Executor of one who had been Executor of another is sued for a debt due by the first Executor to the estate of his testator, the pleadings must state distinctly that the claim is against the second Executor as representing his testator in his executorial character, in order to entitle the Plaintiff to rank as a creditor of the first dignity under the Act of Assembly.

Shearman v. Christian, 49

2. See Execution, No. 3.

3. The official bond of an Executor, in the penalty of which the names of the obligees are not inserted, and in the condition of which the names of the Executor, and of the Court to which he was to return the account of his transactions, are blank, is materially defective, so that no Judgment can be rendered on it.

Cowling v. Nansemond Justices, 349

4. A Testator directed his Executors to sell his land "provided the said land will sell for as much as, in their judgment, will be equal to its value:" the Executors renounce. An Administrator with the Will annexed, may sell the land under the authority of the Statute, for the proviso in the Will does not differ this case from other cases in which the Executor is authorised to sell.

Brown v. Armistead, 594

FACTS.

See Courts of Law, No. 1.

FORGERY.

1. It is not necessary to set forth in an Indictment the persons whom the prisoner procured to forge the instrument or with whom he acted and assisted in the forgery. A general description, in the words of the Statute, is sufficient.

Huffman's Case, 685

2. An Indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, is to be understood as charging that he caused it to be done in his presence, and that he aided, being present: that is, that he was principal in the second degree, not an accessory. Ibid.

3. A forged paper is passed by a prisoner bearing date in 1828: immediately after, with the knowledge of the holder, the prisoner alters the date to 1827. The Indictment sets forth its tenor, and describes it as dated in 1827. The paper is proper evidence in support of the Indictment, notwithstanding the proof that it bore date in 1828, when passed. Ibid.

4. See Examining Courts, No. 1, 2.

FRAUD.

1. A slave is mortgaged, and afterwards sold to the mortgagee; the bill of sale is not recorded, and the vendor retains possession, such sale is fraudulent, as against a subsequent purchaser; and Equity will, under the particular circumstances, entertain the suit of the purchaser for the recovery of the slave against the fraudulent vendee, who had clandestinely got possession of him. Nor can such fraudulent vendee prevent a recovery by showing that

the Plaintiff did not take possession at the instant of his purchase, for such omission cannot make good the fraudulent sale.

Glasscock v. Batton, 78

2. In debt on a bond, a plea that the bond was obtained by fraud, covin, &c., without saying whether the fraud was in the consideration of the bond, or in its execution, is immaterial.

Tomlinson's Adm'r v. Mason, 169

3. See Deed of Trust, *passim*.

4. The doctrine of fraud *per se* investigated by Judge Green.

Claytor v. Anthony, 285

5. Conveyances from a father who was in debt, to his sons, without any valuable consideration, declared to be grossly fraudulent, and decreed to be set aside at the suit of the creditors of the father, who obtained their Decrees long after the execution of the Deeds.

Coleman v. Cocke, 618

6. If a father purchase lands, holds the possession as real beneficial owner for several years, and then being in debt, direct the conveyance to be made to
780 "his son, the conveyance may be impeached for fraud by a creditor of the father. Ibid.

7. See Purchaser, No. 2.

FRAUDS, Statute of.

1. If C authorise H to say to a merchant, "that he C would pay for any goods sold to his son-in-law L," or to any merchant of whom L "might purchase, or might wish to purchase goods, that he would pay for L" a certain sum; this is a collateral promise, and being verbal, is void under the Statute.

Cutler v. Hinton, 509

2. An entry in the merchant's books against L is strong evidence against the merchant that he is dealing with L and not with C, but if the entry be against C., such entry is not evidence for the merchant, so as to make that an original, which would otherwise have been a collateral promise. Ibid.

3. The Statute of Frauds is a wise, and salutary law, and should be fairly, and fully carried into execution by the Courts. Ibid.

4. There having been a written agreement on a sale of land, that the purchaser shall search for coal for a limited time, and on finding it shall pay an augmented price for the land; a parol agreement, varying the written agreement, by extending the time for the search, is within the Statute, and will not be enforced by a Court of Equity.

Heth's Ex'or v. Wooldridge's Ex'or, 605

FRAUDULENT GIFTS.

1. A slave is given to an infant, by Deed, with a reservation expressed in the Deed that the donor is to keep the slave, and raise it for the donee, until she arrives to the age of thirteen. The slave is delivered to the donee on the day of the execution of the Deed, and on the same day is taken back by the donor. The Deed is never recorded: the donee never lived with

the donor. The gift is void under the Act of Assembly concerning gifts of slaves, and the Donee having past the age of 13, cannot recover the slave from the donor.

Durham v. Dunkly, 135

2. A gift of slaves can only be evidenced by a Deed or Will, duly proved and recorded, or by possession passing from the donor to the donee, and remaining with the donee, or some one claiming under him. Ibid.

3. The possession here meant is an actual, abiding, permanent possession. Ibid.

4. A parol gift of a slave by a father to an infant child living with him, by a declaration that the gift is made without delivery of possession, is not good against a subsequent purchaser of that slave, although such purchaser knew, at the time of his purchase, that the father had so made the gift.

Hunter v. Jones, 541

5. See Insolvents, No. 2, 3, 4.

6. If a father give a slave to a child, and the donor retain possession of the slave and exercise control over it, the gift is not the less fraudulent, because the child always lived with the father and the slave was always called the child's in the family and neighborhood.

Shirley v. Long, 764

7. A parol gift of a slave to a child, without possession in the donee, is void, as between donor and donee; and if the slave given be conveyed by Deed, (unaccompanied with possession in the donee,) and without being recorded, it is void as to creditors and purchasers. Ibid.

8. See Answer.

FULLY ADMINISTERED.

See Verdict, No. 1, 3.

GAMING.

The distinctive feature in the character of the games, called A. B. C. and E. O. and Faro Bank, is, that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the games, or tables. If other games resemble those standard games in that distinctive feature, they come within the terms of the 17th section of the Gaming Act, being "gaming tables of the same or like kind, and are liable to the penalties denounced against those standard games, whatever may be the denomination of those other games, and whether played with cards, dice, or in any other manner. Under this construction, the exhibitor of a gaming table, called Hap-hazard, alias Snickup, &c. held to be liable to the same punishment with the exhibitor of Faro Bank.

Wyatt's Case, 694

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*GUARDIAN.

1. If an Administratrix settles her accounts as such, in which a balance is found due to the estate of the intestate, and then she qualifies as Guardian of the infant children of the intestate, and receives their distributive shares into her hands, the sureties in the Administration Bond, are absolved from the claim of the

distributees, and the sureties in the Guardians' Bond are bound to them.

Myers v. Wade, 444

2. A Guardian cannot apply any part of the principal of the infant's estate to his education, or maintenance, without the previous consent of the Court appointing the Guardian, according to the provisions of the 26th section of the Act concerning Guardians. Ibid.

3. A parent who is Guardian of his children, is more bound than others to a strict observance of this rule, for there is a natural, if not a legal obligation on all parents to support their children, if of ability to do so. Ibid.

4. If the expense of maintaining and educating infant wards, exceeds their annual income, until they become of age to render service; and if, when they arrive to that age, their services are equal to their support, the surplus of expenditure during the former period, ought to be set-off against the income of their estates during the latter period, till they arrive to the age of 21 years. Ibid.

5. Guardians in Socage, and Testamentary Guardians, (although they have no beneficial interest,) yet have a legal interest, accompanied with the possession of the Ward's land during the Guardianship. If, therefore, a person trespass on the lands of an infant, and cut and carry away his trees without the license of the Guardian, the Ward cannot maintain trespass, but the Guardian may, and he must account to the Ward for the damages recovered.

Truss v. Old, 556

6. If the trees are cut and carried away by permission of the Guardian, no trespass is committed, and the infant, even after the Guardianship has ceased, cannot maintain trespass for the act. The wrong must be compensated to the Ward by the Guardian. Ibid.

7. It seems that if timber trees, growing on the inheritance of the Ward, are thrown down by tempest or otherwise, they become personal property, and the Guardian has a legal right to sell them as being perishable, and of no value, except as a subject of sale, and in such case, the infant cannot bring trover for them. Ibid.

8. See Evidence, No. 8.

HAND-WRITING.

1. The evidence of a witness as to hand-writing, who has formed an acquaintance with it, from seeing the party write, or from a course of correspondence, is not rendered incompetent, nor its weight impaired, by his having referred to papers in his own possession, known to be written by the party, to refresh his (the witness's) memory.

Redford's Adm'r v. Peggy, 316

2. Qu. Is the evidence of a witness, who has frequently seen the Testator write his name to receipts; and who has resorted to those receipts to refresh this memory; who testifies, that he believes the body of the Will and signature to be the hand-writing of the Testator, though he forms that belief from comparison, and would not be able to prove the hand-writing, except from comparing it with the signature to

the said receipts, competent to prove the hand-writing? The Court, of four Judges, was equally divided. Ibid.

3. Qu. May not a Court of Probate resort to a comparison of hand-writing? Ibid.

IGNORANCE OF LAW.

See Equity, No. 15.

INDICTMENT.

1. In an Indictment with three counts, if in the third count it is omitted to be stated that the Grand Jury, "on their oath," present, (the first two counts being regular in that respect,) the objection is obviated by the fact, that the Record states, that the Grand Jury were sworn in open Court.

Huffman's Case, 685

2. See Examining Courts, No. 1, 2.

3. See Forgery, No. 1, 2.

INFANT.

Although it is a general rule, that an infant Defendant is not bound by a Decree, if *when he arrives of age, he can show error in it, yet it seems, that where a Decree is obviously for his benefit, his rights may be absolutely bound by it.

Brown v. Armistead, 594

INJUNCTION.

1. A creditor cannot have the aid of a Court of Equity to prevent, or interfere with in any way, the disposition that a debtor may make of his property, unless the debtor has first proceeded as far as he can at Law. To subject real estate, he must have obtained a Judgment at Law, and to subject personalty, he must have Judgment and Execution.

Rhodes v. Cousins, 188

2. It is an irregular proceeding in a Chancellor, to dissolve an Injunction in Court, with a direction, that the order of dissolution should not go out; and then in vacation, to direct that the order should go out.

Randolph v. Randolph, 194

3. See Appeal, No. 1.

4. Where an Injunction is granted, and a material fact is alleged in the Bill, and not denied in the Answer, such fact must be taken as true on a motion to dissolve; and no other proof will be required on such motion. Ib.

5. The owner of slave property, which has been taken by virtue of an Execution against another's goods and chattels, is entitled to an Injunction to stay the sale, though he neither alleges nor proves the peculiar value of the property.

Harrison v. Sims, 506

6. When a Chancellor refuses to re-instate an Injunction, on new proofs of the allegations of a Bill, a Judge of the Court of Appeals has a right, on an appeal to him, to re-instate it.

Webster v. Couch, 519

7. In a Bill of Discovery, if the Defendant makes no discovery, but on the contrary negatives the allegations of the Bill, the Injunction awarded on the Bill, should be dissolved. Ibid.

8. If a Bill, which is in part an Injunction, be multifarious, that objection cannot

be made on a motion to dissolve the injunction. It must be made at the final hearing.

Shirley v. Long, 764

INSOLVENTS.

1. When a debtor takes the insolvent oath, and delivers in a schedule, the Sheriff is vested by the Act of Assembly, with all the insolvent's estate, interests and rights, whether they are named in the schedule, or not, and whether the property be in the possession of the debtor, or in that of any other person.

Shirley v. Long, 735

2. If an insolvent debtor, having made a fraudulent gift of a slave to a child, in his schedule disclaims all title to the said slave, the Law vests in the Sheriff the legal title to the slave, the gift being void, and he may recover it in a Court of Law from the debtor, who still retains possession of it. Ibid.

3. The Sheriff has the right to sell, and to pass by Deed, a slave, or other chattel, which the insolvent debtor has made a fraudulent gift of to his child, (but of which the debtor retains possession,) and the purchaser under such sale may recover the slave, or other chattel, although the sheriff had not possession of it, at any time. By two Judges. Ibid.

4. If the property so fraudulently given, be not in the possession of the insolvent debtor, but of some other person, although the title vests in the Sheriff, it seems that he cannot sell the property, but must proceed by summons against the person holding it, under the 35th and 36th sections. Ibid.

5. The Sheriff is a Trustee for the creditors, and if he violates his trust, or the spirit of the Act, by selling the chattels improperly, he is responsible like other Trustees, but the sale is not void, and the purchaser may recover. Ibid.

6. See Deed.

INTEREST of Money.

1. The vendee of land, on a credit, to whom a Deed is made, and possession given, is not excused from paying interest on the purchase money, because of the payment of the principal having been delayed by the adverse claim and suit of a third party, the vendee during all that time having enjoyed the issues and profits of the land.

Selden v. James, 465

2. The covenant of the vendor was to sell and convey a perfect title, (which was done, as proved by the result of the trial,) not that there should be no claimants; he has not, therefore, committed a breach of his covenant; in this, there is no excuse for non-payment of interest. Ibid.

3. The vendee's costs in defending the suit cannot be set off against the interest. Ibid.

783 *4. To excuse the vendee from paying the interest, it is not enough that he should be ready and willing to pay the principal; it ought to appear that he kept it useless and unproductive by him, and that he gave the vendee notice of that fact. Ibid.

5. In this case the Commonwealth being the claimant, who proceeded by Inquisition of Escheat, the supposed seizin in Law in the Commonwealth, upon office found, did not prevail over the actual seizin of the vendee, who, as he actually enjoyed the rents and profits, is not excused from paying interest by that supposed seizin. Ibid.

JEOFAILS.

In debt on a Judgment for 50l. 19 10, the verdict finds for the Plaintiff the sum of 50l. 'that being the debt in the Declaration mentioned;' the error is in the sum only, which may be regarded as surplage, and the verdict is cured by the Statute of Jeofails. But the Judgment being for the lesser sum, the Defendant cannot complain of it.

Roane's Adm'rs v. Drummond's Adm'rs, 182

JOINT OBLIGATIONS.

1. A sealed instrument, written in the singular number, but signed and sealed by two persons, is joint and several.

Holman & Wilson v. Gilliam, 39

2. Where a joint Judgment is obtained against two Defendants, and one dies, an action of debt on the Judgment lies against the representative of the deceased Defendant, the Law respecting joint rights and obligations being applicable to joint Judgments.

Roane's Adm'rs v. Drummond's Adm'rs, 182

JUDGMENT.

1. A demurrer to the Declaration is filed, and also a demurrer to the evidence, and the Court decide against the demurrer to the Declaration; whereupon, the jury find a verdict for the Plaintiff, subject to the opinion of the Court on the demurrer to evidence. The Court render final Judgment for the Plaintiff. This shall be considered as a Judgment on the demurrer to evidence, in favor of the Plaintiff.

Holman & Wilson v. Gilliam, 39

2. The mode in which a party must avail himself of a former Judgment for the same cause of action is by plea in bar, or in an action of assumpsit, by evidence on the general issue.

Cleaton v. Chambliss, 86

3. A former Judgment cannot be pleaded in bar, unless it was directly upon the same point, and between the same parties or privies. Ibid.

4. A Judgment between the same parties, upon the same point, which, if pleaded, would have been a perfect bar is, when used as evidence under the general issue, not conclusive on the Jury, but only evidence to be weighed by them. Ibid.

5. A Judgment, when assets, refers to the time of the plea pleaded; and as to assets received after that time, no enquiry can be made in that suit.

Gardner's Adm'r v. Vidal, 106

JURISDICTION.

1. Where the principal sum demanded, together with the interest, is of sufficient amount to give jurisdiction, the Court of Appeals will take cognizance of the Case.

Stratton v. Mutual Assurance Society, 22

2. A Judgment was rendered in the Superior Court of Chesterfield, on the 15th November, the day on which the General Court is directed by Law to be held at the Capitol: the distance is judicially known to be not more than three hours ride from one place to the other. It does not appear on the Record but that the Judgment might have been rendered in time to enable the Judge to close that Court, and attend at the Capitol to his duties as one of the General Court, on the same day. The Superior Court had jurisdiction to render the Judgment on that day.

Mendum's Case, 704

3. Qu. May not a Superior Court extend its Session into the appointed Term of the next succeeding Superior Court, so that the Judge may leave himself time to open his next Court by 4 o'clock of the third day? Ibid.

4. Qu. May not a Judge, if the business of the Court imperiously require it, keep open a Court so long as that he cannot go to the succeeding Court in time to open it? Ibid.

LARCENY.

See Verdict, No. 6, 7, 8.

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*LEGACIES.

1. Although legacies do not stand on as high ground as debts, yet if the personal fund be inadequate, or if there be expressions in a Will tending to show that the Testator had the land in his mind, a Court will make them a charge on the land, rather than they shall go unpaid.

Downman v. Rust, 587

2. Therefore, where a single woman, having but little personal property, and real estate of considerable value, having only one brother, who would have been her heir and distributee, by her Will bequeaths pecuniary legacies, and makes the brother executor and residuary legatee, she must be considered as intending that the legacies should be paid out of the land; and they were decreed to be a charge upon it. Ibid.

3. A purchaser of the land from the devisee, with notice of the legacies, is bound to see to the application of the purchase money, and the land held to be chargeable in his hands for the legacies: not on the ground of fraud, but on the principle of caveat emptor. Ib.

LIMITATIONS—Act of.

1. A plea of the Act of Limitations ought not to be received after issue joined on another plea, unless some good reason be assigned why it was not sooner tendered. Note. It was tendered four years after the first issue.

Martin v. Anderson, 19

2. See Mutual Assurance Society, No. 1

LUNATIC.

A committee of a lunatic, appointed by a Chancellor, is a mere Commissioner of the Court, managing the person and estate of the lunatic, under the direction of the Chancellor, and is responsible to the Court as a receiver, removable in its discretion, and not liable to be sued at Law on claims, either against the lunatic himself, or his

estate, as in the case of a committee appointed under the Statute.

Bolling v. Turner, 584

MERGER.

The question, whether trespass is merged in felony, and whether felony is a bar, or even a suspension of a civil remedy for the same act, investigated by Judge Green.

Allison v. Farmers' Bank, 204

MILLS.

1. Where a Corporation claims a right to abate a mill-dam as a nuisance, because it obstructs the navigation of a stream, and such abatement would produce great loss to the mill owner, and great inconvenience to the public, a Court of Equity has jurisdiction to prevent such abatement, and to preserve to the mill-owner his establishment, until the question, whether the mill-owner has, or has not, a right to keep up his dam be decided.

Crenshaw v. Slate River Company, 245

2. The inadequacy of the damages, which any Jury could give to the mill-owner, in a suit against a Corporation, for the loss and injury sustained by him, by the removal of his dam, is also a good ground for the interposition of Equity. Ibid.

3. Although grants of lands to individuals may include the bed, and banks of streams or rivers, yet the public have a right to the use of all such streams for the purposes of navigation: but the Legislature (representing the sovereign power,) may confer on individuals, by general Law, or particular grants, rights in opposition to, and paramount to this public right and such paramount rights have been conferred on owners of mills, by the General Law authorising the Courts to establish mills. Ibid.

4. A grant by the County Court, to erect a dam and establish a mill, (after the precautionary proceedings prescribed by the General Law, have been adopted,) is a perfect one, and vests in the grantee all the public right to the stream, or so much of it as is necessary to the full enjoyment of the mill erected under the order. Ibid.

5. After a dam and mill have been erected according to Law, another Act of Assembly, which imposes on the owner of the dam heavy burthens for the benefit of navigation; and on his failure to do what is thus onerously laid on him, vests in a company the power to abate the dam as a nuisance, without a full indemnification, and equivalent for the injury thus done to his vested rights, is unconstitutional and void. Ibid.

MISNOMER.

A suit instituted in one name will not justify a Declaration and Judgment 785 in another; *therefore, when a Plaintiff has two baptismal names, and a mistake is made in the second or middle name, it is a misnomer, and is a fatal error, not only on a plea in abatement, but on a Judgment by default.

Ming & Green v. Gwatkin, 551

MURDER.

1. To constitute murder in the first degree, it is not necessary that the premedi-

tated design to kill, should have existed for any particular length of time. If therefore, the accused, as he approached the deceased, and first came within view of him, at a short distance, then formed the design to kill, and walked up with a quick pace and killed him without any provocation then or recently received, it is murder in the first degree.

Whiteford's Case, 721

2. The Legislature, in their description of offences which constitute murder in the first degree, has at first enumerated some of the most striking instances of deliberate and cruel homicide; but finding it impossible to enumerate all of them then proceeded, by general words to embrace all kinds of wilful, deliberate and premeditated killing. It is improper to interpolate the word "such" in that general description.

Ibid.

3. It seem, that the offence of homicide, by a workman throwing timber from a house, into the street of a populous city, without warning, or of a person shooting at a fowl *animo furandi*, and killing a man, are instances of murder in the second degree.

Ibid.

MUTUAL ASSURANCE.

1. On a motion for quotas by this Society, the Act of Limitations is no defence, because the Declaration for insurance is a sealed instrument.

Stratton v. Mutual Assurance Society, 22

2. A purchaser from one who has insured the property, is liable for quotas, upon motion, as well as an original subscriber.

Ibid.

3. If a Defendant in such motion does not object that he is not assignee, in the Inferior Court, it is too late to make the objection in the Appellate Court.

Ibid.

4. Quotas due before the Act of 1822, may be recovered by motion, before a sale under that Act.

Ibid.

5. The 7½ per cent. imposed by the Society to indemnify them for the expenses incurred in the employment of collectors are not usury, nor in the nature of a penalty, but stipulated damages.

Ibid.

6. A Judgment "that the Plaintiff recover damages, and expenses, according to law, and the rules and regulations of the Society," without specifying the amount, or nature of the damages and expenses, is erroneous for uncertainty.

Ibid.

NAVIGATION.

See Mills, No. 3, 4, 5.

NE EXEAT.

A Writ of Ne Exeat cannot be granted unless, 1st. There is a precise amount of debt positively due: 2d. It must be an Equitable demand on which the Plaintiff cannot sue at Law, except in cases of account, and a few others of concurrent jurisdiction: 3d. The Defendant must be about to quit the country, proved by affidavits as positive as those required to hold to bail, at Law.

Rhodes v. Cousins, 188

NEW TRIAL.

1. After a trial at Law, a Court of Equity

will not grant a new trial, merely because injustice has been done, but the party applying for the new trial must show that he has done every thing that could be reasonably expected from him, to obtain relief at Law.

Faulkner's Adm'x v. Harwood, 125

2. After a verdict and judgment at Law, Equity will not grant a new trial, on the ground of newly discovered evidence, unless the applicant has used proper diligence to procure such evidence before the trial at Law, or the case is involved in great doubt and obscurity.

Arthur v. Chavis, 142

NON EST FACTUM.

1. The plea of Non Est Factum, whether general or special, must conclude to the country: and in such case, the Plaintiff cannot reply any new matter. He must either accept it by a similitur or demur.

Cleaton v. Chambliss, 86

2. The consent of an obligor, to an alteration of the bond, given after the alteration is made, will not repel the plea of Non Est Factum; but a consent

786 *given before or at the time of, the alteration, will be considered as a re-execution.

Ibid.

NONSUIT.

1. The damages of \$5, given by Act of Assembly in case of non-suits, ought to be awarded in all cases of dismissals and discontinuances, produced by a voluntary abandonment of the cause by the Plaintiff, after the Defendant's appearance, whether in the Office, or in Court, and such dismissals ought to be entered up as non-suits.

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2. But the dismissal of a suit for a failure to give security for costs, is not such a voluntary failure to prosecute as authorises this Judgment. Nor in case of a Retraxit ought these damages to be awarded.

Pinner v. Edwards, 675

NUISANCE.

To maintain a public prosecution for a nuisance, (in damming up the waters of a creek, whereby they became stagnant, and the air corrupted and infected,) it is necessary in the Indictment to allege, and on the trial to prove, that the obstructions produced the nuisance, in or near a public highway, or in some other place in which the public have a special interest.

Webb's Case, 726

PARENT AND CHILD.

1. Where a father, being indebted to his children, afterwards conveys property to them, which is more than equal to the amount of the debt, this conveyance shall be presumed to be in satisfaction of the debt, if there are no circumstances to prove a contrary intention.

Kelly v. Kelly's Ex'ors, 176

2. Although the property conveyed, and the debt, are not ejusdem generis, the one may be a satisfaction of the other, if the intention of the testator be apparent, that such should be the effect.

Ibid.

PAROL AGREEMENTS.

See Frauds—Statute of.

PAUPER.

See Equity, No. 7.

PAYMENT.

See Assigned Bond.

PLEAS.

1. Where a plea concludes with a verification, there cannot be a joinder of issue without a replication.

Lockridge v. Carlisle, 20

2. See Non Est Factum, No. 1.

3. See Judgment, No. 2, 3, 4.

4. See Fraud, No. 2.

5. Where property is sold, a bond taken, suit brought, and the Defendant pleads that the property was of less value than it was represented to be, such defence, sounding altogether in damages is bad; and the proper remedy would be an action of deceit.

Tomlinson's Adm'r v. Mason, 169

6. See Demurrer, No. 2, 3.

7. A Defendant files four pleas, one general, and three special. The third plea, which is the second special plea, is bad, and the fourth plea, being the third special plea, is good. The Record states, that the Plaintiff objected to the reception of the third special plea, which objection was over-ruled. There is no other designation of the plea which was objected to, than its number. The Appellate Court having no other guide than the Record, decided that the objection to the third special plea was properly over-ruled.

Graham's Adm'rs v. Pence, 529

8. See Trespass, No. 8.

PROMISE.

1. A. being indebted to B., transfers, without written assignment, two bonds due by C. to A. Previous to the transfer, C. promise B. that they should be paid when they should become due. B. brought suit in the name of A. on the bonds; C. pleaded non est factum, and a verdict and judgment were rendered in his favor. B., the transferee, then sued C. on his promise. Such an action may well be maintained.

Cleaton v. Chambliss, 86

2. See Emancipation, No. 1.

PURCHASER.

1. A Defendant, who claims to be a purchaser without notice, must expressly deny notice in his Answer, though it is not charged in the Bill.

Downman v. Rust, 591

2. Although if a son obtain a conveyance for land purchased by his father, that conveyance may be set aside for fraud by a creditor of the father, whilst the land is in the hands of the son; yet, if the son sell and convey the land to a third person for valuable consideration who has no notice, of the fraud between father and son, such person being a bona fide purchaser, will be protected in his purchase, against the creditors of the father from the operation of the Statute of Frauds, by its proviso.

Coleman v. Cocke, 618

3. Though the Deed of such bona fide purchaser be not duly recorded, yet he will be protected in his purchase against a cred-

itor of the father, who obtains a Decree against the father after the bona fide purchase so made, because such a purchase has a prior equity to such creditor. Ibid.

4. See Fraud, No. 5, 6.

5. See Legacies, No. 3.

RECOGNIZANCE.

1. In recognizance of bail, for the appearance of a prisoner to answer an Indictment, if the principal be bound in a particular sum, and the sureties be separately bound in a like sum, on default by the principal, and on a rule against the sureties, to show cause why a Sci. Fa. should not be awarded against them the principal recognizor is not a competent witness for them, to show that the Sci. Fa. should not be awarded.

Commonwealth v. Craig, &c., 731

2. If at a subsequent Term of a Court, after the default of the principal has been recorded, the sureties, on a rule against them, can show, to the satisfaction of the Court, that the principal was rendered unable, by reason of wounds and sickness, to appear at the proper Court, the Court may spare the recognizance, and decline awarding a Sci. Fa. Ibid.

3. In showing cause against the rule, affidavits are admissible without requiring the presence of the witnesses in Court, if the Court be satisfied that they have been fairly taken. Ibid.

RETAILERS.

The thirteenth section of the Act for the regulation of Ordinaries, &c. is not to be construed as permitting persons, from the produce of whose estates, ardent spirits are made, or distillers, to retail them, to be drank at the place where sold.

Clemmon's Case, 681

SALES OF CHATTELS.

1. In contracts of sale of chattels a constructive delivery is sufficient to pass the right of property; an actual delivery, either in fact or Law, not necessary.

Pleasants v. Pendleton, 473

2. A merchant sells to another merchant one hundred and nineteen barrels fine flour, lying in a certain warehouse: the barrels have on them the brands of eight different mills; the price is agreed on; the vendee gives a check on the Bank for the agreed price of the whole quantity, the vendor at the same time gives to the vendee a bill of parcels, specifying the number of barrels of each particular brand, and an order on the warehouse-man for the flour, and a receipt in full for the price of the flour. This is a complete and executed contract, and the property in the flour was passed to the vendee. The warehouse and all its contents, including the flour and the check, being burnt the next morning, before the actual delivery of the flour, the loss is the vendee's, and the vendor may recover the price. Ibid.

3. It having been proved to be the usage when barrels of flour are delivered by a warehouse-man to a purchaser, to charge the cooperage if any is needed, to the storer, and also the storage. and to deliver the flour to the order of the storer,

when called for such a sale as that above mentioned does not come within that class of cases where something remains to be done by the vendor to complete the contract. *Ibid.*

4. In this case, there were in the same warehouse, at the time of the sale, a great many other barrels of fine and superfine flour belonging to other persons, but none of them had the same brands as those the subject of this sale, and the vendor instead of one hundred and nineteen, had in fact one hundred and twenty-three barrels of fine flour; that is, four more of two of the same brands, than he had actually sold; but, it was proved, that between barrels of the same brand and quality, there is no difference in price. The one hundred and twenty-three were easily distinguishable from the whole mass in the

788 *warehouse; and although the one hundred and nineteen were never separated from the other four, yet the former number belonged to the vendee, and the latter to the vendor, and it was of no consequence which were the individual barrels which should be subducted as unsold all the barrels of the same brand being exactly of the same value. The property in the one hundred and nineteen barrels passed to the vendee, notwithstanding the want of separation. *Ibid.*

5. A case in 4 Taunt. 24, in which it was held, that Trover would lie for one thousand nine hundred and six-nine Spanish dollars, intermixed in a barrel which contained four thousand seven hundred, and eighteen much relied on. *Ibid.*

6. An established usage constitutes the common understanding of parties, and may be resorted to as the interpreter of the contract. An usage, that flour in store is sold by order, and passes, by the transfer of the order, from hand to hand, without an actual delivery of the flour, is a reasonable usage, and ought to be enforced as part of the contract. *Ibid.*

SCIRE-FACIAS.

Where two obligors are sued, and both die pending the proceedings, though it is not expressed which of them died first; on a Scire-Facias against the Administrator of one of them, who does not demur to the Sci. Fa. nor plead a variance between it, and the proceedings on which it issued, but pleads to issue, it must be understood that the other obligor died first, and that the action survived against the obligor, against whose representative the Scire Facias was sued out.

Hamblin's Adm'r v. Atkinson, 574

SET-OFF.

1. See Assign Bond.
2. See Interest of Mouey, No. 3.
3. Unliquidated damages for a substantive injury, cannot be set-off, either at law, or in Equity, against a legal demand. Webster v. Couch, 519

SHERIFF.

1. See Deed of Trust, No. 2, 3, 4.
2. See Insolvents, *passim*.

SLAVES.

1. See Fraudulent Gifts, *passim*.
2. See Emancipation, *passim*.
3. See Execution, No. 1, 2.
4. See Injunction, No. 4.
5. A son acting for his father, removed, with his father's slaves, from Maryland to Virginia, in March, 1797; bought a farm for his father, and settled the slaves on it. He took the oath, within sixty days, prescribed by Law in such cases. The father also removed shortly after, but did not take the oath. The Law was complied with; for, though the son was not the owner, he was the importer, and the agent of the owner. The negroes adjudged to be slaves.

Montgomery v. Fletcher, 612

6. In a prosecution under the last clause of the 13th section of the Act concerning slaves, &c. against a Defendant for permitting a number of slaves more than five, to be and remain on his lot or tenement, it is not necessary for the Commonwealth to prove that they remained thereon more than four hours at any one time.

Booth's Case, 669

7. The object of the first clause of the section, is to protect private rights; that of the last clause, to guard the public against assemblages which might be dangerous or injurious in a much shorter time than four hours.— *Ibid.*

8. Qu. Does the last clause of that section apply to the assemblage of any other negroes than slaves? *Ibid.*

9. The proof must correspond with the allegation, and therefore, if the Information charges an assemblage of negro slaves, it must be proved that they were so. *Ibid.*

SPECIAL DEMAND.

In debt on a Bill Penal, it is not necessary that the Declaration should aver a special demand of the principal sum; nor need it be proved. The institution of the suit is the demand. Interest may be recovered without such special demand.

Payne v. Britton's Ex'or, 101

SUPERIOR COURTS.

See Jurisdiction, No. 2, 3, 4.

TRESPASS.

1. To maintain Trespass *quare clausum fregit*, there must be an actual possession in the Plaintiff, when the trespass was committed.

Cooke v. Thornton, 8

789 *2. And therefore, such an action will not lie for any damages resulting from the ouster of the Plaintiff, after the trespass was committed, unless the Plaintiff has regained the possession. *Ibid.*

3. See Deed of Trust, No. 2, 3.

4. If a Plaintiff bring Trover or Detinue for a horse, and Trespass for taking the same horse, a Judgment for the Defendant in the action of Trover or Detinue, is a good bar to the action of Trespass.

Hite v. Long, 457

5. In Trespass he might have recovered damages, not only for the force and violence, but for the value of the horse; but having elected to sue for the horse only, or its value, he is bound by his election. *Ibid.*

6. A Plaintiff cannot be allowed to sever one cause of action, and carve two suits out of it; therefore, if the trespass consists in the Defendant's stopping the Plaintiff's waggon and team, and taking by force from the team, a horse claimed by the Defendant, the Plaintiff might in Trespass recover damages for the injury in stopping his team, delaying him, &c. as well as the value of the horse taken; but if he elects to bring Trover for the horse taken, he cannot maintain Trespass for stopping the team, &c., for it was one act. *Ibid.*

7. A Declaration in Trespass, which does not allege that the Plaintiff has property in the thing taken, is bad on demurrer. *Ibid.*

8. If a Declaration in Trespass charges the Defendant with taking a horse from the Plaintiff's possession, but not his property, and with stopping his waggon and team, the residue of the horses being the Plaintiff's property, a plea, which avers that this horse was geared with the others, that the Plaintiff's waggoner endeavoured to carry off the Defendant's said horse, by driving his team violently, and that the Defendant stopped the team, to re-take his horse, using no more force than was necessary for that purpose, is a good plea, the Defendant being justifiable in thus stopping the team for that purpose. *Ibid.*

9. Possession is indispensably necessary to support Trespass quare clausum freight.

Truss v. Old, 556

10. See Guardian, No. 5, 6.

TROVER.

1. See Trespass, No. 4, 5, 6.

2. See Guardian, No. 7.

USAGE OF TRADE.

See Sales of Chattels.

USURY.

If to a Bill to foreclose a mortgage, the Defendant pleads usury, and the Bill itself on its face, and the documents filed with it, present a case of usury, such as is pleaded, it is not necessary for the Defendant to take depositions to support his plea. His adversary's Bill supports his plea.

Lane's Ex'x v. Ellzey, 661

VENUE.

In this State, it is not error that the Venue is laid in one County, and the action brought in another, unless the Defendant is an inhabitant of another County, and moves to dismiss the suit for that cause.

Payne v. Britton's Ex'or, 101

VERDICT.

1. A verdict upon the plea of Fully Administered, ought to ascertain the amount of assets in the hands of the Defendant, at the commencement of the suit, and at the time of the plea pleaded.

Gardner's Adm'r v. Vidal, 106

2. See Judgment, No. 5.

3. A verdict which merely finds that assets sufficient to pay the Plaintiff's demand, "have come" to the Defendant's hands, without saying when, is erroneous. *Ibid.*

4. When a verdict is set aside, as to one issue, it must be set aside in toto. *Ibid.*

5. See Jeofails.

6. If an Indictment charges an offence to have been committed by Richard, and the verdict abridges the name by finding the prisoner Richd. guilty, the verdict is not erroneous.

Poindexter's Case, 668

7. If a person be indicted for grand larceny, and the Jury convict him of petit larceny, without ascertaining the value of the goods stolen, the verdict is sufficient. *Ibid.*

8. A verdict which does not ascertain what goods were stolen, nor their value, nor whether they are forthcoming, or not, &c. but merely finds the prisoner guilty of petit larceny, on an Indictment for grand larceny, is not erroneous. *Ibid.*

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*WIDOW.

If a widow, who is also Administratrix of an estate, appropriates the profits to the purchase of slaves, or other personal property, and afterwards she and her second husband agree to consider the property so purchased as part of the intestate's estate, (in lieu of accounting for the estate,) and to take the property so purchased as part of her dower, or distributable share for life, such arrangement is binding on them, and on purchaser from them, so as to vest the title, after the death of the widow, in the distributee of the first husband, in like manner as if that particular property had belonged to the intestate in his life-time.

Hunter v. Jones, 541

WILLS.

1. A Court of Probate occupies the place of a jury as to facts, and ought to find all proper inferences from facts proved.

Smith v. Jones, 33

2. Where the Court refuse to admit a Will to Record, on the ground of a defect of testimony, and it appears before them, that the desired evidence may probably be procured, if time is allowed, they ought to allow such further time, even though they may have pronounced Judgment, and while the Judgment is still in their power. *Ibid.*

3. What evidence is sufficient to sustain a Will of real estate. *Ibid.*

4. By the Ecclesiastical Law, which as to proof of Wills in Court of Probate, is still our Law, two witnesses are necessary to prove Wills of chattels.

Redford's Adm'r v. Peggy, 316

5. Two of the Judges decided that as to olograph Wills, the rule is different. They thought that by our Statute, an olograph Will of lands may be established by the evidence of one uncontradicted, and unimpeached witness, and that on the principle of omnia major, &c. such a Will of chattels might be so proved. The other two Judges present did not decide the point. *Ibid.*

WRIT OF RIGHT.

1. In a Writ of Right brought by several Demandants, the mise is joined on the mere right, and the Jury find for the Demandants, with the addition of this fact, that one

of the Demandants was dead before the institution of the suit, leaving children. This latter clause shall be rejected as surplusage, and the remainder of the verdict received.

Garrard, &c. v. Henry,

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2. So, if the Jury add, that one of the Demandants was tenant in common with the

others, and therefore, could not maintain this writ jointly with them, this, like the other finding, being matter of abatement, cannot be given in evidence, nor found by the Jury, on the mise joined, but must be pleaded in abatement. Ibid.

3. See Abatement, No. 2.

